

RESEARCH REPORT

# Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research



MINISTRY OF  
**JUSTICE**  
*Tābū o te Ture*



# **Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research**

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**November 2009**



**MINISTRY OF  
JUSTICE**  
*Tāhū o te Ture*

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# Executive summary

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The review summarises international and New Zealand research findings on bias against ethnic minority and indigenous peoples at key stages of the criminal justice system. The discretion points examined include: stop and search, arrest, charging, prosecution, conviction, sentencing (including decisions surrounding legal representation, plea, bail, mode of trial, and pre-sentence reports), custodial sentence management decisions within the prison system, and parole.

The review is based on research published during the last 40 years, and concentrates exclusively on literature from Australia, Canada, England and Wales, the United States, and New Zealand. It represents the most comprehensive review of the literature on race/ethnicity and the criminal justice system undertaken in New Zealand to date.

It focuses predominantly on the adult criminal justice system and examines decisions affecting offenders rather than victims. While it was originally intended that the review would focus on Māori and Pacific offenders, the paucity of information published about Pacific offenders meant that the majority of the New Zealand research included is based solely on Māori offenders.

## Main findings

The review found that while an extensive amount of international literature has investigated bias in the criminal justice system, comparatively little recent work has been published on this issue in New Zealand.

Despite the volume of international studies, straightforward answers about the nature and extent of bias operating against ethnic minority and indigenous people are seldom forthcoming within the literature.

Considerable disagreement exists within the literature about how to define the problem (including both its cause(s) and the language used to describe it), how to best measure it, and what should be done to address it.

In line with the structure of the report, the main findings fall into two areas:

- identifying bias in the criminal justice system
- responding to bias.

Findings for each of these areas are outlined below.

## Identifying bias in the criminal justice system

Both international and New Zealand research has consistently shown that certain ethnic-minority groups are disproportionately represented in adverse criminal justice outcomes at successive stages of the criminal justice system.

The review found that precise levels of over-representation are not consistent across different discretion points and have been found to vary by age, gender, location and offence type. This finding, in turn, highlights that ethnic-minority groups are not homogeneous and signals the importance of understanding the contexts in which bias may be operating.

Research has consistently shown that legal factors such as offence seriousness, evidentiary strength, offending history, the direct context of decision making, victim charging preferences, as well as extra-legal factors such as socioeconomic status account for most (but not all) of the variation between different ethnic groups.

Disagreement persists within the literature about how to best interpret these results and to what degree such differences can be understood to be the result of bias. While some scholars interpret such results as proof that no discrimination is occurring (or, if it does, is marginal in nature), others have argued that factors such as offence seriousness, offending history, and socioeconomic status are not neutral factors and may be interpreted as the product of earlier bias in the system and/or the result of broader structural biases that have become entrenched in criminal justice decision making criteria.

The review identified two major explanations for ethnic disproportionality within the literature: the 'differential involvement thesis' and the 'discrimination thesis':

- the differential involvement thesis holds that levels of ethnic disparity are largely, if not solely, the product of differential offending by certain ethnic-minority groups
- the discrimination thesis argues that levels of ethnic disparity should be understood (at least in part) as the result of direct and indirect discrimination within the criminal justice system and society more broadly.

While frequently portrayed as oppositional, the extant research suggests that these two theses interact and operate in tandem to bring about disproportionate outcomes.

Research aiming to identify bias in the criminal justice system has been characterised by a host of methodological problems, and neither qualitative nor quantitative studies have delivered definitive answers on how and why differential outcomes are perpetuated, nor led to the successful development and/or implementation of policies to address ethnic disproportionality in the criminal justice system.

## Responding to bias

In comparison to the large volume of literature on identifying bias, much less attention has been focused on how to respond to it.

Few responses either in New Zealand or overseas have been explicitly directed towards addressing bias in the criminal justice system.

While rarely addressing bias directly, responses have focused on addressing contributors to ethnic disproportionality. These responses typically fall into one of three categories and target different aspects of the problem. They include:

- responses targeted at reducing offending and re-offending (ie, differential involvement)
- responses addressing process-related factors within the criminal justice system associated with direct or overt forms of bias (ie, direct discrimination)
- responses focused on the role of neutral legislation, policies, and decision making criteria which result in differential outcomes (ie, indirect discrimination).

International and New Zealand research has revealed a number of common problems evident across the three different categories of response. These include:

- funding issues arising from the long-term holistic focus of many responses and the fiscal divisions across, and short-term results required by, government departments
- vulnerability due to an over-reliance on small numbers of indigenous and/or ethnic-minority staff, particularly volunteers
- an inability to show that programmes/initiatives work in terms of reducing offending and/or levels of ethnic minority over-representation
- a disproportionate focus on dysfunctional individuals, families and communities at the expense of addressing the role of structural inequalities and/or the role of the criminal justice system in creating and perpetuating ethnic disproportionality
- a failure to fully acknowledge the link between colonisation, structural disadvantage and ethnic disparities in the criminal justice system
- a failure to achieve any meaningful level of indigenous self-determination, ownership or empowerment
- a lack of government accountability for collecting and publishing relevant administrative data on ethnic minority/indigenous disproportionality in the criminal justice system
- competing state and indigenous/ethnic-minority views about the purpose of programmes responding (albeit often implicitly) to ethnic disproportionality
- tensions between crime-control objectives and goals of social/racial inclusion
- a general failure to fully accept and address the different aspects of the problem, namely differential offending, direct bias, and indirect bias.

The review identified a number of more fundamental challenges associated with assessing best practice in this area, including:

- ethnic disproportionality is highly localised and context-specific, meaning that responses for one group in one area may not be appropriate for other groups (or subgroups within ethnic-minority groups) in different locations or at different stages of the criminal justice process
- there is often little explanation of how responses are intended to lead to improvements in rates of ethnic disproportionality
- there is an absence of outcome and long-term evaluations of responses
- there are competing views about what it means for a response to ‘work’
- levels of ethnic disproportionality have continued to increase, raising questions about whether any responses devised so far can be meaningfully viewed as successful.

It is clear from the literature that there is no simple solution to ethnic minority and indigenous over-representation. Existing research, however, broadly suggests that successful responses are likely to be those that:

- afford ethnic minority and/or indigenous people a central role in programme design, implementation and governance
- adopt a holistic approach, looking beyond the remit of the criminal justice system to address structural inequalities more broadly
- incorporate appropriate cultural components
- are appropriately monitored
- recognise that positive changes to criminal justice outcomes may take time to materialise and that different measures of success may therefore be required in the interim
- address each of the different aspects of the problem (offending (and re-offending), direct discrimination and indirect discrimination).

## Future directions

The review concludes that further research is required to remedy the gaps in current knowledge about ethnic disparities in the New Zealand criminal justice system. This could involve quantitative analysis to identify where disparities arise as well as qualitative research to establish which parts of the system are perceived as most problematic from the perspective of those groups most over-represented within it. Qualitative work is also needed to develop a deeper understanding of the processes which contribute to disparate criminal justice outcomes in New Zealand in order to explain why disparities arise.

However, the review acknowledges that over 40 years of international research, including sophisticated multivariate studies, have failed to provide a successful policy blueprint for addressing ethnic disparities. While further New Zealand research would be useful, it is unlikely to provide definitive answers about the location, nature and extent of bias in the



system. It would therefore be unwise for policy development to be placed on hold pending the outcome of future research.

The review concludes that a comprehensive policy approach would take into account each of the three different aspects of ethnic disproportionality identified above, and must involve:

- addressing the direct and underlying causes of ethnic minority and indigenous offending
- enhancing cultural understanding and responsiveness within the justice sector (including increasing positive participation for ethnic minority and indigenous groups, and improving public accountability via monitoring and publishing data on rates of ethnic disparity)
- developing responses that identify and seek to offset the negative impact of neutral laws, structures, processes and decision making criteria on particular ethnic-minority groups.

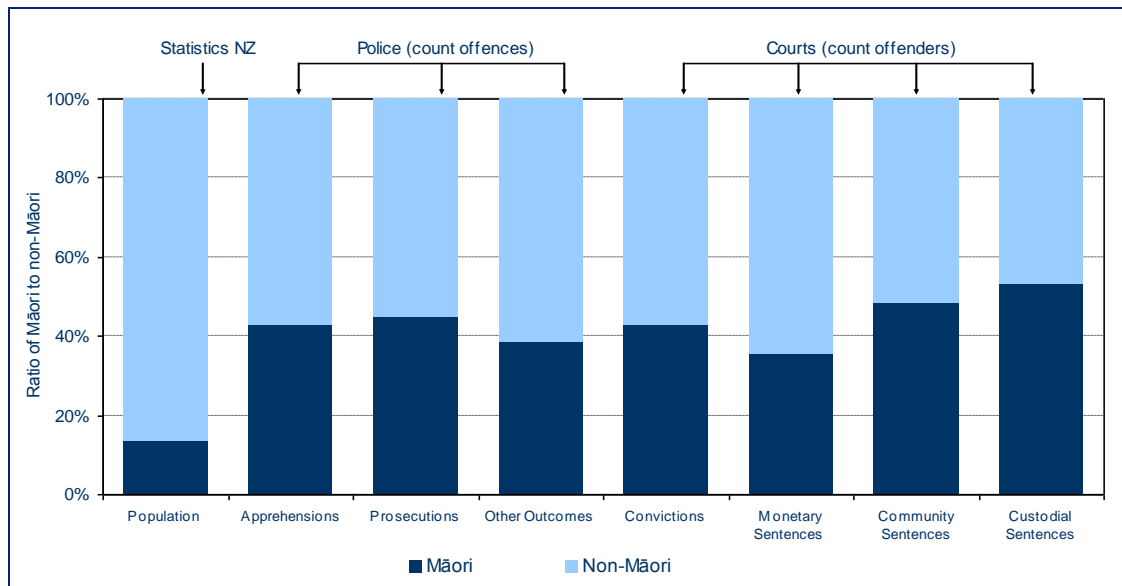


# Introduction

Over the last four decades a substantial body of international literature has addressed issues pertaining to race, ethnicity and crime (Bowling and Phillips 2002; Phillips and Bowling 2002; Spohn 2000). This research has conclusively demonstrated that – in comparison to their representation in the general population and vis-à-vis majority ethnic<sup>1</sup> populations – certain ethnic-minority groups are over-represented at each stage of the criminal justice system (Bowling, Phillips and Shah 2003; Phillips and Bowling 2002; Cole et al 1995; Cunneen and McDonald 1996; Phillips and Brown 1998; Free 2002; Hood 1992a, 1992b; Cole et al 1995; Cunneen 2006; Welsh and Ogloff 2000). Research has also shown that members of those ethnic-minority groups which are over-represented in the criminal justice system are often less likely to trust or feel satisfied with the justice system, and are typically less likely to perceive the system to be fair (Mason et al 2009; Shute, Hood and Seemungal 2005; Clancy et al 2001; Gabbidon and Greene 2005; Walker, Spohn and DeLone 2004; Cole et al 1995). Importantly, existing research suggests that levels of ethnic over-representation in the criminal justice system are getting progressively worse (Cunneen 2006; Blagg et al 2005; Bowling, Phillips and Shah 2003).

The following figure compares New Zealand Māori and non-Māori representation in the criminal justice system.

**Figure 1: Māori representation in the criminal justice system in 2006<sup>2</sup>**



<sup>1</sup> The terms 'ethnic majority' and 'majority-ethnic group/population' are used throughout this report. These terms are preferred to the term 'white', which is regularly found in the international literature. This is because the term 'white' does not refer to a specific ethnic group and ignores the fact that non-white ethnic groups are often included in the category of 'white'.

<sup>2</sup> This graph appears in the *New Zealand Criminal Justice Sector Outcomes Report* published in June 2008 (Ministry of Justice 2008: p33).

As Figure 1 demonstrates, in 2006 Māori were over-represented at different stages of New Zealand's criminal justice system in comparison to their representation in the general population. Further analysis has demonstrated that in 2007 Māori were four to five times more likely to be apprehended, prosecuted and convicted than their non-Māori counterparts.<sup>3</sup> Māori were also 7 ½ times more likely to be given a custodial sentence, and eleven times more likely to be remanded in custody awaiting trial (Ministry of Justice 2006; see also Department of Corrections 2007a; Doone 2000).

These rates have been found to vary by both age and gender. For example, analysis using data from 2007 reveals that Māori aged 10 to 13 were almost six times more likely to be apprehended than their New Zealand European counterparts, while Māori aged 17 to 20 were three times more likely to be so. Similarly, Māori women were 5 ½ times more likely to be apprehended and ten times more likely to receive a custodial sentence than New Zealand European women, while Māori men were over four times more likely to be apprehended and seven times more likely to receive a custodial sentence than their NZ European equivalents. Levels of disproportionality also differ by offence, with Māori just over three times more likely to be apprehended for drug-related offences, while almost seven times more likely to be apprehended for offences against justice,<sup>4</sup> and almost six times more likely to be apprehended for violent offences compared to New Zealand Europeans. Research has also confirmed that Māori are more likely to be reconvicted and re-imprisoned following community-based sentences and on release from prison in comparison to other groups (Nadesu 2008, 2009; Spier 2002; Department of Corrections 2009a).

Research shows that Pacific people are also over-represented in New Zealand's criminal justice system, although not to the same degree as Māori. For example, Pacific people are twice as likely to be apprehended, prosecuted, and convicted, and almost 2 ½ times more likely to receive a custodial sentence or be remanded in custody than New Zealand Europeans. In contrast to Māori women, Pacific women are only 1.7 times more likely to be either apprehended by police or given a custodial sentence compared to New Zealand European women. Like Māori, however, Pacific offenders tend to be more disproportionately represented in apprehensions for offences involving violence and offences against justice, while being less so for drug offences.<sup>5</sup> However, in contrast to Māori, recent analysis published by the Department of Corrections shows that Pacific people were reconvicted and re-imprisoned at a similar rate to New Zealand Europeans (Department of Corrections 2009a).

Taken together, these international and New Zealand research findings broadly set the parameters of ethnic disproportionality in the criminal justice system. The examination of this

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<sup>3</sup> This analysis was based on NZ Police and Ministry of Justice data from 2007, extracted from the justice sector's data warehouse, the Integrated Sector Intelligence System (ISIS), in April 2009. Rates of disproportionality (or over-representation) were calculated using residential population figures from population projections calculated using 2006 Census data. The issues associated with this type of calculation are explored further below.

<sup>4</sup> The 'offences against justice' category is largely comprised of offences involving a breach of a sentence condition (particularly breaches of community work sentences), release condition, or protection order, and the failure to answer bail.

<sup>5</sup> These figures are based on unpublished analysis undertaken by the Ministry of Justice in April 2009, see footnote 3 above for more detail.

broad issue – including its nature, causes and solutions – represents the primary focus of the current review.

## Background

In May 2007 Cabinet directed the Ministry of Justice to undertake a literature review exploring “effective practice in New Zealand and internationally in terms of identifying and responding to the risk of bias in criminal justice system decision making” [POL Min (07) 8/8, paragraph 7]. This report has been produced in response to this directive.

The literature review adopted a ‘whole-of-system’<sup>6</sup> focus, examining bias within initial stop, search and charging decisions through to parole decisions, with particular attention to the impact on Māori.

## Research objectives

The overarching aim of the literature review was to critically review published research from New Zealand and other international jurisdictions on identifying and responding to bias in the criminal justice system.

In fulfilling this aim, the review addressed four key objectives. These were to:

1. summarise and critically assess New Zealand and international research findings on bias against ethnic-minority people at different stages through the criminal justice system
2. outline competing explanations for the disproportionate representation of ethnic-minority people at different stages of the criminal justice system
3. examine methodological issues associated with researching bias in criminal justice system decision making
4. highlight effective practices for responding to ethnic disproportionality in the criminal justice system within New Zealand and internationally, with a particular focus on responses involving Māori and Pacific peoples.

## Methodology

The literature for the current review was collected using a number of different methods, including the following:

- A systematic search of relevant material on ethnic-minority groups and the criminal justice system using existing information held by the Ministry of Justice Library.
- An extensive search of academic databases using key words. The databases searched included: Proquest, Criminal Justice Abstracts, Heinonline, National Library of Australia Pandora Archives, Social Science Research Network (SSRN), Ingenta, and Google Scholar.

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<sup>6</sup> While exploring discretion points across the system, the review found little attempt within the available literature to explore disparities across multiple stages of decision making, with most studies focusing narrowly on particular stages of the system (for example, stop and search, arrest, or sentencing).

- A review of government, professional and other criminal justice websites, including: the Home Office, Australian Institute of Criminology, National Criminal Justice Reference Service (United States), Department of Justice (Canada). In New Zealand key websites included: Department of Corrections, New Zealand Police, Legal Services Agency, the State Services Commission, the Law Commission, Statistics New Zealand, the Institute of Judicial Studies, and the Institute of Professional Legal Studies.
- In addition to the information available online, a number of hard copy reports were provided by government agencies in New Zealand. While a large proportion of this material has been published, some of it was 'grey literature' insofar as its publication status was unclear and/or it consisted of strategy documents, annual reports, policy statements and fact sheets. This 'grey literature' has been used when there was little or no published New Zealand research available on particular subjects of interest highlighted in the international literature.
- Several government agencies, notably the Department of Corrections and Te Puni Kōkiri, also provided access to their collections of literature and/or pre-existing bibliographic lists.
- A substantial amount of further literature was identified through reading bibliographies of books and articles collected through the methods outlined above.

## Scope of review

While it was initially intended that the review would focus solely on material published in the last ten years, this was found to be too restrictive for a number of reasons. First, compared to international material, while comparatively little New Zealand research has been published on ethnic disproportionality in the criminal justice system, a significant proportion of what has been produced was published during the 1970s and 1980s. Second, a number of seminal international studies examining race and the criminal justice system were undertaken during the 1980s and 1990s. This is especially true in the context of the United Kingdom and the United States. Third, most recent research has been significantly influenced by these earlier studies. However, the results of earlier studies have often been subject to varying interpretations in later studies (see Spohn 2000). For this reason it was sometimes necessary to revert to the original sources in order to accurately assess these findings. The current review therefore examines research findings on race and crime from across the last four decades.

The current review focuses exclusively on research findings from Australia, Canada, England and Wales, and the United States of America, in addition to New Zealand. These countries were selected after initial searches revealed that the bulk of research produced on race and criminal justice system derived from them.

In examining research findings from different jurisdictions, this report recognises that important differences exist between immigrant groups and indigenous groups, as well as between different ethnic-minority groups in different countries. As Part 1 and Chapters 2 and 3 in Part 2 illustrate, ethnic disproportionality is neither a static nor universal phenomenon, and the nature, extent and causes of ethnic disproportionality are historically, socially,

culturally, economically, politically and situationally contingent. Notwithstanding this caveat, indigenous and ethnic-minority groups often occupy similarly disadvantaged positions in society vis-à-vis majority ethnic groups (Havemann 2004; Blagg 2008). Standpoint feminists such as Collins (1997) and Cain (1990) have therefore argued that at some level the experience of different disadvantaged groups in the justice system – although culturally and historically unique – is theoretically similar in certain ways. Thus, while recognising key differences, Cain states that it is also possible (and necessary) to “abstract from the myriad of differences between us without denying them, and to reunite them around important sameness” (Cain 1990, p134; see also Agozino 2003). Accepting this view, the current report adopts the position that research findings from different countries based on different ethnic groups can offer some insight into the problem of ethnic disproportionality in the New Zealand context.

The main focus of the review is on ethnic minority and/or indigenous adult offenders. A considerable amount of research has been undertaken on ethnic-minority youth (see for example, Luke and Cunneen 1995; Gale, Bailey-Harris and Wundersitz 1990). It was decided at the outset that a detailed exploration of research on youth justice processes would be beyond the scope of the current review. That said, some of the research on adult disproportionality makes reference to the interaction between race/ethnicity and age in predicting criminal justice outcomes, and some responses to bias have a strong youth focus. Therefore, while youth offenders are not a principal focus, issues relevant to youth and the criminal justice system nonetheless appear at various places throughout the report.

The scope of the current review is also restricted to the impact of criminal justice bias on ethnic minority and/or indigenous offenders. Consequently, it does not offer any detailed exploration of the potential impact of criminal justice processes on victims. There has been an increasing literature produced on ethnic-minority victimisation in recent years (for an overview of this literature see Bowling and Phillips 2002); however, the current review discusses victims only to the degree that processes or decisions involving ethnic minority/indigenous offenders also involve victims.

## Conceptual issues and report terminology

As the following chapters attest, the research literature on race and criminal justice practices is fraught with debates over conceptual issues. For example, there has been some disagreement in the literature concerning the correct usage of terms such as ‘race’, ‘ethnicity’, and ‘ethnic minority’ (see Gelsthorpe 1993; Fitzgerald 1993a), and much more debate over the precise definition and appropriate use of terms such as ‘disparity’, ‘disproportionality’, ‘discrimination’, ‘indirect discrimination’, ‘prejudice’, ‘racism’, ‘bias’, ‘institutional racism’, and ‘systematic bias’. According to Smith (2009) such terms represent “essentially contested concepts”, whose meanings are “inherently unstable and liable to shift over time and in different contexts” (Smith 2009, p10).

While many of these terms are used interchangeably, as Cunneen (2006) has pointed out, they are often based on different assumptions about the nature (intentional or unconscious) and level of bias (ie, individual, cultural, organisational, or structural) in criminal justice

decision making (see Reiner 1993). As the remainder of the report demonstrates, the variable usage of such concepts has led to confusion within the research literature, as authors use the same terms to mean very different things or conversely use different terms to describe the same results. Before progressing, therefore, it is important to assess key distinctions and similarities between these terms and to explain and justify the terms that have been selected for use in this report. This is not merely a semantic exercise; for as Wilbanks (1987, p6) has argued, “the definition of racism often pre-determines the answer to the question ‘is the criminal justice system racist?’”. Establishing a definitional framework, therefore, is a prerequisite to discussing research findings on identifying and responding to bias in criminal justice decision making.

## **Race versus ethnicity**

While decades of sociological research has distinguished the terms ‘race’ and ‘ethnicity’, the terms are still regularly used interchangeably, particularly within the context of the criminal justice system where the accurate collection of ethnicity data is often inhibited by contextual factors (Morrison, Soboleva and Chong 2008). For this reason, it is important to reiterate the differences between these two concepts and explain how they have been used in the literature reviewed and within this report.

‘Race’ is considered a social classification (not a scientific one) based on obvious physical characteristics associated with different social groups (McRae et al 2003; Spoonley 1995; Fitzgerald 1993a). ‘Race’ is therefore a social construct externally applied to social groups (Waddington, Stenson and Don 2004).

In contrast, ‘ethnicity’ is ‘self-claimed’ (Statistics New Zealand 2005). As Spoonley has noted, “an ethnic group is one which shares cultural traditions, beliefs and behaviours, and whose members express a sense (consciousness) of belonging” (1990, p85). Individuals may have multiple ethnic identities, and may change the way in which they identify their ethnic group over time and in different contexts (Statistics New Zealand 2005). For this reason, Fitzgerald (1993a, p55) argues, “ethnicity should not be conceived as a thing, but rather a dynamic process”.

In the research literature the terms ‘race’ and ‘ethnicity’ are often used interchangeably with the former being more widely used in literature from the United States and (albeit to a lesser degree) Canada, and the latter more commonly used in research from England and Wales, New Zealand and Australia. Consequently, the usage of these terms in the report reflects this. That said, it is arguable, given the subject of this report, that racial categories are potentially of more significance than ethnic ones because it is the racial assessments made by criminal justice agents that are most relevant to discussions of bias, rather than how suspects, defendants, or offenders perceive themselves.

In addition, criminal justice research that claims to be using ‘ethnicity’ as a unit of measurement may, in reality, be using a combination of ethnicity and race data. For example, NZ Police historically recorded ethnicity data wherever possible and practical; however, in the event that a person was unwilling or unable to answer questions pertaining to their ethnicity, officers sometimes applied ‘ethnic’ categorisations to suspects or offenders based on either



prior knowledge of the person or their family, the person's surname, or their physical appearance: in effect using a 'race' categorisation (Morrison, Soboleva and Chong 2008). In consequence, New Zealand Police's apprehension data has traditionally comprised a mixture of 'ethnicity' and 'race' categorisations.<sup>7</sup>

To accommodate these divergent uses, the report will refer to 'race' or 'ethnicity' in line with how these terms are used in the literature and will sometimes refer to 'race/ethnicity' to incorporate both types of data where the precise nature of the data under discussion is ambiguous.

The use of the term 'ethnic minority' has also been found to be problematic for several reasons. First, it has been said to have connotations of inferiority insofar as it is interpreted to imply that a designated group is "politically and morally less significant than the majority" (Gelsthorpe 1993, p82). Despite this, the term is widely used in the literature and is therefore used in this report, although the term 'minority' is used here simply to reflect the relative population sizes of the ethnic groups under discussion. The second problem is that this term often fails to adequately distinguish between different types of ethnic-minority groups. For example, it fails to distinguish the important historical and structural differences between indigenous and immigrant ethnic-minority groups (Broadhurst 2002; Jackson 1987, 1988). While recognising these issues, this report is largely confined to the terminology used in the material being summarised. Where possible, however, findings that specifically relate to indigenous groups will be identified.

The precise racial/ethnic categorisations used in the review also reflect those used in the literature. For research from the United Kingdom, the categories 'black' and 'African Caribbean' will be used interchangeably. Similarly, in the United States the categories 'black'/'African American' and 'Hispanic'/'Latino' will be used. In Australia the categories of 'Aboriginal' and 'Torres Strait Islander', and 'Indigenous' will all be used to refer to the same group. In Canada the categories of 'Native', 'First Nation', 'Indigenous' and 'Aboriginal' will each be used to refer to the same ethnic group.<sup>8</sup> In line with the terminology utilised in the international literature, the report also uses the terms 'ethnic majority' and 'majority-ethnic groups' to generically refer to non-minority populations.

Within the New Zealand literature, Māori – and to a lesser degree – Pacific peoples form the focus of this review. While the initial aim was to examine research on both Māori and Pacific peoples, during the early stages of the review it became apparent that comparatively little research has been published on Pacific people in the New Zealand criminal justice system. Consequently, the review has focused predominantly on Māori. Wherever possible, however, it includes relevant literature on Pacific people.

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<sup>7</sup> A new recording standard introduced by NZ Police in 2008 means that officers are now required to separately record 'ethnicity' and 'race'.

<sup>8</sup> In utilising these categories, the report acknowledges that such groups are not homogeneous and that important differences exist between subgroups within these broad categories (for further discussion on this matter see Dickson-Gilmore and La Prairie 2005, p18).

## Prejudice, racism, and bias

While the terms ‘prejudice’, ‘racism’, and ‘bias’ are often used as if they hold the same meaning there are important differences between them which should be noted.

‘Prejudice’ refers “to adverse judgements or opinions not based on reason, knowledge, or experience, but on the irrational suspicion and/or hatred of other groups” (Wilbanks 1987, p13).

‘Racism’ is “the practice of classifying people according to certain physical differences and then believing these differences indicate biological and social superiority and inferiority” (Spoonley 1994, p174). It is also linked to power, insofar as racism typically arises when a group both holds beliefs about another group, and has the power to discriminate against them (Mann 1995; Spoonley 1995; Cole et al 1995).<sup>9</sup>

‘Bias’ is defined as the “inclination of prejudice for or against one thing or person” (eds. Soanes and Stevenson 2006). In the literature the term ‘bias’ is most frequently used in American studies and often refers to the translation of prejudicial attitudes into action, typically through adverse decision making (see, for example, Mann 1995, 1993). There is also a tendency in the United States to use the term in relation to individual decision making rather than organisational or institutional practices (Cunneen 2006).

The significance of these differences will be explored in greater depth in Part 1, and Chapters 2 and 3 in Part 2 of the report.

## Disparity, disproportionality and discrimination

The terms ‘disparity’ and ‘disproportionality’ are often used interchangeably, however, they refer to different things. More crucially, evidence of disparity or disproportionality is often incorrectly taken as prima facie evidence of discrimination. It is therefore important to clarify the meaning of each of these terms.

‘Disparity’ refers simply to difference, but, as Walker, Spohn and DeLone (2004) point out, difference which does not necessarily involve any form of discrimination. Ethnic disparity is sometimes calculated using population data (ie, rates of disparity) but is more often based on a straightforward comparison of different numeric levels (see, for example, Department of Corrections 2007a).

‘Disproportionality’ compares ‘rates’ of ethnic difference in criminal justice outcomes using a common denominator (most typically residential population figures). Disproportionate outcomes are said to exist when the proportional representation of an ethnic-minority group

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<sup>9</sup> This is equivalent to the concept of ‘interpersonal racism’ used by Jones (2000), who also identified a further form of racism she describes as ‘internalised racism’ (2000, p1213). This is defined as “the acceptance by members of the stigmatised races of negative messages about their own abilities and intrinsic self-worth”. As this report is focused on those forms of racism which are applied to ethnic minority and indigenous groups by others, internalised racism is not discussed in the report (see also Reid and Robson 2007).

at different stages in the criminal justice system exceeds their proportional representation in the general population. The term 'over-representation' is similarly used within the literature.

Importantly, the terms 'disparity', 'disproportionality' and 'over-representation' do not automatically indicate the presence or absence of discrimination or bias. For this reason, where the evidence is unclear this report uses the terms 'ethnic disparity', 'ethnic disproportionality' and 'over-representation' as neutral vehicles for discussing ethnic differences without attributing the causes of difference to discrimination or any other factor. While doing so, it is necessary to recognise that a number of scholars have criticised these concepts and have pointed out that such terms are not necessarily neutral or value free (Jackson 1987, 1988; Bull 2009; Agozino 2003).

Within the New Zealand literature there have been a number of problems identified with focusing on statistical disparities/disproportionality/over-representation in relation to Māori in the criminal justice system, including:

- such calculations invite unfavourable comparisons between Māori and New Zealand Europeans that may, in turn, help to both construct and reinforce negative stereotypes about Māori (Jackson 1988)
- comparing aggregated Māori and New Zealand European rates operates to emphasise racial and ethnic difference, while eliding the social and cultural factors responsible for observed differences in criminal justice outcomes (Jackson 1988; Bull 2009)<sup>10</sup>
- the publication of statistical indices of disproportionality has yet to result in the design or implementation of appropriate policy responses despite the statistical justification being apparent (Jackson 1988; Blagg 2008).

In contrast to the terms discussed above, 'discrimination' specifically refers to "difference based on differential treatment of groups without reference to an individual's behaviour" (Walker, Spohn and DeLone 2004, p16). Unlike disparity, disproportionality, and over-representation, discrimination is a legal concept insofar as practising discrimination on the grounds of race or ethnicity (in addition to other factors) is illegal (see Tahmindjis 1995; see also the Bill of Rights Act 1990; Human Rights Act 1993 in New Zealand). Discrimination is often assumed to be evident in situations where racial/ethnic differences in criminal justice outcomes remain once 'legally-relevant' factors such as offence seriousness and prior record are taken into account (Walker, Spohn and Delone 2004; Spohn 2000). In this sense, it has been used to refer to illegitimate difference. Some researchers, however, have challenged the interpretation of this type of 'residual' difference as prima facie evidence of discrimination or illegitimacy on the part of the criminal justice system (Wilbanks 1987; see also Hood

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<sup>10</sup> This critique has been highlighted most prominently in the work of cultural theorist, Stuart Hall, who emphasised the importance of understanding the context in which racial/ethnic differences are articulated, particularly in relation to gender, age and class, in addition to other structural and contextual factors (Slack 1996; Grossberg 1996; for an application of articulation theory to Māori in the criminal justice system see also Bull 2009). For example, in relation to gender, Australian research has shown that Aboriginal women are over-represented to a much greater degree than Aboriginal men, but that due to an over-reliance on aggregate figures, they have often been obscured within broader discourses on over-representation, which tend to focus on Aboriginal men (see Cunneen and Kerley 1995; see also La Prairie (1989) commenting on this oversight in Canadian research).

1992a, 1992b). Interpretational and evidential issues pertaining to ‘discrimination’ will be examined in more depth in Part 1.

Researchers have also recognised that ‘discrimination’ is not a homogeneous concept, and have identified different types and degrees of discrimination within the criminal justice system. For example, the term ‘systematic discrimination’ has been used to refer to situations “where discrimination occurs at all stages of the criminal justice system, in all places, for all crimes” (Walker, Spohn and DeLone 2004, p17). In contrast, ‘contextual discrimination’ refers to the existence of discrimination in some places and circumstances, but not others: for example, in certain regions or for particular types of crime (Walker, Spohn and DeLone 2004).

### **Institutional racism/systematic racism**

The concept of institutional racism has been the subject of considerable debate, disagreement and misunderstanding (see Foster, Newburn and Souhami 2005; Souhami 2007). The term has its origins in the American civil rights movement, where it was typically used to focus on the structural ways in which ethnic-minority citizens were systematically disadvantaged by social institutions such as the criminal justice system (Spoonley 1990). However, its usage in contemporary discussion about ethnic disparities in the criminal justice system has deviated slightly from this original definition.

In recent times the term ‘institutional racism’ is typically associated with the Macpherson Report, which was published in the United Kingdom in 1999. The Macpherson report emerged from an inquiry into the racially motivated murder of Stephen Lawrence in North London, and concluded that the Metropolitan Police Service was ‘institutionally racist’ (Macpherson 1999). Lord Macpherson defined ‘institutional racism’ as:

*The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviours which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people (Macpherson 1999 cited in Bourne 2001, p 17).*

This definition catalysed considerable debate and disagreement about the concept of ‘institutional racism’. A number of scholars have argued that this definition was problematic because, although it drew attention to problems at the level of organisational policy and practices, it was “interpreted as indicating a widespread problem of individual racism” (Foster, Newburn and Souhami 2005, p4; see also Stenson and Waddington 2007; Bourne 2001; Souhami 2007). This is that it was unclear whether the problem was associated simply with overt forms of conscious racism on the part of individuals or whether it also included unconscious forms of bias operating at a deeper, organisational level (Foster, Newburn and Souhami 2005). As will be discussed further in Part 2 of the report, post-Macpherson reform efforts in the United Kingdom have often continued to conceptualise the problem predominantly at an individual level.

Adding to the confusion, the term 'institutional racism' has been interpreted differently in other jurisdictions. Generally speaking, other countries have focused more on the systemic factors that contribute to disparate outcomes for different ethnic-minority groups. For example, in the Royal Commission of Inquiry into Aboriginal Deaths in Custody, Johnston (1991, cited in McRae et al 2003, p430) noted that:

*An institution having significant dealings with Aboriginal people, which has rules, practices and habits which systematically discriminates against, or in some way disadvantages, Aboriginal people, is clearly engaging in institutional discrimination or racism.*

Similar types of definition have been advanced within the American literature. For example, George-Abeyie (1990, p28, cited in Mann 1995, p260) noted that "the key issue is the result, not intent. Institutional racism is often the legacy of overt racism, of de facto practices that often get codified, and thus sanctioned by *de jure* mechanisms". Likewise, Walker, Spohn and Delone (2004) argue that institutional discrimination occurs when ethnic disparities are derived from established or institutionalised policies; for example, the denial of pre-trial release to defendants on the basis of their employment status. Such views have been echoed in Canada, where the Commission of Inquiry into Systematic Racism in the Ontario Criminal Justice System observed that systematic racism stemmed from "policies, procedures, and practices that have an adverse effect on racial minorities, *even if they are not intended to have such an impact*" (Commission of Inquiry into Systematic Racism in the Ontario Criminal Justice System 1994, p1, italics added; see also Williams 1999).

In New Zealand the term institutional racism first entered public discourse in the 1970s and most notably found expression in two prominent government reports produced during the 1980s: the Ministerial Advisory Committee on a Māori Perspective on the Department of Social Welfare's Pūao-Te-Ata-Tū report published in 1988, and Jackson's (1987, 1988) seminal work on Māori in the criminal justice system. Pūao-Te-Ata-Tū focused on more overt, intentional forms of discrimination, defining institutional racism as:

*... the outcome of monocultural institutions which simply ignore and freeze out the cultures who do not belong to the majority. National structures are evolved which are rooted in the values, systems and viewpoints of one culture only (1988, p19).*

Jackson (1988, p113) also made reference to monoculturalism in defining institutional racism, noting that:

*If the criminal justice process uses monocultural stereotypes to determine who will be arrested, prosecuted, and sentenced, and then uses monocultural methods for dealing with those arrested ... it is, in effect, operating in a way which is institutionally racist.*

However, Jackson also acknowledged that institutional racism could occur either "deliberately or unwittingly" (Jackson 1988, p113).

Despite its broad international appeal, the practical and analytical value of the term 'institutional racism' has been questioned by some academics (Pearson 1990 cited in

Spoonley 1995, p22; Matravers and Tonry 2003). Matravers and Tonry (2003, p160) point out that the term may work to “encourage the blameless and the ‘bad apples’ alike to feel exonerated, since the problem is anonymous and impersonal, within the system, rather than within them”. More crucially, they argue that using polar terms such as ‘racism’ in discussions about ethnic disproportionality tends to ostracise people (both those working within the system described as ‘racist’, as well as ethnic-minority communities whose confidence in that system may be further undermined) and tends to stop conversations rather than start them. For Matravers and Tonry (2003, p161) ‘institutional racism’ (and the controversy surrounding its application and meaning) represents a ‘red herring’ insofar as it diverts important time and energy away from discussing the core problem of differential outcomes, which, they argue, “are over-simplistically explained in institutional racism analyses”.

### **Disparate outcomes, indirect/subtle discrimination, structural bias**

In lieu of a focus on ‘institutional’ or ‘systematic’ racism, authors such as Matravers and Tonry (2003) have argued that the main problem is that processes and behaviours of the criminal justice system, although not necessarily racist in intent, nonetheless result in the differential treatment of ethnic-minority groups. They question whether this scenario can be meaningfully described as racism or discrimination of any kind. Focusing on disparate outcomes, they provide the example of racial disparities resulting from guilty plea discounts, noting that while such disparities may be systematic in nature, “this does not make them institutionally or any other kind of racist” (2003, p166). Rather, eschewing the debate over whether discrimination is intentional or unintentional, they note that “disparities point up a serious policy problem which cannot be solved by throwing the word ‘racist’ at it” (Matravers and Tonry 2003, p166).

Other scholars have similarly highlighted the importance of examining the way in which established policies and legally justified practices result in disparate outcomes for ethnic-minority people. Authors documenting this phenomenon have typically used the terms ‘subtle’ or ‘indirect’ discrimination or racism. Spohn (2000, p435) argues that ‘subtle discrimination’ occurs in relation to sentencing, “where an independent variable [ie, race] influences a dependent variable [ie, sentence outcomes] through some other factor [ie, social class], rather than directly”. She notes the correlation between race and employment status, and the influence of the latter in pre-trial detention decisions as an example of subtle discrimination in practice.

Fitzgerald (1993b, p48) has likewise used ‘indirect racism’ to refer to “the ways in which non-racial criteria themselves may systematically, albeit unconsciously, work to the disadvantage of ethnic minorities”. In a similar vein, Tahmindjis notes that indirect discrimination occurs when practices, which appear racially neutral, adversely affect a person or group who share a common attribute such as race (1995, p104). As Blagg et al (2005) point out, the key distinction between direct and indirect discrimination is therefore the difference between disparate treatment and disparate outcome.



Another concept referred to in the literature is the notion of 'state racism' (Bourne 2001). This concept overlaps with subtle/indirect discrimination/racism and disparate outcomes, but is typically used by more critical scholars and is strongly focused on the role played by the state in constructing and maintaining racially neutral criteria and processes which work to the disadvantage of certain ethnic-minority groups (Hudson 1993a; Bourne 2001). This concept will be explored in more depth in Part 1 and also Part 2 (Chapter 3) of the report.

## Responses

For the purposes of this report a response to ethnic disproportionality is broadly defined to include practical policies and programmes, organisational strategies, national inquiries and formalised agreements, as well as academic arguments and recommendations which have yet to find expression in criminal justice policy.

## Structure of the report

The remainder of the report is divided into three parts. Part 1 examines research findings on ethnic disproportionality at various discretion points across the criminal justice system. First, it examines disparities resulting from the application of police discretion, including decisions to stop, search, arrest, and charge. Second, it explores ethnic differentials resulting from decisions occurring during the court process; for example, prosecution, legal representation, bail, plea, mode of trial, pre-sentence reports, conviction and sentencing. Third, it describes findings on ethnic disparities in prison decision making, including security classification, job assignment, prison disciplinary proceedings, and programme allocation, as well as ethnic differences in parole decisions.

Within this structure, the report also briefly highlights the common explanations for ethnic disproportionality, including the over-involvement of ethnic minority and indigenous groups in offending, criminal justice bias, as well as indirect, subtle, and state bias. It further highlights methodological issues associated with research on racial/ethnic disparities and assesses the implications these have for interpreting existing research findings.

Part 2 examines responses to bias in the criminal justice system. The Introduction to Part 2 establishes the common theoretical and practical problems associated with assessing effective practice in this area. It also sets out a conceptual framework for understanding responses to the broader issue of ethnic disproportionality in the criminal justice system. This framework identifies three levels of response to ethnic disproportionality which are underpinned (albeit typically implicitly) by different assumptions about the cause of the problem and each target different aspects of it. The three levels of responses include:

1. those which attempt to reduce ethnic-minority offending (ie, differential offending)
2. those aimed at improving or modifying practices and processes within the mainstream criminal justice system (ie, direct bias)
3. responses that focus on apparently neutral policies or practices which, nevertheless, engender ethnically disproportionate outcomes (ie, indirect bias).

This framework provides the structure for the following three chapters in Part 2 of the report.

Chapter 1 investigates interventions that aim to reduce levels of ethnic disparity in the criminal justice system by reducing offending and re-offending by ethnic minority and indigenous groups. It examines both generic 'risk factor' approaches as well as more overtly 'cultural' approaches. It highlights strengths and weaknesses associated with these responses in both practical and theoretical terms. It also identifies principles of best practice and common difficulties associated with such responses.

Chapter 2 explores responses to biased decision making within the criminal justice system. It examines both inward-focused and outward-focused responses.

- Inward-focused responses include those aimed at increasing cultural understanding and sensitivity within criminal justice agencies in order to improve their responsiveness to ethnic-minority groups. Examples of this approach include cultural awareness training, the increased recruitment of ethnic-minority staff, as well as the restriction of discretion exercised by individual criminal justice actors.
- Outward-focused responses are those that attempt to improve relationships between criminal justice agencies and the ethnic-minority communities they service. Such approaches have typically been aimed at improving public accountability processes and increasing the participation of immigrant or indigenous groups in the delivery of criminal justice processes.

In addition to describing these approaches, this chapter assesses the advantages and disadvantages associated with them.

Chapter 3 examines responses to ethnic disproportionality that seek to remedy the effects of bias built into existing criminal justice policies and procedures, as well as addressing disparate outcomes more generically regardless of their cause. It considers responses that target indirect discrimination, including: limiting the use of racially-correlated factors in sentencing, limiting the use of custodial sentences for indigenous offenders, the decriminalisation of particular offences, randomised policing models, and the utilisation of disparate impact analysis during policy development. It also examines the possibility of parallel justice systems for indigenous groups. The strengths and weaknesses of these approaches will each be assessed.

Part 3 draws together the main themes and issues identified in the review.



# Part 1: Identifying bias in the criminal justice system: an overview of research findings

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## Setting the scene: an overview of race and crime literature

In the last four decades a considerable body of international research has emerged on the nature, extent, and causes of disproportionate criminal justice outcomes for certain ethnic-minority groups<sup>11</sup> (Jeffries and Bond 2009; Snowball and Weatherburn 2008; Spohn 2000; Bowling, Phillips and Shah 2003). The research conclusively demonstrates that in comparison to ethnic-majority populations, people from certain ethnic-minority groups are over-represented in adverse criminal justice outcomes at discretion points across the criminal justice system.

International studies have unequivocally shown that members of certain ethnic-minority groups are disproportionately stopped, searched, and arrested by police (Bowling, Phillips and Shah 2003; Phillips and Bowling 2002). These groups are more likely to experience excessive levels of police force during and following an arrest (Phillips and Bowling 2002; Cunneen and Kerley 1995). They are also less likely to be informally warned or cautioned, and more likely to be charged and prosecuted (Cole et al 1995; Cunneen 1996; Phillips and Brown 1998). If prosecuted, ethnic-minority defendants are less likely to be released on bail before trial and are more likely to be convicted (Cole et al 1995). Following conviction, research has shown that ethnic-minority offenders are less likely to receive fines and have a greater likelihood of being sentenced to imprisonment (Spohn 2000; Hood 1992a, 1992b; Triggs 1999; Free 2002; Cunneen 2006; Blagg et al 2005).

Once in prison, evidence further suggests that ethnic-minority prisoners are more likely to be placed in high security accommodation and experience institutional violence at much higher rates than their ethnic-majority counterparts (Cole et al 1995; Blagg et al 2005; Sim 2008). They are also found guilty of disciplinary infractions more regularly and are subsequently more likely to receive more severe forms of punishment (Genders and Player 1989; Bowling and Phillips 2002; Cole et al 1995). International research has also shown that ethnic-minority prisoners are less likely to be given job assignments within prison or participate in rehabilitative programmes (Genders and Player 1989). They are also less likely to apply for, or receive, parole (Welsh and Ogloff 2000; Department of Corrections 2007b).

## Explaining disparities

Despite cogent evidence of ethnic disparities across the criminal justice system, there has been considerable disagreement within the literature about how these results should be interpreted. A number of authors have attributed disparities in arrest and imprisonment rates

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<sup>11</sup> As noted in the introduction, this does not refer to all ethnic-minority groups but relates to: African Caribbean/black people in England and Wales; African American/black people and to a lesser degree Hispanics/Latinos and American Indians/Native Americans in the United States; Māori and Pacific peoples in New Zealand; Aboriginal and Torres Strait Islander/Indigenous people in Australia; and Aboriginal/Indigenous/First Nation and black people in Canada.

either largely or solely to differences in ethnic offending rates (Snowball and Weatherburn 2008; Weatherburn, Fitzgerald and Hua 2003; Dickson-Gilmore and La Prairie 2005; Wilbanks 1987; Blumstein 1983; Langan 1985). This perspective is typically referred to as 'the differential offending thesis' within the literature. In contrast, other scholars have claimed that bias within the criminal justice system also plays a contributory role (Keen and Jacobs 2009; Cunneen 2006; Blagg et al 2005; Spohn 2000; Jefferson 1993; Reiner 1993; Hudson 1993a; Fitzgerald 1999, 1993b). This perspective is commonly termed the 'discrimination thesis' within the literature. Although these hypotheses are by no means mutually exclusive, a number of researchers have treated them as if they are, and a significant amount of scholarly attention has focused on empirically testing these theories.<sup>12</sup> The resultant findings have been complex, contradictory and often inconclusive.

## Structure of Part 1

The central aim of Part 1 of the report is to provide an overview of these complex findings from both international and New Zealand research. The focus is not on providing definitive answers to the question, 'Is the criminal justice system biased?', but on promoting a broad understanding of the range and intricacy of research findings produced on this topic, and the debates surrounding them. It will therefore identify those areas where the existing research findings have been inconclusive and outline the competing accounts that have been put forward to explain the results. In doing so, it will highlight methodological problems evident in the extant research and assess the implications these have for interpreting findings on this subject.

The structure of Part 1 replicates the flow of the criminal justice process. The first section explores ethnic disparities resulting from the application of police discretion, including police decisions to stop, search, arrest, and charge. The second section examines ethnic differentials evident during the court process (for example, prosecution decisions, legal representation, plea, mode of trial and sentencing). The following sections will investigate ethnic disparities in prison decision making and parole decisions. The final section will draw together and discuss common limitations associated with research on ethnicity, race and the criminal justice system.

## Policing

A considerable proportion of the research literature produced on ethnic bias in the criminal justice system has focused on policing (Jefferson 1991; Jefferson 1993; Reiner 1993; Bowling, Phillips and Shah 2003; Kahar 2006; Hudson 1993). There are a number of reasons for this:

1. Police represent the 'gatekeepers' of the criminal justice system insofar as they control initial entry into the system (Sutphen, Kurtz, and Giddings 1993; Kahar 2006; Wilbanks 1987). This gatekeeping role has been afforded particular significance in light of research findings demonstrating that ethnic disparities in arrest rates are similar to rates of ethnic

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<sup>12</sup> A recent example of this in New Zealand can be found in Raumati-Hook's (2009) article on institutional racism and domestic violence legislation.

disparity in imprisonment (Blumstein 1983; Langan 1985; Reiner 1993; Department of Corrections 2007a).<sup>13</sup> The recognition by some researchers that levels of ethnic disparity set at the arrest stage remain relatively static throughout the remainder of the system has, in turn, led them to conclude that if racial discrimination does happen it must occur at the early stages of the criminal justice process controlled by police (Blumstein 1983; Langan 1985; Weatherburn, Snowball and Hunter 2008; Weatherburn, Fitzgerald and Hua 2003; Snowball and Weatherburn 2007, 2008; Department of Corrections 2007a).

2. It is generally agreed that police have greater latitude in their decision making than other criminal justice actors (Gabbidon and Greene 2005; Waddington, Stenson and Don 2004; Wortley 2003; Fitzgerald 1999; Cole et al 1995). For example, police decide whether certain behaviours are defined as criminal and, if so, whether they will respond formally, informally, or not at all. They decide when to stop, search, or arrest individuals, as well as selecting what types and how many offences people are initially charged with. In New Zealand, police also decide which cases will be prosecuted.<sup>14</sup>
3. Policing organisations constitute the most common interface between the public and the criminal justice system. This means that police decision making is open to greater levels of public scrutiny compared to other – more hidden – stages of the criminal justice process. Largely owing to this heightened visibility, policing has formed a central focus within several high profile government inquiries into racism in criminal justice practices in Australia, Canada, and the United Kingdom (McDonald 2004; Cole et al 1995; McMullen and Jaywardene 1995; Phillips and Bowling 2002)
4. During the past three decades, following criticism arising through government inquiries, increasing numbers of police agencies have been legally required to publish data on the ethnic outcomes of police decision making. Consequently, police data is often more readily available to academic researchers in comparison with data from other criminal justice agencies (Harris 2003; Fitzgerald 1993b, 1999).

The literature on policing principally focuses on three areas: stop and search practices (including both foot and traffic stops); arrest decisions; and charging decisions. Key findings for each of these areas will be explored below.

## Stop and search

A substantial body of international research has shown that – more than any other aspect of police work – stop and search practices have generated considerable tensions between police and ethnic-minority groups (Gordon 1988; Lea and Young 1993; Bowling, Phillips and Shah 2003; Smith and Petrocelli 2001; Hawkins and Thomas 1991; Bull 2001, 2004; Hall et

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<sup>13</sup> Australian findings represent an important distinction here (see Cunneen 2006).

<sup>14</sup> In other countries this responsibility has been removed from police, with prosecution decisions handled by independent agencies such as the Crown Prosecution Service in the United Kingdom. Similar agencies also operate in Australia, Canada and the United States. In the New Zealand context the prosecution function of the police has been separated from the investigation arm and uniformed command structure since 1999 when the Police National Prosecution Service was established (see Stenning 2008, p110).

al 1978; Webb 2003; NZ Police 2002<sup>15</sup>). For example, in the Canadian context Cole et al (1995, p337) have argued that the overuse of stop and search practices against ethnic-minority groups, “has probably done more than any other [police practice] to exacerbate tensions and fuel mistrust”. In the last three decades, the literature on ethnicity and police stop and search practices has been dominated by research from England and Wales and the United States, where a legal requirement has been placed on a number of policing agencies to collect and publish stop and search data (Fitzgerald 1999; Harris 2003).<sup>16</sup> Research from these countries will therefore form the main focus of the following discussion.

The research on police stop and search practice has been almost exclusively quantitative in nature, and has been largely based on the analysis of official datasets. This analysis has widely demonstrated that police disproportionately stop members of certain ethnic-minority groups (Bowling, Phillips and Shah 2003; Harris 2003; Phillips and Bowling 2002; Smith and Petrocelli; 2001; Home Office 2000; McMullen and Jaywardene 1995; Cole et al 1995; Reiner 1993). Recent statistics from the Home Office, for example, show that black people in England and Wales are six times more likely to be stopped by police than people from ethnic-majority groups (Home Office, 2005). Studies have also found that ethnic-minority groups are more likely to be stopped multiple times (Clancy et al 2001; Cole et al 1995; Norris et al 1992). Findings from the British Crime Survey (1999) have further demonstrated that ethnic minority people are less likely to be provided with an explanation by police for being stopped and, in the event that an explanation is provided, are less satisfied with the rationale given (Bowling, Phillips and Shah 2003; Clancy et al 2001; Norris et al 1992).

Once stopped, some analyses have shown that ethnic-minority groups are more likely to be searched than their ethnic-majority counterparts (Bowling, Phillips and Shah 2003; Skogan 1990 cited in Phillips and Bowling 2002). Other studies, however, have failed to support this conclusion (Smith and Petrocelli 2001). Existing evidence also indicates that searches of ethnic-minority people tend to be more invasive, and are more likely to include the use of clothing searches and strip searches (Skogan 1990; Newburn and Hayman 2001, cited in Phillips and Bowling 2002).

In order to establish whether the disproportionate stopping and searching of ethnic-minority groups is discriminatory, researchers have typically examined ethnic differences in arrest rates or ‘hit’ rates<sup>17</sup> resulting from stop and search activities. (Waddington, Stenson and Don 2004; Harris 2003; Smith and Petrocelli 2001). Research findings in this area have been inconsistent. Some United Kingdom studies have reported equal hit rates for different ethnic groups and have interpreted this as evidence that no racial discrimination is occurring (see, for example, Waddington, Stenson and Don 2004). In contrast, several American studies

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<sup>15</sup> In addition to stop and search procedures, the relationship between NZ Police and Pacific people was historically undermined through dawn raids executed against Pacific overstayers as part of government efforts to clamp down on illegal immigration during the 1970s (see NZ Police 2002, p2).

<sup>16</sup> For example, in the United Kingdom this requirement was legislated for in the Criminal Justice Act 1991 (see Home Office 2005). In the United States, 15 states legislated for the collection and publication of traffic stop and search data in the 1990s following several high profile discrimination lawsuits against police agencies (Harris 2003; see also Perisco and Todd 2004).

<sup>17</sup> The ‘hit rate’ is calculated by dividing the number of arrests for each ethnic group over the total number of people stopped and/or searched from each ethnic group.

have found evidence of lower hit rates for ethnic-minority groups, interpreting this as proof that these groups are unfairly targeted by police (Harris 2003; Smith and Petrocelli 2001).

There have been a host of methodological criticisms directed towards statistical analyses of stop and search practices. A number of researchers have criticised the use of straightforward comparisons of ethnic disparities based on official data to imply racial discrimination, arguing that such approaches are over-simplistic and potentially misleading. It has been noted that such studies are over-reliant on official data and fail to consider the possibility that police are likely to under-report more dubious stops and searches involving ethnic-minority groups (Meehan and Ponder 2006; Schafer, Carter and Katz-Banniste 2004). A Home Office study, for example, found that less than one third of all eligible stops were recorded by police (Miller, Quinton and Bland 2000a, 2000b).

It has been further argued that such comparisons fail to take into account other demographic factors that influence the likelihood of being stopped by police and, as a result, have overstated the salience of race in predicting police stops. For example, a number of studies have shown that age (ie, youth), gender (being male) and class (being lower class, unemployed or employed in unskilled labour) are of equal or greater importance than race or ethnicity in predicting stop and search rates (Stenson and Waddington 2007; Tuck and Southgate 1981 cited in Walker 1987; Smith and Gray 1985; Fitzgerald et al 2002; Waddington, Stenson and Don 2004; Jefferson 1993; Jefferson and Walker 1992).

Simple racial comparisons based on official statistics have also been criticised for their failure to take into account the situational context of stop and search decisions (Walker et al 1989 cited in Jefferson and Walker 1992; Cole et al 1995). Studies have shown that a wide variety of factors impact on police stop and search decisions, including: visibility and whether it is possible for officers to determine suspects' race prior to instigating stops (Waddington, Stenson and Don 2004); officer demographics (Smith and Petrocelli 2001); the racial composition of the neighbourhood (Meehan and Ponder 2006; Cole et al 1995); the type of searches and the varying levels of discretion associated with them, such as warrant-based searches (low discretion) versus consent searches (high discretion) (Harris 2003; Fitzgerald 1999); as well as the behaviour of the persons stopped, including whether they are under the influence of drugs and alcohol (Klinger 1994, 1996; Schafer, Carter and Katz-Banniste 2004).

More recently, basic stop and search studies have been critiqued for relying on residential population data (typically census data) as a denominator for estimating ethnic stop and search rates rather than examining the ethnic distribution of the population actually available to be stopped by police (MVA and Miller 2000; Fitzgerald and Sibbitt 1997; Waddington, Stenson and Don 2004; Schafer, Carter and Katz-Banniste 2004). To address this shortcoming several large-scale observational studies carried out in the United Kingdom examined ethnic disproportionality in stop and search rates based on the ethnic composition of the available population (MVA and Miller 2000; Waddington, Stenson and Don 2004). These studies discovered that ethnic-minority groups were not disproportionately stopped by police and, in contrast to earlier work, that young white males were stopped at a disproportionate rate compared to their presence in the available population (MVA and Miller

2000; Waddington, Stenson and Don 2004). On this basis, such studies have rejected the discrimination thesis.

Although the 'available population' studies have been used to refute the discrimination thesis, they have led other scholars to question the "neutrality of availability" (Phillips and Bowling 2002, p595) and drawn attention to the possibility that racial discrimination may be occurring in police deployment decisions.<sup>18</sup> Criminologists have well documented that police seldom deploy their resources randomly and decisions about where and when to deploy officers inevitably impact on the construction of the available population (Harcourt 2006; Garland 2001; Jefferson 1993; Hall et al 1978). For example, Phillips and Bowling (2002) point out that structural inequalities affecting ethnic-minority groups, such as their high rate of school exclusion, high levels of unemployment, and significant representation within shift-work populations (conditions which, they observe, can be understood as the product of racial discrimination within society more broadly) mean that certain ethnic-minority groups are more available and, consequently, more vulnerable to police stops than other groups. For this reason, it has been argued that the results of the 'available population' studies do not necessarily prove that police do not discriminate against ethnic-minority people.

No published research has quantitatively explored police stop and search practices in New Zealand. The absence of research in this area represents a significant gap in current knowledge on ethnicity and the criminal justice system in this country, although the fact that New Zealand Police do not collect or publish data on stop and search practices largely accounts for the paucity of quantitative research on this subject. To date, Te Whaiti and Roguski's (1998) qualitative study examining Māori perceptions of police is the only published research providing some insight into Māori experiences of stop and search practices. Through a series of focus group interviews, they found that Māori participants believed that the police disproportionately targeted Māori youth for stop and search procedures without just cause. The interviews also revealed a general belief among participants that police harass Māori in an attempt to provoke retaliation in order to justify an arrest where no other rationale for arrest is apparent. Participants also perceived that police purposely focus their deployment on areas where Māori are more likely to congregate, singling out particular clubs and gatherings for large policing operations (Te Whaiti and Roguski 1998).

Although a significant amount of international research has focused on stop and search procedures, it is well recognised that arrests resulting from stop and search activities account for only a small proportion of total arrests. For example, Home Office data has shown that only 13 percent of stop and search events involving ethnic-minority people in England and Wales resulted in an arrest, while arrests following a stop and search procedure accounted for only 7 percent of all arrests (Home Office 2003 cited in Bowling, Phillips and Shah 2003). As Phillips and Brown (1998) have pointed out, the vast majority of arrests result from reactive forms of policing rather than proactive activity on the part of police. There is some suggestion, therefore, that rather than discrimination on the part of police being a major

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<sup>18</sup> This point has also been raised by Te Puni Kōkiri (see Submission from Te Puni Kōkiri: Review of Crime and Criminal Justice Statistics: Consultation Paper, 10 August 2008, correspondence provided to the Ministry of Justice by Te Puni Kōkiri).



contributor to ethnic minority over-representation in arrest statistics some degree of victim selection bias may be operating, whereby victims are more likely to report offences involving ethnic-minority groups (see Hinderlang 1978). Regardless of whether this is the case, it is safe to conclude that ethnic disparities in stop and search practices do not adequately account for the ethnic differentials in overall arrest rates. The following section will explore ethnic disparities arising from arrests.

## Arrest decisions

A large amount of research has focused on identifying and explaining ethnic disparities in police arrest decisions. This is because the point of arrest is when initial decisions are made about whether a person will formally enter the criminal justice process (Bowling, Phillips and Shah 2003). In addition, as noted above, studies have claimed that ethnic disparities set at the point of arrest play a significant role in determining levels of ethnic disproportionality throughout the remaining phases of the criminal justice system (Blumstein 1983; Langan 1985; Weatherburn, Fitzgerald and Hua 2003; Snowball and Weatherburn 2007; Wilbanks 1987). Consequently, identifying reasons for ethnic disparities in arrest rates is often considered crucial to understanding ethnic disproportionality in the system more broadly.

Arrest statistics illustrate that ethnic-minority groups are disproportionately arrested or apprehended by police in comparison to their representation in the general population, both in New Zealand and internationally (Weatherburn, Snowball and Hunter 2008; Snowball and Weatherburn 2008; McDonald 2004; Cunneen 2006; Blagg et al 2005; Mauer 2006; Cole et al 1995; Walker, Spohn and DeLone 2004; Smith and Petrocelli 2001; Mann 1996, 1993; La Prairie 1997; Cunneen and Kerley 1995; Bowling, Phillips and Shah 2003; Fergusson, Horwood and Lynskey 1993a; Doone 2000; Department of Corrections 2007a). The level of ethnic disparity, however, has been found to differ depending on age (particularly, youth) and gender, as well as offence type (Weatherburn, Fitzgerald and Hua 2003; Walker, Spohn and DeLone 2004; Wilbanks 1987; Cunneen 2006; Cunneen and Kerley 1995; Cole et al 1995; Tonry 1994; Hawkins and Thomas 1991; Department of Corrections 2007a).

Few published studies have examined contemporary rates of ethnic disproportionality in police apprehension statistics in New Zealand. A preliminary investigation of police data published in 2007 by the Department of Corrections found that, as is the case internationally, levels of over-representation vary according to offence type. The research demonstrated that although over-represented in all offence categories, Māori tended to be most over-represented in apprehension figures for violent, dishonesty and administrative<sup>19</sup> offences and – in contrast to international research findings – were less over-represented in low-level ‘status’ offences, such as offences against good order (Department of Corrections 2007a).<sup>20</sup> No recent publications provide a detailed statistical analysis of apprehension rates for Pacific people. Prior research on conviction rates undertaken by the Ministry of Justice suggests that the apprehension profile of Pacific people is likely to be broadly similar to that of Māori,

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<sup>19</sup> The administrative offence category is largely comprised of offences involving the breach of sentence conditions or judicial orders.

<sup>20</sup> These findings are supported by more recent analysis undertaken – but not previously published – by the Ministry of Justice; see ‘Introduction’ for figures.

although Pacific people were found to be proportionately more likely to be convicted for violent offences, and slightly less so for property and administrative offences. In line with international research findings, Pacific people were also more likely to be convicted for offences against good order (Paulin and Siddle 1997). More recent analysis undertaken by the Ministry of Justice broadly confirms this picture, revealing that Pacific peoples tend to be over-represented for violent offences and offences against justice.<sup>21</sup>

Internationally, the extent of ethnic disparity has also been found to vary across different states (Austin and Allen 2000; Spohn 2000; Crutchfield, Bridges and Pitchford 1994; Cunneen 2006) and for different types of locations within states. For example, Australian research has suggested that ethnic disparities in arrest rates are more pronounced in rural areas (see Blagg et al 2005; McDonald 2004; Cunneen and Luke 2007). Given this regional variation, such studies have, in turn, called into question the over-reliance on aggregate studies of national datasets in this field of research, which tend to mask regional differences (Stenson and Waddington 2007; Crutchfield, Bridges and Pitchford 1994; Austin and Allen 2000; Harris 2003).

In a similar vein to research into stop and search, a number of international studies have shown that racial disparities in arrest rates are largely offset by a range of legal and extra-legal factors. For example, offence seriousness, victims' preference for arrest, the victim-offender relationship, use of a weapon, availability and strength of evidence, whether a person portrays a disrespectful demeanour towards police, is under the influence of drugs or alcohol at the time of arrest, or commits an offence whilst in the presence of police, the presence of bystanders and the immediate neighbourhood context, as well as the offender's socioeconomic status, prior offending record and residence location have all been found to be stronger predictors of arrest than race/ethnicity *per se* (Sutphen, Kurtz and Giddings 1993; D'Alessio and Stolzenberg 2003; Free 2002; Piquero and Brame 2008; Kahar 2006; Stenson and Waddington 2007; Meehan and Ponder 2006; Weatherburn, Snowball and Hunter 2008; Engel 2003; Klinger 1994, 1996; Schuck 2004).

A number of scholars have debated the causes of ethnic disproportionality in arrest rates. The explanations offered to date have been broadly divided between those that claim that arrest differentials are caused by disproportionate rates of offending (the differential involvement thesis), and those that acknowledge the contributory role of discrimination on the part of the criminal justice system (whether directly or indirectly). Most academic effort in this area, however, has focused on the former, debating the extent to which ethnic disparities in arrest rates can be explained by ethnic differentials in 'real' offending rates<sup>22</sup> (Walker, Spohn and DeLone 2004; Piquero and Brame 2008; Fergusson, Horwood and Lynskey 1993a, 1993b; Fergusson, Horwood and Swain-Campbell 2003; Fergusson, Swain-Campbell and Horwood 2003; Wilbanks 1987; Hinderlang et al 1981; Elliot and Ageton 1980; Hinderlang 1978). While this type of work has generally been more prominent in the United States, in

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<sup>21</sup> This analysis, based on data from 2007, was undertaken by the Ministry of Justice in April 2009.

<sup>22</sup> Critical scholars such as Blagg (2008) and Agozino (2003) have suggested that the academic and government tendency to focus on the differential offending thesis has occurred because the alternative – namely the acknowledgment of state racism (both direct and indirect) and its link to social inequalities associated with offending – would require a re-examination of the unpleasant truths associated with colonial pasts. This argument has also been made in relation to New Zealand, see Mikaere (2008).



recent years similar types of analysis have emerged in Australia (Snowball and Weatherburn 2007, 2008; Weatherburn, Fitzgerald and Hua 2003).

Accepting that official arrest data are unlikely to reflect real offending rates, studies in this area have attempted to prove that ethnic differentials in offending exist by comparing descriptions of offenders derived from victim survey data or offender self-report data alongside official statistics. The results of these studies have been inconsistent: while some have revealed higher levels of offending for certain ethnic-minority groups for particular types of offence (Walker, Spohn and DeLone 2004; Piquero and Brame 2008; Weatherburn, Snowball and Hunter 2008; Fergusson, Horwood and Lynskey 1993a), others have found little ethnic difference in self-reported offending rates (Maguire 2007; Smith 2007; Hinderlang et al 1981; Graham and Bowling 1995, cited in Phillips and Bowling 2002; Flood-Page et al 2000).

A number of methodological criticisms have been levelled at these studies. The validity of victim recall studies has been widely questioned due to problems with victim memory decay, the tendency for victims to revert to racial stereotypes of offenders, and, perhaps most crucially, the fact that only a small subset of crimes are actually witnessed by the victim, meaning that the resulting offender descriptions are unlikely to be representative of all crime or all offenders (Walker, Spohn and DeLone 2004; Walker 1987). Offender self-report studies have been critiqued for their over-reliance on 'captive' populations such as school children or other institutional groups, which are unlikely to be representative of the adult population whose offending levels they are often used to explain (Maguire 2007; Wilbanks 1987; Blagg et al 2005). Self-report studies have also tended to focus on more minor forms of offending, and, for this reason, do not support conclusions about differential involvement in crime more generally. Offender self-report studies also rely on respondent honesty (Bowling 1990). Several studies have further asserted that self-report data is not equally valid across different ethnic groups, with some evidence that ethnic-minority respondents may under-report more serious forms of offending (Junger 1989, 1990; Piquero and Brame 2008). This, in turn, has led criminologists to question whether it is in fact possible or ethical to definitively quantify ethnic differentials in 'real' offending rates (Bowling 1990; Jefferson 1993; Reiner 1993; Walker 1987).

Notwithstanding these ontological limitations, a number of criminologists have widely accepted that the available evidence lends some credence to the differential involvement thesis (Cunneen 2006; Blagg et al 2005; La Prairie 1997; Kahar 2006; Walker and McDonald 1995; Walker 1987; Jefferson 1991; Phillips and Bowling 2002). For example, Walker (1987, p40) famously observed during the 1980s that black people in the United Kingdom would have to be 4 ½ times more likely to be arrested for burglary and 14 times more likely to be arrested for robbery if offending rates in the black and ethnic-majority populations were equal. She therefore concluded that the suggestion that no ethnic differentials existed in 'real' offending rates was highly implausible. However, Walker (1987) points out that this does not exclude the possibility of racial discrimination on the part of the criminal justice system.

As proponents of the 'discrimination thesis' have regularly pointed out, the actual degree of ethnic disparities revealed by self-report studies has often been less than the disparities

found in official arrest figures, meaning that different offending rates explain some, but not all, of the disparity (Walker, Spohn and DeLone 2004; Mauer 2006; Fergusson, Horwood and Swain-Campbell 2003; Fergusson, Swain-Campbell and Horwood 2003; Fergusson, Horwood and Lynskey 1993a; Jackson 1988). For this reason, Blagg et al (2005, p28) argue that the discrimination thesis is not alleging that over-representation is a factor external or independent of offending rates, but rather that “complex factors at play mean that arrest rates are not an accurate index of actual offender levels, or actual levels of differential offending between different ethnic groups”. In short, ethnic differentials in official arrest statistics are more complicated than the differential involvement thesis allows.

Research undertaken by Fergusson, Horwood and Lynskey (1993a) suggests that this conclusion may also hold true in the New Zealand context. Fergusson and colleagues compared self-reported offending data with police contact statistics for a Christchurch cohort, and discovered that although self-report data suggested that children of Māori or Pacific descent were 1.7 times more likely to offend than European children, police contact data revealed that Māori and Pacific children were almost three times more likely to come into contact with police. They therefore concluded that “official police contact statistics contain a bias which exaggerates the differences in the rate of offending by children of Māori/Pacific Island descent and Pākehā children” (Fergusson, Horwood and Lynskey 1993a, p193). This finding was also supported by analysis undertaken by Fergusson, Swain-Campbell and Horwood (2003) that examined cannabis-related offences for the Christchurch cohort. This study found that Māori were three times more likely to be arrested for such offences than non-Māori with similar histories of self-reported offending and the same level of police contact for other offences.

## Charge management

The charge management stage encompasses police decisions about laying and reviewing charges, as well as determining which cases will be diverted from the formal court system. Decisions around charges afford police considerable discretion as they are not legally or professionally obligated to lay formal charges, even if they have sufficient evidence to do so. On the contrary, police may do nothing or chose to issue a warning or caution. Despite the importance of charge management processes, little research has investigated this discretion point in detail, and those studies that have, have tended to focus predominantly on youth offenders (see for example, Carrington and Schulenberg 2004; Cunneen and Luke 2007; Landau 1981; Landau and Nathan 1983; Maxwell et al 2004). Within this small body of research, two areas have formed the dominant focus: decisions on the nature and number of charges laid, and decisions regarding diversionary options for ethnic-minority offenders.

Research on police charging decisions has been inconclusive. A number of studies have claimed to have found evidence of racial discrimination (Cole et al 1995; Phillips and Brown 1998; Mhlanga 1999, 1997; Cunneen and Luke 2007; Landau 1981). For example, in their study of charge decisions in Canada, Carrington and Schulenberg (2004) deduced that the decision to charge was strongly correlated with the number of previous police contacts experienced by Aboriginal offenders; however, having controlled for this variable they found that Aboriginal offenders were still more likely to be charged, leading them to conclude that

other factors such as demeanour, the role of parents, victim preference, and the availability of diversion options in Aboriginal communities also impacted on police charge decisions. Other studies, however, have found little evidence of ethnic differences once legally relevant factors, such as prior record and offence seriousness, have been taken into account (Welsh and Ogloff 2000; Farrington and Bennett 1981, cited in Bowling and Phillips 2002).

Other studies have yielded more mixed results. For example, Sutphen, Kurtz and Giddings (1993) developed a questionnaire for police officers working in a Midwestern state that included a number of hypothetical charging scenarios modelled on real crime events. While they found some evidence of over-charging for black offenders (who were charged with more offences in most scenarios) they also discovered that black and ethnic-majority offenders were equally likely to be charged with more serious offences, and that ethnic-majority offenders were more likely to be charged with liquor-related offences. They concluded that this variation was likely to be due to officer views about 'typical' offences and behavioural expectations based on racial stereotypes. A similar type of study was undertaken in New Zealand by Dance (1987). This study found that despite possessing a number of negative stereotypes about Māori offenders, officers of all ranks revealed little evidence of differential charging practices based on race.

Several studies have explored over-charging practices by focusing on court records. These studies have largely derived from the United Kingdom and have found some evidence of over-charging practices by police, whereby ethnic-minority defendants are charged for offences insufficiently supported by the available evidence (Mhlanga 1999; Phillips and Brown 1998; McMullen and Jayewardene 1995; Her Majesty's Crown Prosecution Service 2002 cited in Bowling and Phillips 2002). For example, Phillips and Brown (1998) in their research on the Crown Prosecution Service (CPS) in the United Kingdom found that the CPS was more likely to terminate cases due to insufficient evidence when the defendant was black. Similarly, in her extensive study of CPS decisions Mhlanga (1999) found that case termination rates were higher for black and Asian defendants compared to ethnic-majority defendants. These differences remained after legally relevant factors were taken into account, leading Mhlanga to conclude that the CPS was, in effect, correcting cases where police had demonstrated racial bias. Analogous results were obtained in a study undertaken by the CPS, which concluded that police were presuming guilt based on racial stereotyping in cases where there was insufficient proof to proceed (cited in Bowling and Phillips 2002).

In addition to over-charging, research has shown that ethnic-minority defendants are generally less likely to be cautioned or given the option of police diversion compared to their ethnic-majority counterparts (Jourdo 2008; Cole et al 1995; Phillips and Brown 1998; Bowling and Phillips 2002; Landau and Nathan 1983). Landau and Nathan (1983) found that black juvenile offenders in a selected London borough were less likely to be cautioned even after prior record, offence type and offence seriousness were controlled for. However, this study failed to control for socioeconomic status, and given that black youth in the sample were more likely to come from lower class families with greater levels of family disruption (for example families characterised by divorce, unemployment, imprisonment and parental death) it is likely that class differences may have accounted for at least part of this disparity. As Bowling and Phillips (2002) acknowledge, it is also highly probable that differences in

receiving cautions and accessing police diversion programmes may be due to the greater proclivity of black defendants to plead not guilty thereby becoming ineligible for receiving either a caution or diversion.

In contrast to international research, existing New Zealand research suggests that Māori offenders may be more likely to plead guilty to charges than their New Zealand European counterparts (Department of Corrections 2007a; O'Malley 1973). For example, a Department of Corrections report noted that in 2001, 80 percent of Māori defendants pleaded guilty compared to 73 percent of non-Māori defendants (Department of Corrections 2007a).<sup>23</sup> Assuming that this is still the case, the restricted access of Māori to diversion cannot be explained by ineligibility resulting from a greater likelihood of pleading not guilty (as has been the case internationally). The low rate of Māori diversion in New Zealand therefore requires a different explanation.

Little research has examined ethnic differentials in cautioning and accessing diversion in New Zealand. Those studies that have explored this issue, however, suggest that some level of ethnic disparity exists. For example, in their study of diversion practices in New Zealand, Kim Workman and Associates (1998) found that despite comprising 40 percent of total police apprehensions, Māori accounted for only one-fifth of the cases receiving diversion. Similarly, Maxwell et al (2004) found that police were more likely to send Māori and Pacific youth directly to the Youth Court in lieu of utilising diversionary options such as Family Group Conferences.

International and national research findings have offered a number of explanations for disparities in accessing diversionary options, and have pointed out that ethnic minority offenders may be considered less eligible to receive either cautions or police diversion for a number of legal reasons (such as previous offending, offence seriousness, and offence type) and extra-legal reasons (such as family and residential circumstances, demeanour, and substance abuse problems) (Kim Workman and Associates 1998; Cole et al 1995). This, in turn, has led some authors to question the degree to which apparently 'racially neutral' restrictions on diversion schemes, such as the exclusion of certain types of offence, disproportionately impact negatively on defendants from ethnic-minority groups (Cole et al 1995, p195; see also Kim Workman and Associates 1998).

## Court processes

During the last four decades an extensive amount of research literature has examined the issue of racial discrimination in court processes. As was the case for research on policing, this body of literature has emerged largely from the United Kingdom and the United States, and, to a lesser degree, Canada and Australia. Comparatively little empirical investigation has been undertaken on ethnic disparities in court-related outcomes in New Zealand.<sup>24</sup>

To an even greater degree than research on police, studies on discrimination in courts have been characterised by both methodological and ontological problems, revealing considerable

<sup>23</sup> O'Malley's study published in 1973 found a similar disparity in guilty pleas, with 84 percent of Māori defendants pleading guilty compared to 73 percent of European defendants (O'Malley 1973, p 52).

<sup>24</sup> Triggs' (1999) multivariate study on sentencing in New Zealand is an important exception.

disagreement about the most reliable statistical methods for investigating racial discrimination (including which controls should be included) and more fundamental dissension about how to interpret the results (Hudson 1993a; Wilbanks 1987; Reiner 1993; La Prairie 1990; Matravets and Tonry 2003; Hood 1992a, 1992b).

Research within this area has primarily focused on prosecution and sentencing decisions, although most predominantly on the latter. A number of studies have also explored ethnic disparities in the granting of bail, plea, probation (particularly the provision and content of pre-sentence reports) and legal representation; however, these topics have typically been examined only to the degree that they help to explain ethnic differentials in sentencing. Consequently, literature on these aspects of the court process will be examined within the broader section on sentencing.

## Prosecution

Prosecuting authorities may decide whether charges are withdrawn either due to insufficient evidence or on the basis that a prosecution would not be in the public interest (Cole et al 1995). Most of the countries examined within the current review have separate prosecuting authorities that make these decisions; however, within New Zealand the Police Prosecution Service undertakes this role (Stenning 2008).

In comparison to the volume of work exploring ethnic disparities in sentencing decisions, only a small amount of research has focused explicitly on prosecution decisions. This may be partly due to the fact that some studies have suggested that prosecution decisions are heavily influenced by police recommendations, meaning that prosecutorial discretion is seldom exercised. For example, Cole et al (1995) found that prosecution decisions in Ontario rarely departed from police recommendations (see also Denman 2001; Walker 1988 cited in Reiner 1993 in relation to the United Kingdom). However, other studies from the United Kingdom have found that this is not always the case (Phillips and Brown 1998; Mhlanga 1999).

Research on racial discrimination in prosecution decisions has been inconclusive. Free (2002) completed a review of 24 American studies exploring ethnic disparity in prosecution decision making. Over half of these studies found no evidence of racial discrimination once prior record, offence type, and at least one other legally relevant variable were taken into account. In contrast, several studies carried out in the United Kingdom have suggested that the Crown Prosecution Service (CPS) discriminates against ethnic-minority defendants by allowing cases to proceed with insufficient evidence, leading to higher judicial dismissal rates for cases involving ethnic-minority groups (Denman 2001; Walker 1988, cited in Reiner 1993). However, as noted above in relation to charge management practices, others have argued that the CPS regularly terminates cases involving ethnic-minority defendants which lack sufficient evidence to proceed, thereby 'correcting' earlier discrimination in police charging decisions. For example, Phillips and Brown (1998) found that the CPS terminated a far greater proportion of cases involving ethnic-minority defendants compared to ethnic-majority defendants. These differences remained after offence type, offence seriousness,

and offending history were taken into account. Mhlanga (1999) reported similar results following her study of prosecution decisions at 22 CPS branches across the United Kingdom.

Free (2002) identifies several methodological weaknesses apparent with studies in this area. First, he notes that many studies fail to adequately control for evidentiary strength, which is highly problematic given that this is likely to have considerable bearing on prosecution decisions. Second, he observes that studies of prosecution decisions have often focused on serious offences which arguably allow for less prosecutorial discretion insofar as they are likely to be 'in the public interest' to prosecute. Third, he notes the interpretative difficulties associated with research on prosecution decisions, whereby both leniency and severity can invariably be read as evidence of discrimination. This, he argues, demonstrates the importance of not examining stages of the system in isolation (Free 2002). However, as Wilbanks (1987) has argued, this also highlights more fundamental interpretational and ontological difficulties concomitant with this type of research, as it is always possible to attribute prima facie evidence of 'leniency' to bias at earlier stages of the process. In this event it becomes impossible to empirically 'prove' or 'refute' the discrimination thesis. On a more practical level, research within the United Kingdom has demonstrated that it is often not possible for prosecutors to make discriminatory decisions as information on ethnicity is often missing from prosecution files. For example, Phillips and Brown (1998) found that the ethnicity of the defendant was absent on 40 percent of the files processed by Crown prosecutors, thereby bringing into question the degree to which prosecutors were in a position to make discriminatory decisions.

To date no detailed investigation of prosecution decision making has been published in New Zealand. Evidence from Maxwell et al's (2004) study on youth justice processes, however, provides some initial insight into this discretion point. This study found that Māori youth were more likely to enter into the formal youth justice system for less serious offences than European youth. The authors argue that this could be indicative of greater vigilance on the part of the public and police (and, presumably, police prosecutors) in the case of Māori offenders. In addition, preliminary bivariate analysis of existing data undertaken by the Department of Corrections (2007a) has revealed that between 1996 and 2005, Māori were 6.4 percent more likely to be prosecuted than their New Zealand European counterparts. This rate varied for different offence categories, being highest for violence, dishonesty, and administrative offences, and lowest for sex, drug, and property offences. However, this analysis did not include controls for offence seriousness, prior record, strength of evidence, or other legally-relevant factors, which – given results from similar studies internationally – are likely to explain at least some of this disparity.

## Sentencing

A substantial amount of research has examined the possibility of racial discrimination at sentencing in the hope of quantifying the contribution of sentencing to the over-representation of certain ethnic-minority groups in prison. This research has predominantly focused on the type of sentence imposed (with particular attention to custodial sentences) and the quantum (ie, length of custodial sentence imposed). Research in this area has again led to mixed results (Spohn 2000; Kleck 1981 in Spohn 2000; Cole et al 1995; Reiner 1993;



Hudson 1993a; Chiricos and Crawford 1995; La Prairie 1990; Wilbanks 1987). In terms of sentence type, a large number of studies have concluded that defendants from certain ethnic-minority groups are generally treated more punitively at sentencing in comparison to ethnic-majority defendants (Walker, Spohn and Delone 2004; Spohn 2000; Hood 1992a, 1992b; Cole et al 1995; Petersilia 1985; Mair 1986; Zatz 1987; Chiricos and Crawford 1995). Conversely, a number of studies claim to have found little evidence of racial discrimination in sentencing practices once legally relevant factors and other demographic variables are controlled for (Jeffries and Bond 2009; Dickson-Gilmore and La Prairie 2005; Bonta 1989 cited in La Prairie 1990; Moxon 1988 cited in Hudson 1993b; Crow and Cove 1984 cited in Hudson 1993b; McConville and Baldwin 1982; Klein et al 1990 cited in Spohn 2000; Walker and Jefferson 1992; Boldt et al 1983 cited in La Prairie 1990).

A wide variety of factors have been found to mediate the predictive role of race/ethnicity on sentencing decisions. For example, a range of individual factors such as welfare status, social links, higher incidence of alcohol and drug abuse, mental health problems, lack of education, unemployment, gang membership, gender, age, and whether the defendant lives locally or is an 'outsider' have all been found to play a predictive role in sentencing decisions (Spohn 2000; Latimer and Foss 2005; Kruttschnitt 1981, cited in Mann 1996; Rumgay 1995). Several studies have also argued that the immediate context or 'culture' of the court plays an important part in sentencing decisions. For example, research from England and Wales has shown some courts (and individual judges within courts) are more punitive and thus more prone to imposing custodial sentences than others (Rumgay 1995; Hucklesby 1997; Cole et al 1995; Wilbanks 1987; Spohn 2000; Chiricos and Crawford 1995; Hood 1992a, 1992b; Shute, Hood and Seemungal 2005).

Procedural factors may also result in racially disproportionate outcomes. For example, the number and type of charges, and prior record impact on sentencing and are highly correlated with race, as ethnic-minority offenders tend to present with more, and more serious offences (again it has been suggested that this may be read as the product of earlier biases) which are more likely to attract custodial sanctions (Jeffries and Bond 2009; Hood 1992a, 1992b; Matravers and Tonry 2003; Moxon 1988 cited in Hudson 1993a; Cunneen 2006; Blagg et al 2005; Kleck 1981 cited in Spohn 2000). Matravers and Tonry (2003) refer to this situation as 'sample selection bias' which occurs when events happening earlier in the process may have made ethnic minority and ethnic-majority defendants appearing before the courts systematically different (see also Jeffries and Bond 2009). This is likely to be a significant issue for Māori, given that New Zealand research has shown that Māori are more likely to be imprisoned for the first time at age 19 or less, and are more likely to be reconvicted and re-imprisoned than other ethnic groups (see Nadesu 2008, 2009; Department of Corrections 2009a).

The development of more sophisticated multivariate methodologies in recent years has given birth to more complex findings still. For example, a number of studies have found that racial differences in sentencing differ between different types of offenders (for example, by gender, age, socioeconomic and/or employment status) and across different offence categories (Spohn 2000). The nature and extent of racial disparity has also been found to vary in different locations, at different courts, and over time (Walker, Spohn and DeLone 2004;

Spohn 2000; (Spohn and Cederbalm 1991, Chiricos and Bales 1991, and Nobiling, Spohn and DeLone 1989 all cited in Spohn 2000); Chiricos and Crawford 1995). As Spohn (2000, p478) observes, “contemporary researchers have moved beyond simply asking whether race makes a difference to attempting to identify the conditions under which, and the context in which, race makes a difference”. This has led a number of authors to focus on the indirect effects of race on sentencing outcomes. As noted in the introduction, indirect discrimination (also referred to as interaction effects) refers to a situation in which race or ethnicity alone does not strongly predict sentence outcomes, yet legal and extra-legal factors which are strongly correlated with race impact on judicial decision making to produce racially disparate outcomes (Spohn 2000).

In relation to sentence length, research findings have again been mixed. For example, a recent study undertaken in South Australia by Jeffries and Bond (2009) found that although indigenous offenders were less likely to receive a prison sentence compared to similarly positioned non-indigenous offenders, those who did were slightly more likely to have longer sentences imposed. The authors tentatively suggest that this result could be the product of earlier leniency afforded to indigenous offenders, whereby judges had previously diverted indigenous offenders on multiple occasions.

In contrast, other studies have reported evidence of more lenient treatment for ethnic-minority defendants (especially those from indigenous groups) insofar as they typically receive shorter custodial sentences than similarly placed ethnic-majority defendants (Blagg et al 2005; Dickson-Gilmore and La Prairie 2005; La Prairie 1990; Crow and Cove 1984, cited in Hudson 1993b). However, as was the case for prosecution decisions, apparent leniency in decisions relating to sentence length has been attributed to bias at earlier stages of the system (Cole et al 1995; La Prairie 1990). For example, questions have been raised about whether the fact that ethnic-minority offenders receive shorter sentences indicates that a custodial sentence was inappropriate and that a similarly positioned ethnic-majority defendant would not have received a custodial sentence in the first place, or if shorter sentences are simply a reflection of the time already spent in custody given that ethnic-minority defendants are more likely to be refused bail (Free 2002; Spohn 2000; Cole et al 1995; La Prairie 1990).

Authors have further questioned the degree to which short sentences contribute to bias against ethnic-minority defendants insofar as those serving short sentences may be denied access to institutional treatment programmes, leading to increased recidivism (see, for example, La Prairie 1990). Several authors have also raised the possibility that the greater tendency for ethnic-minority defendants to receive short custodial sentences may mean that ethnic-minority prisoners are more likely to develop more extensive custodial histories, which, in turn, disadvantages them in the event they re-enter the system (La Prairie 1990; Blagg et al 2005; Cunneen 2006).

Research on ethnic disparities in sentencing has further highlighted five aspects of the pre-trial process which are believed to indirectly contribute to racially disparate sentencing outcomes, namely legal representation, plea decisions, mode of trial selection, pre-trial detention, and the preparation of pre-sentence reports by probation officers. Each of these areas will be explored, in turn, below.



## Legal representation

Several studies have examined the relationship between legal representation and sentencing outcomes. These studies have generally found that ethnic-minority defendants are more likely to have public defenders than private lawyers. But as to whether this contributes to more negative sentencing outcomes for these defendants, the results have again been mixed. For example, while some studies have found that public legal representation is associated with more punitive outcomes for ethnic-minority defendants (see, for example, Spohn 2000); others have found that having a public defender may result in more lenient outcomes. For example, research undertaken in New Zealand on the Public Defender Service (PDS) pilot suggested that cases handled by PDS were less likely to result in a custodial sentence being imposed (Paulin, Kingi and Mossman 2008). Paulin, Kingi and Mossman (2008) also noted that the severity of sentence was likely to be related to plea, with PDS clients more likely to plead guilty than those who had retained private lawyers.

## Plea decisions

The defendant's decision to plead not guilty has been identified as an important factor governing sentence severity in Canadian, American and British research (Cole et al 1995; Hood (1992a, 1992b); O'Malley 1973; La Prairie 1990; Hudson 1993a; Ulmer 1997 cited in Spohn 2000; Welsh and Ogloff 2000). The nature of the plea is important because it is common practice for a sentence discount to be offered to defendants who plead guilty. This is because those who plead guilty are able to demonstrate that they have taken responsibility for their offending and can indicate their remorse to the court. They may also have taken steps to make amends prior to sentencing by writing apologies or providing some form of reparation to the victim (Hood 1992a, 1992b). Several studies have argued that the tendency for ethnic-minority defendants to plead not guilty increases their risk of more punitive outcomes at sentencing in the event that they are found guilty (Hood (1992a, 1992b); Hudson 1993a; Ulmer 1997, both cited in Spohn 2000; Walker, Spohn and DeLone 2004). In addition, as noted above, plea decisions are also related to legal representation, again showing how racial differences in one aspect of the criminal justice process can impact on later stages (Hudson 1993a; Matravers and Tonry 2003).

In contrast to international research, as noted above, several studies in New Zealand have revealed that Māori defendants are *more* likely to plead guilty than their New Zealand European counterparts (O'Malley 1973; Department of Corrections 2007a; Te Puni Kōkiri 2002). Research undertaken by Te Puni Kōkiri (2002) indicated that this was not necessarily indicative of actual guilt, but reflected the fact that many Māori defendants feel intimidated by the criminal justice system and are insufficiently supported when making their plea, being encouraged by both lawyers and police to plead guilty. However, to date, no published research has provided a detailed examination of the processes surrounding plea decisions and the implications of these decisions for sentencing outcomes in New Zealand.

## Bail

A number of authors have identified links between racial disparities in bail decision making and later sentencing decisions (Matravers and Tonry 2003; Hood (1992a, 1992b); Cammiss and Stride 2008; Cole et al 1995; Blagg et al 2005; Mann 1996, 1993; Free 2002; Albonetti et al 1989, cited in Free 2002). Hood (1992a, 1992b) for example has noted that being detained before trial impacts on a defendant's ability to make amends for their offence, maintain or obtain stable employment, and prepare a strong legal defence. In addition, in their research in the United Kingdom, Cammiss and Stride (2008) found that defendants remanded in custody typically appeared behind screens or barriers in the courtroom, causing them to visibly seem more dangerous than defendants released on bail.

A number of studies have found some prima facie evidence of discrimination on racial grounds surrounding bail decisions (Hood 1992a, 1992b; Free 2002; Cole et al 1995); however, these findings have seldom been straightforward. For example, Cole et al (1995) found that racial disparities in pre-trial release in Ontario differed between different types of offence, being most pronounced for drug-related offences after offence seriousness and prior record were taken into account. They further found that having a current record (in particular, being convicted of an offence within the last three months) as well as bail status at the time of the hearing (ie, whether the current alleged offence was committed whilst already on bail) and employment status were key predictors of bail decisions. Bail decisions have also been found to vary depending on a defendant's gender, age, employment status, appearance and demeanour in court, as well as being highly contingent on evidentiary strength (see Free 2002; Cole et al 1995).

Other research, while not explicitly examining racial differences, has suggested that the culture of individual courts plays a crucial role in the granting of bail. For example, in a study of bail hearings in Welsh magistrates' courts, Hucklesby (1997) found that a court's reputation and whether the sitting magistrate was considered 'harsh' directly impacted on prosecution recommendations regarding bail. The extent to which such behaviour impacted disproportionately on ethnic-minority groups was not possible to discern from Hucklesby's study due to the small sample size used. However, earlier research undertaken at a South London magistrates' court by Cain and Sadigh (1982, p91) found some evidence that black defendants disproportionately appeared before magistrates with a reputation for being "tough".

In the United States greater racial differences have been found in the setting of bail conditions, rather than the initial decision about whether to grant bail itself. Research has shown that African American defendants are more likely to require cash or surety bonds as conditions of release and are less likely to be provided with alternative options (Free 2002). There was also some evidence of gender differences as well as ethnic differentials. For example, Ayres and Waldfogel (1994 cited in Free 2002) found that African American female defendants were required to pay larger cash sureties than ethnic-majority women after controlling for risk of flight (see also Mann 1996, 1989).

Australian research has similarly shown that Aboriginal defendants are likely to have more restrictive (and often unrealistic) bail conditions imposed, leading to higher rates of bail breaches in comparison to ethnic-majority defendants (Blagg et al 2005). As Free (2002) points out, defendants' ability to meet the conditions of bail has typically been overlooked in studies examining racial differences in bail decision making, but should be a central consideration in future studies. It is also possible that other factors independent of court decision making may cause racial disparities in bail decisions. For example, Pallesen (1991, cited in Free 2002) examined bail decisions in a county in Florida and discovered that the private company employed to supervise defendants on pre-trial release were more likely to accept ethnic-majority 'clients' rather than black 'clients'.

There has also been some evidence that ethnic-minority defendants held in custody are proportionately *less* likely to receive custodial sentences compared to ethnic-majority defendants. For example, research undertaken in Australia has shown that Aboriginal defendants who have been remanded in custody are less likely to receive a custodial sentence than their ethnic-majority counterparts. As Blagg et al (2005) observed, one in ten Aboriginal defendants who were refused bail were subsequently found not guilty and had their cases dismissed, while 45 percent of Aboriginal defendants refused bail did not go on to receive a custodial sentence. The interpretation of such findings, however, can be ambiguous as the fact that a defendant has been in custodial remand can, in turn, impact on sentencing decisions. To date no published research examined this issue in detail in New Zealand. However, data from the Ministry of Justice shows that 56 percent of cases that involved a period of custodial remand in 2006 did not result in a custodial sentence (Morrison, Soboleva, and Chong 2008).

A number of studies have pointed out that regardless of whether ethnic or racial differences remain after 'legally relevant' criteria have been taken into account, such criteria are themselves discriminatory insofar as they automatically disadvantage ethnic-minority defendants (Cole et al 1995; Blagg et al 2005). For example, Australian research has suggested that Aboriginal youth were 40 percent more likely to be refused bail than ethnic-majority youth; however, once prior record was controlled for this difference disappeared (Luke and Cunneen 1995). However, Blagg et al (2005) argue that interpreting this result as evidence that no bias exists is problematic, for having a more extensive prior record is itself likely to be the function of earlier criminal justice bias. Similarly, in their study of bail decisions in Ontario, Cole et al (1995) observed that the salience of employment status in bail decision making impacted more negatively and disproportionately on ethnic-minority defendants, who were more likely to be unemployed than their ethnic-majority counterparts.

Little research has examined ethnic disparities in bail decisions in New Zealand. O'Malley (1973) undertook some provisional bivariate analysis of bail decision making within a broader study on sentencing in New Zealand courts in the 1970s. He found that although similar proportions of Māori and non-Māori were awarded bail, Māori tended to have greater difficulty arranging financial sureties and, as a result, were less likely to meet the conditions of bail. O'Malley (1973) surmised that this was due to Māori defendants having deprived social networks and family members who were less willing and/or able to provide financial guarantees. As O'Malley pointed out, the fact that Māori defendants were less likely to make

bail impacted on their ability to arrange and access legal advice, which was, in turn, thought to disadvantage them at the conviction and sentencing stages.

O'Malley's work is now considerably dated and no recent research has explored ethnic differentials in bail decisions in detail. While the Ministry of Justice published a report on offending on bail in New Zealand in 1994, this did not include any ethnic breakdown of bail statistics (Lash 1998). A more recent report by the Department of Corrections, has demonstrated that Māori account for the largest proportion of remand custody starts,<sup>25</sup> and that the number of remand custody starts involving Māori defendants has increased more rapidly than other ethnic groups (Harpham 2008); however, this report did not include any detailed discussion or further analysis on the Māori remand population.

## Mode of trial

Several studies in England and Wales have highlighted racial differences in mode-of-trial decisions that are believed to impact on sentence severity. Mode-of-trial decisions arise when defendants are charged with indictable or serious offences which may be heard either in a magistrates' court or at the Crown Court (the equivalent of New Zealand's High Court). These are commonly referred to as 'triable-either-way' cases in the United Kingdom (and 'middle-banded' cases in New Zealand). In such cases a magistrate may refuse jurisdiction and refer a case to a higher court. Alternatively, a defendant has the option of requesting that their case be transferred to a higher court. Mode-of-trial decisions are considered particularly important because higher courts can impose more severe sentences than the magistrates' court (Hood 1992a, 1992b).

A number of studies from the United Kingdom have revealed that black defendants are more likely to opt for a Crown Court trial in such instances (Hudson 1993b; Hood 1992a, 1992b). One possible reason for this is that ethnic-minority defendants have a higher acquittal rate in Crown Courts compared to magistrates' courts (Phillips and Brown 1998). However, in the event that black defendants are found guilty in the Crown Court they may face more severe sanctions because a more serious range of sentencing options are available. Thus, in his seminal study of sentencing in Crown Courts in the West Midlands, Hood (1992a, 1992b) highlighted the sheer number of black defendants tried in Crown Courts as a key contributor to their over-representation in prison.

Other studies, however, have questioned the assumption that the disproportionate number of black defendants in Crown Courts is simply a product of defendant decision making, arguing that this is also caused by magistrates being more likely to refuse jurisdiction in cases involving ethnic-minority defendants (Brown and Hullin 1992; Jefferson and Walker 1992). A recent study undertaken by Cammiss and Stride (2008) examined this issue through the multivariate analysis of triable-either-way cases. They tentatively surmised that magistrates were more inclined to decline jurisdiction in cases involving ethnic-minority defendants; however, this was more likely to occur when defendants were remanded in custody regardless of ethnic group. They concluded, then, that regardless of race, defendants on

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<sup>25</sup> A 'start' refers to a discrete remand episode. Individual offenders may in the course of a year have multiple remand starts that may result in a single charge (or set of charges) or successive charges.

custodial remand were at a structural disadvantage in mode-of-trial hearings because they appeared behind barriers (thereby implying dangerousness) and were often shabbily dressed and therefore unable to present a good image to the court (Cammiss and Stride 2008). This again indicates how decisions at one stage of the system (ie, bail) may impact on decisions at later stages.

To date no published research has examined ethnic differences in triable-either-way or middle-banded offences and its impact on sentencing outcomes in New Zealand.

## Pre-sentence reports

Sentencing research has often highlighted the important role of Pre-Sentencing Reports (PSRs) in determining sentence outcomes. Probation officers prepare PSRs<sup>26</sup> on defendants, with the central purpose being to investigate and recommend suitable sentencing options (Bowling and Phillips 2002). Research has suggested that there is often a high level of congruence between PSR recommendations and sentencing decisions, meaning that if racial discrimination was evident in PSRs, there is a strong likelihood that this bias would be transmitted to sentencing decisions (Cole et al 1995; Rungay 1995; Moxon 1988, cited in Hudson 1993a; Denney, Ellis and Barn 2006; Denney 1992). The provision of a favourable PSR has also been correlated with receiving a community-based sentence.

Research on racial discrimination in PSRs has emerged largely from England, although Deane produced a small-scale study examining gender and ethnic differences in PSRs presented before the Wellington District Court during the 1990s (Deane 1995, 2000). Quantitative findings from England have been mixed. Some studies have found that black defendants were generally less likely to have a PSR prepared on them than their ethnic-majority counterparts, thereby reducing their likelihood of accessing community-based sentences (Moxon and Hudson 1989 cited in Denney 1992). Other studies have found that black people are more likely to be remanded for PSRs than ethnic-majority defendants (Shallice and Gordon 1990, cited in Denney 1992; Gale, Bailey-Harris and Wundersitz 1990). Within New Zealand, Deane's study found little evidence that the request for PSRs differed by either race or gender (Deane 1995), although she found that Pākehā women and Māori and Pacific men were slightly more likely to be remanded for a full PSR than Māori women (Deane 2000).

In their study of PSR use in four London courts, Shallice and Gordon (1990, cited in Denney 1992) found that very similar recommendations were made for black and ethnic-majority defendants; however, the same recommendations were made for people with vastly different criminal histories and involvement with the probation service. They also found that black defendants were moved up the sentencing tariff more quickly than ethnic-majority defendants, and that PSR recommendations were more likely to be followed in the case of black defendants because recommendations made for ethnic-majority defendants were often considered too lenient by the court (Shallice and Gordon 1990, cited in Denney 1992).

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<sup>26</sup> Previously termed Social Inquiry Reports in the United Kingdom.

In contrast to most research examining bias in the criminal justice system, research on racial discrimination in PSRs has tended to include more qualitative studies, with much of the early work in this area carried out in England (Lewis 2009; Gelsthorpe 1993; Hudson 1993b; Whitehouse 1983 and Hudson 1988, both cited in Hudson 1993b)). Following a content analysis of PSRs in English courts, Hudson (1988 cited in Hudson 1993b;) found that the reports often portrayed black offenders as being more hostile and aggressive, with less desire to change to a non-criminal lifestyle compared to their ethnic-majority counterparts (see also Denney 1992). In a later study, Hudson (1993b) found that black defendants were often discussed within PSRs in ways that made custodial sentences more probable, emphasising family pathology, rootlessness, child-rearing outside marriage, and multiple partners. Such findings have been confirmed in a more recent study carried out by Hudson and Bramhall (2005, cited in Lewis 2009, p109) which found that reports on Asian defendants in North West England were often less detailed, employed more distancing language, and were more likely to include weak, unclear, or negative recommendations (or, contained no recommendations at all).

Such findings have been echoed in Australian and Canadian research. For example, PSRs in Australia have been found to contain negative expressions about Aboriginal culture, family dysfunction, and unsatisfactory child-rearing practices (Blagg et al 2005). Similarly, recent research undertaken by Denney, Ellis and Barn (2006) on PSRs presented to Toronto and Vancouver courts during 2001, found that inappropriate links were being made between Aboriginal culture and moral values in PSRs, which tended to construct Aboriginal offenders outside the “rehabilitative discourses” recognised by probation officers and sentencing judges (Denney, Ellis and Barn 2006, p9). They further found that within the reports Aboriginality was generally linked to generational alcohol abuse, a lack of closeness to family, frustration and unhappiness (Denney, Ellis and Barn 2006). In terms of the content of PSRs in New Zealand, Deane (2000, 1995) found no mention of cultural factors or evidence of racial stereotypes in the reports she examined at Wellington District Court. She consequently concluded that there was no evidence to suggest that probation officers intentionally or unintentionally practiced racial discrimination when writing PSRs (Deane 2000). Deane’s work, however, was small scale and there has been no subsequent attempt to examine PSR content in other areas or nationally.

Gelsthorpe (1993, p79) has pointed out the difficulties associated with assessing racial discrimination through the content analysis of PSRs, and has warned that “racism – like sexism, cannot be neatly packaged and picked off the pages”. Offering a different approach to straightforward content analysis, Gelsthorpe and colleagues looked below the surface to examine the processes behind the construction of PSRs. This investigation revealed evidence of racial discrimination in the allocation of client files, which meant that black and Asian male clients were less likely to receive home visits prior to writing reports (Gelsthorpe 1993). This, in turn, limited the scope of PSRs and made custodial sanctions more probable. Such research illustrates that it can be important to explore *processes* surrounding criminal justice decision making, rather than restricting analysis to criminal justice outcomes alone. No published research has examined the processes surrounding the construction of PSRs in depth, at either a national or local level in New Zealand.



## Sentencing decisions in New Zealand

No research has systematically examined sentencing decisions in New Zealand with the level of sophistication observed in other countries. To date, the most comprehensive study of sentencing was carried out by the Ministry of Justice. This was published in 1999 and involved a large-scale multivariate analysis of 300,000 cases (Triggs 1999). This study found that Māori and Pacific offenders were more likely to receive periodic detention and community programme sentences, and less likely to receive monetary penalties than their New Zealand European counterparts. Triggs (1999) surmised that this was likely to be due to the perception that Māori, Pacific, and female offenders had fewer financial resources with which to pay fines, and that community sentences were being utilised by judges as an alternative to fines, rather than as an alternative to imprisonment as originally designed. In terms of imprisonment, however, Triggs (1999) found little evidence of ethnic differences once other legally relevant factors, such as offence seriousness and prior record, were taken into account.

Following international examples, such findings could be interpreted in a number of ways. For example, these results could be read as evidence of earlier bias in the construction of prior records or police charging practices. It is also possible that studying sentencing outcomes at a national aggregate level may mask significant differences between different court regions, and, indeed, different judges. As Young (2008) notes, research undertaken by the Law Commission in New Zealand found substantial variations in practice between different court districts in sentences imposed, which were unlikely to be accounted for by offence or offender variables.

## Prison

Compared to the volume of research on sentencing decisions, little research has explored ethnic disparities in prison decision making; and the work undertaken has been based largely in England and Canada (Clements 2000, cited in Bowling and Phillips 2002; Cole et al 1995; Genders and Player 1989). This research suggests that ethnic-minority prisoners are more likely to be held in closed prisons rather than open prisons (Bowling and Phillips 2002), are more likely to be formally charged with, and found guilty of, disciplinary infractions within prison (Genders and Player 1989; Cole et al 1995), and are likely to receive more severe forms of punishment as a result of such infractions, such as being placed in segregation (Clements 2000, cited in Bowling and Phillips 2002; Cole et al 1995).

The Commission of Inquiry into Systematic Racism in Ontario found that ethnic minority prisoners were more likely to be charged with more discretionary forms of misconduct, such as wilfully disobeying an order, and less likely to be charged with offences which required objective proof, such as contraband offences (Cole et al 1995). However, the Commission also noted that institutional records were often incomplete and inadequate for research purposes. In terms of punishments within prison, the Commission noted “the striking absence of correlation between the offence type and the penalty, indicating complete randomness in the assignment of penalties to offences” (Cole et al 1995, p213). Deciphering the reasons for

such decisions was impeded by the fact that this information was rarely recorded by prison administrators.

Research has further demonstrated that ethnic-minority offenders are more likely to be the victim of violence while in custody (Blagg et al 2005; Cole et al 1995). The Commission of Inquiry in Ontario noted the widespread use of racist violence in Ontario prisons and commented on the general reluctance of prison staff to intervene, owing to fears of being ostracised by other officers (Cole et al 1995; Burnett and Farrall 1994, cited in Bhui 2009). More recently, results of research based on 5,500 interviews with prisoners published by the Prison Inspectorate in England and Wales in 2005, revealed that Asian prisoners felt most unsafe and experienced the most racist abuse within prison, while black prisoners were the least likely group to feel that they were treated with respect by prison staff (Sim 2008).

There has been some evidence from research undertaken in the United Kingdom, United States, and Canada that ethnic-minority prisoners are under-represented in the more favourable job allocations within prison and are less likely to say that they had been treated well by prison management (Bhui 2009; Cole et al 1995; Chigwada-Bailey 1989; Genders and Player 1989; Burnett and Farrall 1994 cited in Bhui 2009). There is also some suggestion that ethnic-minority prisoners are less likely to be placed on suitable rehabilitative or educational programmes while in prison (Chigwada-Bailey 1989). However, in New Zealand the Department of Corrections (2007a) has noted that rather than representing discrimination, an offender's ethnicity can often play a crucial role in the allocation of culturally relevant programmes and interventions within prisons.

The most comprehensive study of prison racism to date was undertaken in the United Kingdom by Genders and Player (1989). They observed that racial stereotypes were frequently applied to black prisoners who were viewed by prison officers as lazy, arrogant, and noisy, "with a chip on their shoulder". Chigwada-Bailey's (1997, 1989) study of female prisoners found that similar stereotypes were applied to black women in custody, and that black female prisoners were typically defined as more aggressive than their ethnic-majority counterparts owing to their inability to fulfil white middle-class stereotypes of acceptable femininity.

To date no published research has explored the issue of racial or ethnic discrimination within New Zealand prisons.

## Parole

Compared to other discretionary stages in the criminal justice process, little empirical research has been undertaken on the possibility of racial discrimination in parole decision making. The small amount of research that has been undertaken, however, has shown that some degree of ethnic disparity is apparent (Blagg et al 2005; Bowling and Phillips 2002; Welsh and Ogloff 2000; Cole et al 1995; Mann 1996; Petersilia 1985). For example, Home Office research has demonstrated that significantly higher proportions of black prisoners are refused parole in comparison with ethnic-majority prisoners. This disparity, however, was found to be predominantly (although not entirely) attributable to the comparatively longer



sentences imposed on black prisoners in addition to minimum non-parole periods set at the sentencing stage (Home Office 1994, cited in Bowling and Phillips 2002, p208; HM Inspectorate of Probation 2000). This research has been criticised for failing to take into account the other legally relevant factors which impact on parole decision making. For example, the nature of the current offence, the prisoner's criminal, educational and employment history, their residential circumstances, and their risk of re-offending and likelihood of complying with supervision requirements following release have all been found to factor into parole decisions (Bowling and Phillips 2002).

The Commission on Systematic Racism in the Ontario Criminal Justice System undertook some initial investigation into racism in parole decisions. They found that black male prisoners were significantly less likely to put in requests for temporary release and concluded that "systematic barriers" may have impeded their ability to access this parole option (Cole et al 1995, p321). They also found that pre-parole reports written by probation officers "sometimes (unintentionally) stereotype applicants" (Cole et al 1995, p327). This stereotyping was often done indirectly by making reference to the applicants' high crime neighbourhood of residence, multiple de facto relationships, and listing the 'aliases' of their acquaintances.

More recent research into this issue has been completed by Welsh and Ogloff (2000), who undertook a quantitative study of parole decision making in Canada. They found that Aboriginal prisoners were less likely to apply for parole compared to their non-Aboriginal counterparts, and were also more likely to waive their right to a full parole hearing. Aboriginal prisoners were also less likely to be granted full parole on their first hearing compared to non-Aboriginal groups. Multivariate analysis, however, revealed that Aboriginal status was not a significant predictor of parole outcomes, with the best predictors of parole decisions being criminal history, criminogenic risks and needs, and institutional behaviour such as fighting in prison (interestingly, the completion of rehabilitative programmes was associated with decreased likelihood of applying for, or receiving, parole). On this basis they concluded that "it does not appear that Aboriginal offenders are discriminated against in respect to full parole decisions" (Welsh and Ogloff 2000, p486).

Research on ethnic disparities in parole decisions in New Zealand has been relatively limited. Brown (1992) examined decision making by the District Parole Boards during the late 1980s, undertaking a multivariate analysis of parole decisions involving 600 offenders, just less than 60 percent of whom identified as being of Māori and/or Pacific ethnicity. He found that despite board members claiming to be influenced by a wide variety of factors, positive parole decisions were, statistically speaking, predicted by a small number of variables, including: favourable probation reports, longer sentence lengths, being granted work and/or home parole prior to release, being female and being of either Māori or Pacific ethnicity. Taking into account the results from hearing observations and interviews with members of the Parole Board, Brown concluded that the 'race' variable was standing in for another underlying factor, namely that the Māori community were more sensitive to the needs of Māori prisoners, and that, as a result of this, a far broader range of programmes and options were available to Māori prisoners through their access to iwi, hapū and whānau networks. It was therefore this enhanced access to programmes and community support, rather than 'ethnicity' *per se* which led to positive parole outcomes. Of all the factors, however, Brown (1992) found that having a

favourable probation report was the most significant single predictor of parole. This again indicates how decision making at earlier stages may have a bearing on later decisions.

In 2007 the Department of Corrections published the results of a multivariate statistical study on ethnic disparities in access to home detention in New Zealand (Department of Corrections 2007b).<sup>27</sup> This study found that Māori offenders were less likely to be granted leave to apply for release on home detention, and if given permission to apply – as was the case with early release in Canada – were less likely than their European counterparts to do so (Department of Corrections 2007b). Of those who did apply for Home Detention, Māori were also less likely to have their application approved. However, after conducting a multivariate analysis taking into account legally relevant factors, it was found that much of this disparity was explained by ethnic differences in offence seriousness, offending history, and risk ratings based on the Department of Corrections' ROC\*ROI (Risk of Reconviction and Risk of Re-imprisonment) scale. Once these factors were controlled, it was found that Māori were 3.6 percent less likely to be granted leave to apply for, and two percent less likely to be granted, home detention. The findings also suggested that the risk threshold was set higher for Māori offenders, with Māori offenders, on average, being released on home detention with higher risk scores than their European counterparts. As was the case with earlier stages of the system, however, it is possible that factors such as risk scores, offending history and offence serious may be interpreted as the product of earlier bias.

## Methodological issues

As the above sections have illustrated, quantitative studies examining the issue of racial discrimination in criminal justice decision making are characterised by a series of methodological problems, which mean that the results are often inconclusive and subject to contradictory interpretation.

In his controversial study, 'The Myth of the Racist Criminal Justice System', Wilbanks (1987) assesses evidence for and against the 'discrimination thesis'. While many of the arguments he proposes are problematic, he nevertheless delivers a cogent critique of empirical research on race and criminal justice bias. His critique of quantitative research methodologies will form the basis of the following discussion.

According to Wilbanks (1987) a fundamental problem with research in this area is the over- and under-interpretation of the results of multivariate studies. One of the most fundamental mistakes, he observed, is that the remaining variance once 'legally relevant' and 'legally irrelevant' factors are taken into account is regularly interpreted as 'the race effect'. This is incorrect. As Wilbanks points out, any residual difference can only be interpreted as 'unexplained variance', and while some of this may be due to discrimination, it may also be

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<sup>27</sup> This study occurred prior to the introduction of home detention as a sentence in its own right in October 2007 and examined the – now obsolete – role of the Parole Board in granting home detention as an early release option for prisoners.

caused by a potentially infinite number of other factors, which have yet to be measured.<sup>28</sup> Consequently, quantifying the 'residual' difference at successive stages of the criminal justice system does not allow us to make comparisons about the quantitative contribution of discrimination to differential outcomes at different stages of the system. In essence, because it is impossible to control for everything, we can never distil the contribution of 'pure' racial discrimination at each stage.

Conversely, it is also incorrect to conclude that no racial discrimination occurs in the event that racial disparities disappear after the introduction of controls (Wilbanks 1987). It is therefore misleading to argue that the race effect has been diminished by the introduction of control variables because these variables are typically themselves highly correlated with race/ethnicity: in essence, the 'race effect' operates through them (Spohn 2000). Consequently, when race is inextricably related to other legal and non-legal factors it is not correct to conclude that no race effect exists. In addition, multivariate analyses only measure difference across large samples and may consequently mask considerable variation between different regions and different courts. For example, if ten judges were highly punitive to ethnic-minority defendants and ten judges were equally lenient, Wilbanks argues, a multivariate analysis would conclude that there was no evidence of racial discrimination. Multivariate analyses, then, can never unequivocally prove that discrimination is *not* occurring, but only that discrimination is not systematic or pervasive across an entire sample (Wilbanks 1987; see also Free 2002).

An over-reliance on aggregated datasets may also result in misrepresentation due to the statistical phenomenon known as 'Simpson's Paradox'. The paradox occurs when it is assumed that combining data from different areas will average the proportions, but doing so creates a weighted average (rather than a simple average) which misrepresents the individual areas (Westbrook 1997). An example of this phenomenon was found in research carried out by the Department of Justice examining whether Māori were under-represented on juries. The results showed that although Māori were over-represented in the juror pool on a national scale using aggregate data, they were actually under-represented in every individual court district. As Westbrooke (1997, p8) argues "aggregation can often lead to losing the plot".<sup>29</sup>

In summing up the interpretive conundrums associated with measuring 'bias' Wilbanks (1987, p53) notes that:

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<sup>28</sup> A further difficulty with undertaking multivariate studies was recently noted by the Ministry of Justice in England and Wales, who, following the completion of a pilot study, concluded there was insufficient data available to undertake a meaningful analysis of sentencing decisions in Magistrates' and Crown courts. The pilot study found that the average record attrition rate was 39 percent, and that data on bail decisions, aggravating and mitigating circumstances, previous convictions and PSR recommendations were often absent from court records (Ministry of Justice 2009; Dhimi and Souza, with Bottoms and Vivbla 2009).

<sup>29</sup> For a full description of Simpson's Paradox and the Jury Composition Survey see Westbrook (1997).

*... when racial disparity occurs we cannot safely say (even if controls are introduced) that the disparity is due to race, and when there is no disparity we cannot safely say that no discrimination exists (since the absence of disparity in aggregate outcomes may mask disparity in individual cases). It is accurate to say we cannot “prove” either discrimination or non-discrimination given the methods used to date.*

Wilbanks (1987) further argues that multivariate studies on criminal justice decisions are only useful to the extent that they accurately model these decision making processes. He points out, however, that, particularly in sentencing research, many studies can only account for a small amount of the total variance (see also Jeffries and Bond 2009). Given the myriad of factors which impact on sentencing, and the fact that the importance of different factors may vary from case to case, it is not surprising that the actual sentencing decision making process is difficult to model. This also highlights another key limitation of multivariate studies: they examine outcomes rather than processes. Consequently, multivariate and other quantitative methods are not particularly well positioned to explain why certain disparate outcomes occur (for example, why ethnic minority defendants are more or less likely to plead guilty or apply for parole).

The implications of these findings for New Zealand are important. New Zealand has yet to undertake the type of sophisticated large-scale multivariate study of racial disparities in criminal justice decision making evident overseas. However, while a study of this nature will identify the quantum of unexplained variation at each successive stage of the criminal justice system, it will not resolve the question of how much of this variance is the product of racial discrimination or bias. Nor would it enable policy makers to identify which parts of the system are most ‘prone’ to racial discrimination. That is not to suggest that quantitative research is of no utility, indeed, quantitative studies are useful in identifying areas of disparity that may be more closely examined using qualitative methods. The application of qualitative methods may, in turn, increase our understanding of why ethnic differentials exist and allow effective policy solutions to be devised.

## Summary

Part 1 examined international and New Zealand research findings on the nature and extent of ethnic disparities in the criminal justice system. It also summarised the dominant arguments used to explain disparities. The main findings from this part of the review are as follows:

- while a large volume of research has been produced internationally during the last four decades, little recent research has been published on this issue in New Zealand
- international and New Zealand research suggests that certain ethnic-minority groups are frequently over-represented in adverse outcomes at successive stages the criminal justice system
- levels of ethnic disproportionality are inconsistent and differ across different states, regions, courts, and offence categories
- the extent of disproportionality varies by gender, age, socioeconomic status, and situational context

- there is some evidence that certain ethnic-minority groups appear to be treated more leniently at certain stages of the system, notably in relation to sentence length and parole (although this has been interpreted by some authors as being suggestive of bias or discrimination at earlier stages).

The mixed and inconsistent nature of these findings has, in turn:

- led many researchers to conclude that any discrimination that may be operating against ethnic-minority groups is unlikely to be systematic in nature
- highlighted the complex aetiology of ethnic disparities and signalled the importance of understanding the specific contexts in which such disparities arise
- indicated that important intra-group differences exist within ethnic-minority groups which should be taken into account when identifying and responding to bias
- revealed a number of methodological and ontological limitations associated with both quantitative and qualitative research on this subject.

Part 1 also examined explanations for ethnic disparities in the criminal justice system. In searching for the causes the extant research has consistently shown that ethnic differences are significantly reduced once legal factors (for example, offence seriousness, number of concurrent charges, evidentiary strength, and offending history) and extra-legal factors such as socioeconomic status are taken into account.

These results have been interpreted in competing ways:

- some authors argue that this proves the system is not biased against ethnic-minority groups (or is only marginally so) and that any remaining differences arise from differential involvement in offending ie, the 'differential involvement thesis'
- others argue that legal factors such as 'offending history' and 'charge seriousness' may themselves be the product of earlier bias in the system (direct bias) and that apparently 'neutral' decision making criteria may nonetheless work to the disadvantage of certain ethnic groups (indirect bias) ie, the 'discrimination thesis'.

As Part 1 has demonstrated, taken alone neither the differential involvement thesis nor the discrimination thesis adequately explains ethnic disparities in criminal justice outcomes. Rather, a critical review of the literature suggests that these theses are not mutually exclusive (despite often having been treated as such) and that both processes interact to bring about ethnic disproportionality in the criminal justice system.

The implications of these explanations for developing and assessing responses to ethnic disparities will be examined in Part 2 of the report.



## **Part 2: Responding to the over-representation of ethnic minority offenders in the criminal justice system**

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### **Introduction**

As demonstrated in Part 1, the nature and extent of ethnic disparities in the criminal justice system has been the subject of considerable attention and scholarly debate. While much effort has focused on debating the causes of ethnic disparity, comparatively less academic attention has been afforded to examining appropriate responses (Wolpert 1999). Despite the lack of consensus amongst academics on the precise nature and causes of the problem, criminologists, governments and criminal justice agencies have widely acknowledged the need to address this issue through a variety of responses (Blagg et al 2005; Phillips and Bowling 2002; Spohn 2000; Jackson 1988; Walker, Spohn and DeLone 2004).

As noted in Part 1, research on the causes of ethnic disproportionality has been inconclusive, inconsistent, and contested. Given the complexities inherent in this field of study, before discussing research on responding to bias it is important to outline the limitations inherent in the responses literature and clearly delineate the parameters of the remaining chapters.

### **Analysing responses to bias: challenges and limitations**

Ascertaining effective practice for responding to bias in the criminal justice system has proven to be particularly challenging. The reasons for this are outlined below.

#### **Focusing solely on criminal justice decision making is too narrow**

As demonstrated in Part 1, the contention that ethnic disproportionality is either solely or largely the product of bias has been widely contested in the literature and there remains disagreement about the precise causes of disproportionality. Thus, while some scholars have cited issues of criminal justice system bias as a key problem in increasing rates of ethnic disproportionality, others hold that the principal cause of ethnic disproportionality is higher levels of offending among particular ethnic groups. Many others concede that the likely cause is a complex mixture of the two. Even if scholars could broadly agree on the causes of disproportionality, as will be demonstrated within the following chapters, there is further disagreement about the primary causes of indigenous or ethnic minority offending, and whether bias in the criminal justice system is the product of individual prejudice, organisational culture, or more fundamental state and/or structural bias.

Because there is little agreement about the precise nature of the problem, focusing on bias alone has been found to be too narrow insofar as doing so would effectively foreclose on any discussion of the complex and multifaceted causes of disproportionate outcomes and how this complexity has, in turn, impacted on the development of responses (see Blagg et al 2005).



Accordingly, in order to accommodate competing explanations of the problem, and the divergent responses derived from them, the following chapters focus on responses to the broader issue of 'ethnic disproportionality' or ethnic disparity. As noted in the introduction, disproportionate outcomes are said to exist when the proportional representation of an ethnic-minority group at different stages in the criminal justice system exceeds their representation in the general population. Recognising that there has been some debate about how disproportionality should best be defined, and, indeed, whether it is an appropriate form of measurement (see, for example, Miller, Quinton and Bland 2000a; Jackson 1988), this concept has been deliberately selected because regardless of how it is subsequently interpreted, ethnic disproportionality is the basic empirical problem that competing theories try to explain and criminal justice responses attempt to rectify. Crucially, adopting this broad approach avoids *prima facie* attributing the cause of ethnic disproportionality to direct discrimination, and recognises that this is merely one of a number of potential causes.

### **Lack of problem specification and an absence of intervention logic**

Within the responses literature there is often little explanation provided about how criminal justice responses are directly expected to lead to reductions in levels of ethnic disproportionality. This is predominantly a product of the ambiguity surrounding the causes of ethnic disparity, which mean that links between different responses and the reduction of disproportionate outcomes are rarely made explicit within the literature. Indeed, many responses simply aim to reduce indigenous and ethnic-minority offending rates *per se* and do not overtly target disproportionality. This, in turn, raises uncertainties about the criteria on which these programmes or initiatives should be assessed. If such responses were purely judged on their ability to reduce disproportionate outcomes they would inevitably be found wanting, as research conclusively indicates that levels of ethnic disproportionality are increasing (Jeffries and Bond 2009; Blagg et al 2005; Department of Corrections 2007a; Phillips and Bowling 2002; Tonry 1997; Reiner 1993). Assessing what constitutes 'effective practice' in this context is therefore problematic.

### **Divergent responses are not always directly comparable**

Due to the wide range of responses discussed within the literature (and the different conceptualisations of the problem that often underpin them) it is not always appropriate to compare them. Indeed, responses are often targeted at different levels and aim to achieve vastly different objectives. For instance, some are long-term, operating at a macro-level to achieve fundamental social change, while others are focused on small-scale, short-term procedural or organisational change. To compare such disparate responses in terms of their effectiveness would be akin to comparing apples with oranges, as they are based on different assumptions and target different aspects of a highly complex and multifaceted problem (Blagg et al 2005).

### **An absence of outcome and/or long-term evaluations**

Even if conceptual differences could be overcome, the research literature produced on responses often precludes an analysis of their effectiveness in addressing ethnic



disproportionality. This is because the literature is dominated by formative and process evaluations. In contrast, full outcome evaluations are relatively scarce within the literature, and, where they do exist, few explicitly address outcomes related to reducing levels of ethnic disproportionality. Moreover, as noted above, a number of responses in this area (especially those focused on reducing disproportionate offending rates) have comprised macro-level long-term social programmes, which are unlikely to produce tangible results within the short timeframes typically associated with evaluative research. Not surprisingly, as will be demonstrated in Chapter 1 (Part 2) of the report, evaluations of such initiatives are often inconclusive or conclude that insufficient time had passed to assess whether long-term objectives were achieved.

### **The nature of the problem is often localised and divergent**

The assumption that any universal form of 'best practice' exists in terms of responding to ethnic disproportionality is problematic for a number of reasons. As demonstrated in Part 1, ethnic disproportionality is not a static or universal phenomenon. That is to say, different ethnic groups may be more or less over-represented in different types of offence at different stages of the criminal justice process for quite different reasons (Spohn 2000; Blagg et al 2005). The nature and extent of ethnic disparity, then, can be viewed as historically, socially, culturally, economically, politically, and situationally contingent. In consequence, responses devised to reduce disproportionality for one group in one location are not necessarily suitable to address that experienced by other ethnic-minority groups in different contexts. The different experiences of indigenous peoples and immigrant groups is an obvious case in point, although nor can it be automatically assumed that practices which 'work' for one indigenous group will necessarily work for other indigenous groups elsewhere (Tauri 1996; Cunneen 2001). This, in turn, raises important issues about the degree to which 'best practice' can be shaken loose of its contextual specificity and be meaningfully assessed for the purposes of establishing international principles of best practice (Morrison 2003; Cunneen 2001).

### **Competing criteria for determining 'what works'**

More crucially, as critical criminologists<sup>30</sup> have noted, investigating principles of 'best practice' inevitably raises questions about best practice *for whom?* Indeed, from *whose* perspective is a response defined to be successful, and what does it mean for a response to 'work' (Carlen 2002; Walters 2007; Tauri 2009; La Prairie 1999b)? This has been said to be particularly salient in terms of responding to ethnic disproportionality in the criminal justice system, where few responses have been shown to 'work' in terms of reducing statistical disparities between ethnic groups, and where there is evidence of competing perspectives in terms of defining 'what works' (Cunneen 2001, 2006; Blagg 2003; Tauri 2009).

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<sup>30</sup> The term critical criminology loosely defines the vast scope of work undertaken by criminologists who accept that crime is a social construct and aim to identify the unequal power relations that influence the processes of criminalisation, policing, and punishment.

## Certain responses have received more attention than others

Finally, although the following chapters examine a wide range of responses, it is important to note from the outset that the literature on responses has focused on some areas more than others. For example, a much larger amount of research has focused on addressing offending and re-offending by indigenous peoples as a mechanism for reducing their over-representation in the criminal justice system. As noted in Part 1, more critical scholars have suggested that the reason for this is that accepting the 'differential involvement thesis' enables the state to elide the role played by bias (whether direct or indirect, individual, organisational, state or structural, conscious or unconscious) in the production and perpetuation of ethnic disparities (see, for example, Agozino 2003; Mikaere 2008; Blagg 2008).

A large proportion of the literature has also been preoccupied with policing reforms. As noted in Part 1, this is attributable to the relatively public nature of policing functions compared to other – more private – criminal justice functions such as sentencing and punishment. This heightened visibility has meant that public inquiries commissioned to explore the existence of disproportionality in the criminal justice system have often had a significant focus on policing reforms (see Rowe 2007). It is important to note that although a lot of literature has been produced on police-level responses, this does not mean that the police are necessarily more responsible for the problem of ethnic disproportionality than other justice agencies. Thus, the heavy focus on police-based responses in Chapter 2 is simply a reflection of the content of the responses literature.

## Responding to disproportionality: a conceptual framework

While acknowledging the abovementioned issues, the following chapters provide an exploration of the variety of responses that have been considered and attempted within New Zealand and/or internationally. The responses explored in Part 2 have been extremely diverse and have often been targeted at different aspects of the ethnic disproportionality problem. In order to meaningfully compare different types of responses it was considered prudent to broadly categorise them into three main groups based on their underlying assumptions about the nature and cause of ethnic disproportionality. The conceptual framework outlined below has been developed towards this end and provides the structure for the remainder of the review.

As demonstrated in Part 1, there has been considerable debate on the causes of disproportionate outcomes within the literature, which has tended to oscillate between two polarised explanations of the problem. On one side of the debate, scholars have argued that disproportionate outcomes are the unfortunate, but inevitable, product of disproportionate rates of offending. This, in turn, has been typically (although not exclusively) viewed as the product of broader structural inequalities and economic disadvantage facing some ethnic-minority groups. For those writing from this perspective, the reason why certain ethnic groups are over-represented in the criminal justice system is simply because they commit more serious offences and have more extensive criminal histories (La Prairie 1990; Weatherburn, Fitzgerald and Hua 2003; Wilbanks 1987). According to proponents of this position, the most

obvious means of responding to the over-representation of indigenous and ethnic-minority groups is to reduce the level and seriousness of their offending.

On the other side of the debate are those who argue that disproportionate outcomes stem – at least in part – from discrimination. As demonstrated in Part 1, the discrimination thesis can be understood to have two strands:

First, there is a considerable body of research – typically characterised by more qualitative approaches – that focuses on ethnic minority perceptions of the criminal justice system (and vice versa), as well as ethnographic studies almost exclusively involving frontline police officers, which purports that ethnic disparities can be partially attributed to more overt and direct forms of discrimination operating in the criminal justice system. Such research has been particularly salient in the United Kingdom (Jefferson 1993; Reiner 1993; Hudson 1993a; Bowling and Phillips 2002), and has received some endorsement from Māori commentators and criminologists in New Zealand (Jackson 1988; Webb 2003, 2008; Walters, Bradley and Tauri 2005; Tauri 1996). From this perspective, reform efforts must critically address bias/racism on the part of individual staff working within, as well as the racist organisational culture(s) of justice sector agencies.

Second, over the last two decades, researchers have increasingly focused on the problem of indirect or subtle discrimination built into existing legal frameworks, institutions and practices and the ethnic disparities to which it gives rise (Harcourt 2006; Matravers and Tonry 2003; Jackson 1988). As noted in Part 1, such accounts argue that disproportionate outcomes can be viewed as the product of discrimination already incorporated into the existing structures of the criminal justice system (Hudson 1993b; Jefferson 1993, 1991; Matravers and Tonry 2003; Harcourt 2006; Jackson 1988). For those focusing on this aspect of the problem, a more fundamental examination of criminal justice structures and decision making criteria is required in order to successfully address the problem of ethnic disproportionality.

Even though rarely made explicit, these three conceptualisations of the problem nevertheless underpin responses to ethnic minority disproportionality to some degree. Thus, whether disproportionality is primarily perceived to stem from: disproportionate offending; direct bias on the part of the criminal justice system; or subtle/indirect discrimination in existing criminal justice structures, determines the type and level of response required.

These three approaches therefore offer a useful framework through which the different types of responses to ethnic disproportionality can be categorised. This is not to suggest that these approaches are mutually exclusive or incompatible. For example, responses that attempt to reduce offending often utilise processes that aim to enhance the positive participation of indigenous and ethnic-minority groups in the criminal justice process and thereby limit direct forms of bias. Similarly, responses seeking to improve the relationship between criminal justice agencies and ethnic-minority communities, such as restorative justice, also typically aim to reduce re-offending.

Both academics and government inquiries have acknowledged that successful responses to ethnic disproportionality are likely to require a multifaceted approach which addresses each of these three dimensions of the problem (Blagg et al 2005; Cunneen 2006; McDonald 2004;

Cole et al 1995). For example, Dickson-Gilmore and La Prairie (2005, p40) have argued that in relation to Canada:

*Over-representation, and its regional variation therein, is the result of a complex interplay of a multiplicity of factors, and any effective response to this phenomenon must be multifaceted and interdisciplinary in nature.*

Utilising this three-pronged framework, the following chapters will provide an overview of the key responses to disproportionate outcomes (including their strengths and limitations where appropriate). Chapter 1 examines responses to disproportionate offending as a mechanism for reducing the over-representation of ethnic minority and indigenous groups in the criminal justice system. Chapter 2 explores responses undertaken by criminal justice institutions to address bias. It identifies both inward-focused organisational responses (such as ethnic minority recruitment and cultural awareness training) as well as outward-focused responses that address the relationship between the criminal justice system and indigenous or ethnic minority communities. Chapter 3 investigates responses that target disparate outcomes resulting from the 'neutral' application of criminal justice laws, processes, and decision making criteria.

As noted in the Introduction, the term 'responses' is broadly defined in the following chapters to include practical policies and programmes, organisational strategies and national inquiries, as well as academic arguments and recommendations that have yet to find expression in criminal justice policy.

## Part 2: Chapter 1 – Reducing offending

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### Introduction

International literature largely concurs that addressing offending by indigenous and ethnic-minority groups is a key mechanism for reducing their over-representation in the criminal justice system (Cunneen 2006; Blagg et al 2005; Weatherburn, Snowball and Hunter 2008; Weatherburn, Fitzgerald and Hua 2003; Snowball and Weatherburn 2008; Weatherburn, Snowball and Hunter 2006; Cole et al 1995; McDonald 2004; Reiner 1993). For example, in the Australian context Weatherburn, Fitzgerald and Hua (2003, p69) have argued that:

*If the primary cause of Aboriginal over-representation in prison is Aboriginal over-representation in crime, the primary focus of policy attention should be on reducing Aboriginal crime, not on changing the responses of police or the criminal justice system to Aboriginal offending.*

In line with this approach, within New Zealand, interventions that aim to reduce offending by Māori (and, to a lesser degree, Pacific peoples) represent the most common type of response to ethnic disproportionality in the criminal justice system. However, despite a widespread consensus on the importance of addressing the underlying causes of offending, there is disagreement within the literature about how the causes of indigenous and/or ethnic minority offending can best be understood. On one hand, a number of authors have argued that general causal explanations can be applied to indigenous and ethnic-minority offending, as offending by these groups stems from the same underlying factors as other groups. Such accounts typically reject the explanatory significance of race, ethnicity or culture, claiming instead that indigenous and ethnic-minority groups are simply more exposed to generic 'risk factors' compared to other groups (La Prairie 1999a, 1990; Snowball and Weatherburn 2008; Hunter 2001; Weatherburn, Fitzgerald and Hua 2003; Doone 2000; Department of Corrections 2007a; Fergusson, Donnell and Slater 1975).

Some scholars, however, have strongly resisted this assumption and have placed cultural factors at the heart of explanations of indigenous and/or ethnic-minority offending (Durie 2003; Marie, Fergusson and Boden 2009; Quince 2007; Maynard et al 1999; Jackson 1988). That is not to suggest that there is agreement over precisely how cultural factors precipitate offending. For example, while some authors have purported that offending derives from social and cultural disorganisation caused by mass urbanisation post-colonisation, whereby indigenous and ethnic-minority groups have historically experienced difficulties adapting to new urban environments and traditional forms of social control (such as cultural bonds) were eroded (McCreary 1969; Duncan 1971a, 1971b, 1972; Trlin 1973), others have argued that the negative impact of colonisation on cultural identity and structural opportunities is a more crucial consideration in explaining disproportionate offending (Maynard et al 1999; Quince 2007; Webb 2003, 2008; Cunneen 2006; Marie, Fergusson and Boden 2009; Broadhurst 2002; Jackson 1988, 1995a, 1995b; Mikaere 2008; Gabbidon 2010).

These different perspectives are important, because precisely how the causes of indigenous and ethnic minority offending are conceptualised, in turn, impacts on the development of appropriate responses. For example, if the over-exposure of certain ethnic groups to generic 'risk factors' explains their over-involvement in offending, then more general social programmes that ameliorate social and economic disadvantage will be the most effective response (La Prairie 1990; Snowball and Weatherburn 2008; Department of Corrections 2007a). However, for those who consider cultural factors to be paramount, broader social responses that fail to take culture into account are *prima facie* considered ineffective and inappropriate (Quince 2007; Durie 2003; Webb 2003, 2008; Jackson 1988, 1995a).

This chapter explores how competing explanations of indigenous and ethnic-minority crime have been translated into government responses and specific interventions, with a strong focus on the New Zealand context. The first section will examine approaches that target generic 'risk factors', while the second section will examine those responses that have a more obvious focus on cultural factors. This is not to suggest, however, that these two approaches are mutually exclusive. Particularly within the New Zealand context, many initiatives directed towards reducing offending include cultural components – although the precise nature and extent of these components varies.

The chapter will describe the key strengths and limitations associated with different responses to indigenous/ethnic minority offending in both practical and theoretical terms, and will identify common themes across the different responses.

The third section will identify general principles of best practice evident in the literature, while also outlining the main challenges and tensions associated with addressing offending for ethnic-minority groups. The last section of the chapter will summarise the key findings and dominant themes.

Research in New Zealand has largely focused on reducing crime by Māori rather than Pacific peoples. For this reason, responses targeting Māori will form the main focus of this chapter. In addition, the international literature produced on this topic has focused predominantly on indigenous crime reduction to the exclusion of immigrant or ethnic minority crime more generally. Consequently, this chapter will focus on research from countries with significant indigenous crime problems, namely Australia and Canada. In doing so it does not claim that responses produced for indigenous groups in one country are necessarily internationally transferable or suitable to the New Zealand context. It recognises, however, that there have been some commonalities between responses developed in different countries.

## Generic 'risk factor' approaches

A number of authors have argued that a principal cause of indigenous and ethnic-minority peoples' over-representation in offending is their over-representation in various social indicators linked with criminal offending (Weatherburn, Snowball and Hunter 2008; Snowball and Weatherburn 2006; Weatherburn, Snowball and Hunter 2006; Dickson-Gilmore and La Prairie 2005; Pratt 2004; Broadhurst 2002; Hunter 2001; Doone 2000; La Prairie 1999a; Cole et al 1995; Hazlehurst 1995; Munro and Jauncey 1990). Writing from this perspective, a



number of scholars have argued that responses aimed at increasing the cultural sensitisation of criminal justice processes fundamentally miss the mark and will not lead to any meaningful or lasting reduction in ethnic disproportionality because the over-involvement of indigenous and ethnic-minority groups in offending represents the most significant driver of their over-representation in the criminal justice system (Hazlehurst 1995: xiii; Walker and McDonald 1995; Baker 2001).

Studies within this area have regularly denied that the over-representation of indigenous or ethnic-minority groups has anything to do with ethnicity, race or culture. For example, in his report on combating and preventing Māori crime published in 2000, Peter Doone stated that, “There is no basis for any belief that being Māori causes criminal behaviour. However, Māori are over-represented in the risk factors that contribute to criminality” (Doone 2000, p10). Similar sentiments were conveyed in a more recent report produced by the Department of Corrections on the over-representation of Māori in the criminal justice system. Reminiscent of many of the international studies discussed in Part 1, the report found that once a range of social and economic factors were taken into account, Māori were scarcely over-represented at all. On this basis it was concluded that:

*The level of Māori over-representation in the criminal justice system is very much what could be predicted given the combination of individuals’ life experiences and circumstances, regardless of ethnicity. In this sense, over-representation is not a Māori problem at all (Department of Corrections 2007a, p36).*

Analogous conclusions have been reached internationally. For example, eschewing approaches which have focused on cultural factors to the exclusion of underlying social and economic conditions, La Prairie (1999, p254) argued that in Canada, “the major issue for Aboriginal over-representation is that a larger proportion of Aboriginal than non-Aboriginal people occupy the lowest level of the socioeconomic scale and criminogenic factors are unevenly distributed”. Likewise, the Royal Commission of Inquiry into Aboriginal Deaths in Custody (RCADIC) in Australia found that the over-representation of Aboriginal people in the criminal justice system could be attributed to underlying issues associated with social and economic deprivation (Broadhurst 2002). Walker and McDonald (1995, p6) have thus observed that, “one cannot help but conclude that the principal causal factor of indigenous over-representation in prison is the generally low status of the indigenous community in Australia”.

Quantitative studies have shown that a wide variety of generic risk factors are associated with offending behaviour, and that these factors are, in turn, disproportionately experienced by indigenous and ethnic-minority groups. For example, Hunter (2001) undertook a multivariate analysis of the National Aboriginal and Torres Strait Islander Survey (NATSIS) in Australia and concluded that alcohol abuse was one of the largest single factors underlying Aboriginal arrest rates. He also found that unemployment, lack of educational attainment, and having been removed from the natural family, were each positively correlated with Aboriginal arrests. Hunter did, however, acknowledge the possibility of feedback loops between risk factors and the actions of the criminal justice system, whereby an arrest actually reinforces

disadvantage by making it more difficult to obtain educational qualifications and/or employment (2001, p2–3).

Repeating this study using NATSIS data from 2002, Weatherburn, Snowball and Hunter (2006) found similar results, with the key 'risk factors' associated with Aboriginal imprisonment identified as: unemployment, high risk alcohol consumption and/or use of illicit substances, living remotely and in over-crowded housing, and having a family member who was part of the 'stolen generation'<sup>31</sup> (Weatherburn, Snowball and Hunter 2006). On this basis, they concluded that the single most effective response to Aboriginal over-representation would be to reduce indigenous drug and alcohol abuse. They note that improving indigenous school performance and introducing labour market programmes that reduce indigenous unemployment also represent potentially fruitful directions for combating indigenous disproportionality (Weatherburn, Snowball and Hunter 2006). They also acknowledge the possibility that social support may act as an important buffer against criminality.

In a more recent analysis, based on NATSIS data from 2004, Weatherburn, Snowball and Hunter (2008) concluded that economic stresses, welfare dependence and unemployment were strongly correlated with Aboriginal arrests, although in line with their earlier work, the single strongest predictor was still alcohol abuse. They therefore advocate responses that reduce alcohol consumption and financial stress in Aboriginal communities as the best way to reduce current levels of Aboriginal over-representation in the Australian criminal justice system. However, Weatherburn and colleagues fall short of describing exactly how such responses should be framed in practical terms, and do not explain why existing responses broadly similar to those which they recommend have failed to bring about a marked improvement in the socioeconomic status of indigenous peoples or reduce their over-representation in the criminal justice system (Cunneen 2006; Blagg et al 2005).

A similar relationship between risk factors and indigenous communities has been revealed in Canada. For example, Muirhead (1982, cited in La Prairie 2005) found that underlying structural factors were more important in explaining Aboriginal crime than cultural factors, with the over-representation of Aboriginal people in the criminal justice system viewed as the inevitable product of their disproportionate membership in a marginal underclass (see also Dickson-Gilmore and La Prairie 2005). Similarly, Munro and Jauncey (1990) highlighted the importance of improving educational outcomes for Aboriginal people *per se*, as well as increasing the provision of alcohol rehabilitation programmes in Aboriginal communities as key factors in reducing their over-representation in the criminal justice system. According to Dickson-Gilmore and La Prairie (2005) it is important to remember that most Aboriginal people in Canada do not have any contact with the criminal justice system. Consequently, it is important to think about what differentiates those who do from those who do not. They note that the key factors which distinguish those who offend are alcohol abuse, early departure from school, unemployment and being removed from their natural families.

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<sup>31</sup> The 'stolen generation' is a term used to describe those children of Aboriginal and Torres Strait Islander descent who were removed from their Aboriginal and Torres Strait families and communities under government policies which began in the 1860s and continued in some areas until the 1970s.



Such findings have been echoed in the New Zealand context. For example, Jensen (1968, cited in Fifield and Donnell 1980) attributed Māori over-involvement in crime to the general disadvantaged status of Māori in society. During the 1970s several studies linked Māori and Pacific peoples' offending to general risk factors. For example, Duncan (1971a, 1971b) linked crime by Pacific people in Auckland to a range of risk factors including overcrowding, poor housing, and a lack of parental supervision. MacKenzie (1973) noted low socioeconomic status, the influence of alcohol, social and familial disruption, housing problems, and lack of educational attainment as key factors underpinning ethnic minority and indigenous crime. Triln (1973) similarly attributed Pacific crime to the over-representation of Pacific peoples in the unskilled labouring classes, unemployment, overcrowding and poor housing, which, despite being superior to the standard of housing Pacific immigrants experienced in their home countries, was inferior in comparison to their New Zealand European neighbours. It is important to note, however, that these conclusions were typically supported by anecdote rather than empirical evidence, and none of these studies included sufficient analysis to test these assumptions statistically.

Adopting a more sophisticated statistical approach, Fergusson, Donnell and Slater (1975) found that part (but not all) of the difference between European and non-European juvenile offending could be attributed to socioeconomic differences.<sup>32</sup> They therefore concluded that improving the socioeconomic status of the non-European population “should have a substantial benefit on the disproportionate rate at which they appear in the criminal justice system” (Fergusson, Donnell and Slater 1975, p24). Fifield and Donnell (1980) reached a similar conclusion in 1980. While acknowledging that Māori offending had increased despite improvements in the socioeconomic position of Māori, like Triln's (1973) earlier argument regarding Pacific peoples, they concluded that it was the *relative* socioeconomic position of Māori in comparison with New Zealand Europeans that was crucial. They therefore noted that:

*...improvements in Māori socioeconomic status are unlikely to lead to a reduction in crime and other social problems unless they are sufficiently large to advance the relative position of Māoris [sic] compared to non-Māoris [sic] (Fifield and Donnell 1980, p52).*

Such conclusions were subsequently supported by research from a Christchurch longitudinal study. In this study, Fergusson, Horwood and Lynskey (1993b) found that higher self-reported rates of offending by Māori and Pacific children were largely attributable to the fact that these children were reared in more disadvantaged homes, and that once levels of disadvantage were taken into account, “there was little evidence to suggest ethnicity *per se*

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<sup>32</sup> A contrasting conclusion was reached in later research published by Fergusson, Horwood and Lynskey (1993b). This study found that there was no evidence of significant ethnic differences in self-reported rates of violent offences, property offences, total offences, or police contacts, once social background and early childhood environment was controlled for. According to this study, the different results reached by Fergusson, Donnell and Slater (1975) were because the authors had under-controlled for socioeconomic difference (the earlier study had used parental occupation as a proxy for socioeconomic status). That said the multicultural nature of the households included in the cohort on which these studies are based means that the Māori and Pacific children in the study cannot be assumed to be representative of Māori and Pacific children and/or families in New Zealand more broadly. In addition, as noted in Part 1, there have been a number of methodological criticisms raised about the reliability of self-report data.

was a predictor of, or factor associated with, early offending behaviours” (Fergusson, Horwood and Lynskey 1993b, p163).

During the 1990s general risk factor approaches became more prominent in New Zealand responses to crime (Webb 2003). Following the introduction of the Child, Young Persons and their Families Act in 1989, strategies for youth crime increasingly focused on need and risk assessments. A literature review on responding to youth offending published by the Ministry of Youth Affairs in 2000 epitomised this approach. The report reviewed national and international research findings and concluded that – regardless of ethnic group – the primary causes of youth offending lay in a range of overlapping psychological and environmental ‘risk factors’, including: a lack of family ties, antisocial peers, aggressiveness, poor school attendance, a lack of vocational skills, antisocial attitudes that support offending, living in a disorganised neighbourhood, drug and alcohol abuse, and lacking cultural pride (McLaren 2000, cited in Webb 2003, p144).

A more recent report produced by the Department of Corrections (2007a) echoes these findings, linking Māori offending to a wide range of social, psychological and biological ‘risk factors’. The report observes that the Māori population has a younger age distribution, with a quarter of the Māori population aged between the peak offending years of 15 to 29, compared to 20 percent of NZ Europeans. It also points out that Māori are over-represented in familial factors associated with subsequent offending such as being born to young mothers, a lack of family stability, a family environment characterised by conflict and violence, a lack of parental care, parental problems with alcohol and/or involvement in crime, and being exposed to harsh punishment as a child. It further notes that Māori children are more vulnerable to biological factors associated with “adverse outcomes” including low birth weights and maternal smoking and drinking (Department of Corrections 2007a, pp29–30; see also Fergusson 2004; Fergusson and Lynskey 1997, Fergusson, Horwood and Lynskey 1993a, 1993b).

The report goes on to note that Māori have lower school retention rates, higher rates of truancy, school stand-downs, suspensions and exemptions, as well as a greater likelihood of leaving school with no qualifications. It further observes that Māori adults are more likely to engage in hazardous drinking and regular marijuana use in comparison to non-Māori groups. On the basis of these findings, it concludes that when measures of social and economic disadvantage are taken into account, “Māori ethnicity recedes as an explanation for over-representation” (Department of Corrections 2007a, p38). The report states that Māori access to health, social support, and education – and the effectiveness of such services for Māori – are consequently of “crucial importance” in reducing Māori disadvantage and ‘risk’ of criminality (Department of Corrections 2007a, p39).

## Reducing indigenous offending and re-offending

A number of responses in New Zealand and internationally have sought to address the underlying risk factors associated with indigenous offending. In New Zealand several have focused specifically on reducing Māori offending and, in the last two decades, have often been at least partially designed and administered by Māori. The emphasis on producing responses 'by Māori for Māori' gained momentum during the 1980s (Williams, C. 2001; Webb 2003). For example, a key recommendation of the Ministerial Committee on a Māori Perspective for the Department of Social Welfare's seminal report, Pūao Te-Ata-tū (1988) was that Māori should be given greater resources to control their own programmes (Ministerial Advisory Committee on a Māori Perspective 1988).

In the early 1990s government directed justice agencies to develop proposals for responding to Māori offending, noting that the over-representation of Māori in family violence, poverty, financial pressure, drug and alcohol abuse, poor parenting, low self-esteem, cultural alienation, unemployment, poor educational attainment and truancy were key problems for which practical solutions were lacking (Ministry of Justice and Te Puni Kōkiri 1998). At this time there was also a growing emphasis on crime prevention *per se*, with the establishment of the Crime Prevention Unit in the Prime Minister's Department and Cabinet in 1993. This saw the introduction of Safer Community Councils throughout New Zealand, including nine iwi-sponsored councils with a particular focus on reducing Māori crime and victimisation (Williams, C. 2001).

During the 1990s the government also introduced the 'Closing the Gaps' scheme, which aimed to reduce Māori crime and victimisation by providing additional protection against 'risk factors' associated with offending and victimisation (Doone 2000). As part of this programme, the Ministry of Justice alongside other justice sector agencies commenced a project to develop a sector-wide policy for reducing Māori crime in 1995. This resulted in the Responding to Offending by Māori (ROBM) work programme, which was presented to government in 1997 (Williams, C. 2001). This programme specified reducing the over-representation of Māori in the criminal justice system as offenders and victims as an overarching goal, and broadly focused on encouraging interventions 'by Māori, for Māori' through increasing funding for Māori-run programmes and Māori provider development, improving interagency collaboration in contracting Māori service providers, and assessing and monitoring the performance of Māori-delivered programmes (Williams, C. 2001; Webb 2003; the Law Commission 1999).

Alongside these high-level policy developments a number of community-based programmes emerged that attempted to reduce Māori offending. These initiatives largely focused on four main areas:

- reducing youth offending
- drug and alcohol treatment programmes
- diversion and indigenous court processes
- more general indigenous community crime prevention initiatives.

Examples of specific initiatives within each of these areas will be briefly described below.

### Youth offending programmes

A number of initiatives have explicitly targeted Māori youth offending. Examples of youth programmes include:

*He Waka Tapu Violence and Abuse Programme* – Based in Christchurch, this programme was targeted at Māori youth and aimed to reduce violent offending and improve life and education outcomes for participants through better interagency coordination, providing health checks, and coordinating access to other services such as drug and alcohol treatment programmes. An evaluation of He Waka Tapu found that although offending initially reduced, rates of offending increased within 12 months of completing the programme (Makwana 2007).

*He Waka Tapu Caseworker Programme* – Situated in Christchurch, this initiative targets young Māori females ‘at risk’ of offending, and involves a mixture of individual and group counselling and life-skills components. Evaluation results indicated that while not all participants had offended prior to commencing the programme, those who had, had re-offended during the course of the programme, with several participants committing more serious offences (Makwana 2007).

*Lake Tarawera and Moerangi Treks* – Based in the Bay of Plenty, this residential programme involved youth ‘at risk’ of offending and boys referred from the Youth Court. The programme consisted of a 90-day course focusing on developing knowledge of Māori culture, as well as developing self-esteem, confidence and responsibility (Ministry of Justice and Te Puni Kōkiri 1998).

*Mokoia Island Programme* – This Rotorua-based initiative targeted youth ‘at risk’ of offending, aiming to address self-esteem and confidence, as well as improving relationships with whānau and increasing positive participation in society (Ministry of Justice and Te Puni Kōkiri 1998).

### Drug and alcohol programmes

A number of drug and alcohol programmes also emerged during this time. For example:

*Homai Te Rongopai* – This was an Auckland-based alcohol and drug treatment programme for youth and adult drink-driving offenders. The programme was whānau-based and utilised the Alcoholics Anonymous 12-step programme. Preliminary analysis indicated that this was a successful programme, with only a small number of referred drink drivers re-offending (Ministry of Justice and Te Puni Kōkiri 1998).

*Moana House Therapeutic Programmes* – These programmes were targeted at offenders on supervision and included a large proportion of Māori clients (60 percent). The programmes involved a mix of community work, therapy, education, household management skills and recreation. Despite a high drop out rate, this initiative was found to reduce the seriousness of offending (Ministry of Justice and Te Puni Kōkiri 1998).

*Taha Māori Unit* – This residential programme was based at the drug and alcohol unit at Queen Mary’s Hospital in Hanmer Springs and involved drug and alcohol treatment and counselling within a kaupapa Māori framework (Ministry of Justice and Te Puni Kōkiri 1998).

### **Adult pre-trial diversion programmes and indigenous courts**

A number of programmes and initiatives have looked to modify existing legal processes in order to increase their cultural relevance and thereby lower offending. These programmes come in a number of different forms including adult pre-trial diversion and indigenous courts.

Adult pre-trial diversion programmes began in the mid 1990s. Examples include Whānau Āwhina at Hoani Waititi Marae in West Auckland and the Second Chance Restorative Justice Programme in Rotorua. Despite exhibiting some differences in structure and process, these programmes typically involve an offender participating in a meeting with members of a community panel often including kaumātua and also the victim (although the level of attendance by victims was found to differ between schemes). The focus is on reparation, rehabilitation, reintegration and restoring balance, although reducing re-offending is a key objective (Maxwell, Morris and Anderson 1999). Evaluations of these schemes have shown mixed results. Thus, while Maxwell et al (1999) found a reduction in re-conviction rates of those who had attended compared to a matched sample processed through mainstream legal processes, a more robust analysis undertaken by Paulin et al (2005) and Paulin, Kingi and Lash (2005) of programmes operating in Rotorua and Wanganui revealed no differences in reconviction rates between the restorative justice group and a matched group (see also Paulin, Kingi and Lash 2004).

Similar types of initiative have been adopted in Australia in the form of Aboriginal Courts,<sup>33</sup> although these have typically focused more on producing appropriate sentencing options for indigenous offenders than diversion *per se*. Examples of this approach include the Nunga and Aboriginal Courts in South Australia, Koori Courts in Victoria, the Murri and Rockhampton Courts in Queensland and Circle Sentencing in New South Wales (Marchetti and Daly 2004). The core processes of Aboriginal courts will be examined in more depth in Chapter 2; however, in terms of their impact on re-offending, preliminary analysis has suggested that these courts have had a positive impact on re-offending rates (Cunneen 2008; Marchetti and Daly 2004). Indigenous courts operating in Canada, such as sentencing circles and the Glaude Court in Toronto have also been found to have a positive effect on re-offending (Green 1998).

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<sup>33</sup> While there are also a number of Aboriginal diversion programmes a recent evaluation by Jourdo (2008) was unable to shed significant light on the effectiveness of such programmes for Aboriginal offenders due to the lack of available ethnicity data.

## General crime prevention programmes

In terms of indigenous community crime prevention programmes, a recent response to reducing Māori crime in New Zealand has been the development of the iwi-led Crime and Crash Prevention Plans (ICCPPs). ICCPPs afford local Māori communities a central role in developing prevention plans to address Māori crime issues within their specific geographic region. Although statistical information, as well as administrative and financial support is provided by central government, local iwi decide which issues will form the focus of their crime prevention plans and determine how these will be addressed. As this initiative is still under development, no evidence about its impact on Māori offending is currently available.

In addition to ICCPPs, a system of Māori wardens has operated in New Zealand since 1945<sup>34</sup> (Hill 2004; 2005). Under the Māori Community Development Act 1962, wardens were granted the authority to enter licensed premises at any time in order to warn the licensee or any servant of the licensee to abstain from supplying any liquor to Māori persons who were in a state of intoxication and/or were behaving in a disorderly manner. In addition to their role in reducing alcohol-related harm, modern-day Māori wardens have a much broader function. For example, wardens fulfil a deterrent function by undertaking foot patrols in urban areas and helping to diffuse conflict situations, especially those involving Māori youth. They also participate in truancy-reduction initiatives and other crime prevention programmes, attend court to support Māori defendants, as well as providing security services for particular social and cultural events (Walker, Fisher and Gerring 2008).

In 2007 the government allocated \$2.5 million towards enhancing the capacity and capability of Māori wardens (New Zealand First 2007). This led to the development of the 'Joint Māori Warden's Project' (Walker, Fisher and Gerring 2008). To date, the project has focused on re-examining existing governance structures for the Māori wardens, establishing regional positions to aid the coordination of the wardens at a local level, purchasing uniforms and equipment, and developing and implementing training at both national and regional levels (Walker, Fisher and Gerring 2008). The project is being overseen by Te Puni Kōkiri and is still being implemented. Consequently, its impact on Māori crime rates has yet to be examined by researchers.

## Advantages and disadvantages of 'risk factor' approaches

Research has shown that there are a number of advantages associated with indigenous crime prevention programmes based around addressing general risk factors. One of the most common benefits is an improvement in familial relationships and increased knowledge of indigenous culture and values (Wehipeihana, Porima and Spier 2003; Potiki 2001). Possibly as a result of this, participants and their families often report high levels of satisfaction with such programmes (Makwana 2007; Ministry of Justice and Te Puni Kōkiri 1998). A further benefit associated with such initiatives is that they permit a greater level of participation and

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<sup>34</sup> Māori Wardens were officially recognised by the state under the Māori Social and Economic Advancement Act 1945 (see Hill 2005, p182); however, historical research has demonstrated that Māori Wardens operated on marae in some form during the nineteenth century (Walker, Fisher and Gerring 2008).



decision making for indigenous groups within the criminal justice system, and may therefore help to improve the relationship between justice agencies and indigenous communities (Cunneen 2008; Blagg 2008; Dickson-Gilmore and La Prairie 2005; Hazlehurst 1995; Chan 1997).

Indigenous crime prevention initiatives based on general 'risk factor' approaches have also experienced a number of practical difficulties. Such difficulties are not peculiar to the New Zealand context and have also been widely noted in both Canadian and Australian research (see for example, Cunneen 2008, 2002; La Prairie 1999b; Hazlehurst 1995). Key problems identified in the literature are as follows.

- Indigenous crime prevention programmes are often under-funded given their broad social remit and holistic approach (Williams, C. 2001; Doone 2000; Makwana 2007; Hazlehurst 1995).
- Given their multifaceted approach, evidence suggests that such programmes often suffer from fiscal divisions within government funding which prevents service providers from obtaining financial support across different government agencies (Ministry of Justice and Te Puni Kōkiri 1998; Smith 2007).<sup>35</sup>
- Many programmes have not been subjected to any form of evaluation. One reason for this is that the cost of such evaluations is often likely to exceed the annual operating budgets of these interventions, which are often small-scale. It is also difficult to make definitive claims about the outcome of programmes based on what are typically small sample sizes (Makwana 2007). Moreover, as demonstrated by Jourdo (2008) in her recent research on drug and alcohol diversion options in Australia, difficulties may be encountered in both obtaining accurate ethnicity data on programme participants and then gaining permission to publish it. In addition, owing at least in part to resourcing problems, adequate programme records may not be maintained to the level required to support an outcome evaluation (Makwana 2007).
- Those evaluations that have been produced are typically unable to conclusively 'prove' that such programmes reduce re-offending (Makwana 2007; Paulin et al 2005; Porima and Wehipeihana 2001; Williams, C. 2001). Researchers have suggested a number of possible explanations for why this might be the case, including the fact that many indigenous crime prevention initiatives are holistic and focused on achieving long-term goals that are unable to be realised within the constraints of short-term government funding cycles (McFarlane-Nathan 1999; Porima and Wehipeihana 2001; Makwana 2007).
- Questions have also been raised about the degree to which such initiatives empower indigenous communities and enable self-determination in practice. For example, several authors have questioned whether programmes where cultural aspects are bolted onto largely mainstream initiatives targeting generic risk factors permit any truly meaningful form of self-determination (Blagg 2008; Walters, Bradley and Tauri 2005; Jackson 1988; Tauri 1996, 1999).

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<sup>35</sup> The Cross Departmental Research Pool in New Zealand recognises this problem and is designed for projects with a multiagency focus; however, this is for research purposes rather than funding prevention programmes.



Several New Zealand researchers have argued that this type of approach suffers from more fundamental limitations. For example, Jackson (1988) has pointed out that New Zealand research by Fergusson, Donnell and Slater (1975) examining the causal relationship between socioeconomic status and police contacts experienced by adolescents actually found socioeconomic differences *did not* account for all of the variance in police contacts between different ethnic groups. However, he notes, that responses targeting criminal justice system biases have been largely overlooked in favour of a focus on social 'risk factors' in New Zealand. According to Jackson (1988, p23), "To understand crime, one ... needs to consider the relationship between crime defining authorities and those who they define as criminal" (see also Mikaere 2008; Jackson 1995a). Webb (2003) has elaborated on this point, stating that 'risk factor' approaches typically assume that a social consensus exists from which collective notions of crime and morality are derived. In this sense, he argues, such responses (and the government discourse which surrounds them) ignore key power imbalances between Māori and the state, and mask the fact that the state operates in the interests of the powerful.

Webb (2003, 2008) further points out that responses that identify dysfunctional indigenous communities and families as the key problem to be solved effectively depoliticise and individualise the problem of indigenous offending (see also Mikaere 2008; Reid and Robson 2007; Quince 2007; Cunneen and Kerley 1995). In doing so, he argues that such approaches gloss over the structural inequalities experienced by those communities insofar as indigenous communities (rather than the social conditions in which they reside) are often constructed as pathological and in need of state intervention (Webb 2003; see also Blagg 2008). According to Webb, such a focus also means that other important processes are ignored, "such as the Māori interaction with a predominantly non-Māori criminal justice system, and how this contributes to the labelling of Māori as problems in terms of crime" (Webb 2003, p144). Such initiatives, he argues, also implicitly assume that problems stemming from macro-level social inequalities can be resolved at the level of the community. In essence, he suggests that the inability of such responses to 'fix' the problem of Māori crime is inevitable as it is beyond the capacity of local communities to resolve large-scale structural inequalities (Webb 2003).

Finally, it has been argued that responses focused on ameliorating general 'risk factors' often fail to acknowledge the underlying reasons why indigenous groups are over-represented in those 'risk factors' in the first place (Jackson 1988, 1995a, 1995b; Webb 2003, 2008; Mikaere 2008; Reid and Robson 2007; Harris et al 2006). For example, Jackson (1988, p65) has argued that post-colonial policies such as those which restricted the construction of homes on Māori land and subsequently contributed to the depopulation of Māori rural communities, "led to a racialisation of poverty which has shaped the present day position of the Māori community and differentiates it from the situation of Pākehā people who are poor" (see also Pratt 2004).

By ignoring the historical context of colonisation and the specific cultural factors derived from it, Jackson argues that 'risk factor' approaches have typically overlooked the fact that the reasons and consequences for different ethnic groups' over-representation in 'risk factors' are not the same for Māori and other ethnic groups in New Zealand (1988, p64; see also Reid and Robson 2007, p5; Carr 2007). According to Jackson (1988), owing to the cultural

alienation associated with colonisation economic stresses experienced by Māori are more acute than those experienced by members of other ethnic groups occupying similarly socioeconomically disadvantaged positions (see also Broadhurst 2002, p257). In short, then, it has been argued that generic risk factor approaches ignore important cultural differences and cannot succeed without first acknowledging the detrimental impact of colonisation on Māori culture and life experiences (Quince 2007; Webb 2003, 2008; Jackson 1988; Mikaere 2008; Reid and Robson 2007; Carr 2007).<sup>36</sup> Applying this argument to health inequalities in New Zealand, Reid and Robson (2007, p5) have similarly pointed out that:

*When unequal Māori outcomes are apparent, the problem is said to lie with Māori through any mix of inferior genes, intellect, education, aptitude, ability, effort or luck. This type of colonial thinking, where the 'problem' or 'deficit' lies with Māori, is called 'deficit theory' or 'victim blame' analysis (Ryan 1976; Valenca 1997) ... It ignores system and structural bias. The focus on Māori as 'the problem' ensures that the outcomes of non-Māori are never closely examined and Pākehā privilege never exposed ... Any discussion on equality and rights must be informed by acknowledging this preferential benefit accrued by Pākehā from the systems they introduced and built, and continue to refine and control.*

Similar arguments have also been voiced by Australian academics (Blagg 2008; Munro and Jauncey 1990). For example, Munro and Jauncey (1990, p254) noted in their research on reducing Aboriginal imprisonment:

*Ultimately, any real attempt to improve the socioeconomic position of Aboriginal people and to reduce the rate of imprisonment must come through the recognition of the invasion and confiscation of land, compensation for the invasion (including recognition of effective land rights), and the development of Aboriginal structures controlled by the Aboriginal community to deal with Aboriginal problems and enhance Aboriginal pride and culture.*

Consequently, from the perspective of some members of indigenous groups, notions of indigenous identity and culture – and the impact of colonisation on these – remain a, if not the, core issue in explanations of indigenous offending (see, for example, Jackson 1988). In criticising the tendency of academics to use quantitative studies to 'cancel-out' cultural, ethnic or racial factors, Blagg (2008, p4) has argued that "we can't pretend that real Aboriginal people don't exist as we focus instead on the representations and artefacts visible to us as data on our computer screens".

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<sup>36</sup> This perspective was challenged by Fergusson, Horwood and Lynskey (1993b) in their multivariate analysis of factors associated with self-reported offending. Refuting the role of cultural difference, they argued that ethnic differentials in offending by Māori/Pacific children are sustained by socioeconomic factors similar to those which influence sections of Pākehā society. However, the authors acknowledged that the study's Māori/Pacific participants, who were typically drawn from households with at least one parent identifying as Pākehā and levels of cultural attachment were weak, did not offer the best sample for testing cultural hypotheses on offending.

## Cultural approaches

More overtly cultural approaches place culture at the centre of explanations of indigenous offending. Thus, rather than general risk factors 'cancelling' out the so-called 'race effect', a number of commentators have argued that social risk factors are inextricably linked to, and mediated by, cultural identity (Quince 2007; Maynard et al 1999; Jackson 1988; Durie 2003). Those writing from this perspective typically hold that indigenous offending is precipitated by either a negative cultural identity or a lack of cultural identity altogether. They argue that problems of cultural identity are the direct product of cultural denigration and alienation wrought by historic processes of colonisation and acculturation, which have operated to deny indigenous groups positive knowledge of their cultural heritage (Quince 2007; Broadhurst 2002; Cunneen 2002; Jackson 1988, 1995a; Mikaere 2008).

According to Durie (2003) Māori occupy trapped lifestyles, whereby a complex interaction between social risk factors and a confused or partially developed sense of cultural identity detrimentally affects their general wellbeing and leaves them more vulnerable to criminal offending and victimisation (Durie 2003; see also Marie, Fergusson and Boden 2009). This perspective is not unique to New Zealand and has been developed internationally by colonial conflict theorists such as Tatum (2000, 1994, cited in Gabbidon 2007) and Bachman (1992, cited in Gabbidon 2007) in the United States, La Prairie (1997, 1990) in Canada, and Broadhurst (2002) in Australia.

The rise of colonial conflict theory since the late 1980s has been accompanied by a growing recognition among justice agencies in New Zealand (although most prominently by the Department of Corrections) of the limitations inherent in internationally imported responses to offending that fail to take into account the specific cultural factors associated with Māori offending (Maynard et al 1999; McFarlane-Nathan 1999). International responses, it has been argued, are largely incompatible with Māori cultural values (tikanga Māori) insofar as they focus on the individual rather than the family, privilege individual over communal responsibility, and fail to facilitate the development of a positive cultural identity (McFarlane-Nathan 1999).

The recognition that unique cultural factors need to be taken into account has significantly impacted on the development of responses to Māori offending. While earlier Māori crime reduction programmes had often included cultural components, from the late 1990s onwards responses have increasingly been underscored by the belief that the development of cultural identity represents a key mechanism for reducing Māori offending and re-offending.<sup>37</sup> This approach has been most enthusiastically adopted by the Department of Corrections, who developed a Framework for Reducing Māori Offending (FreMo) in 1999, which made the integration of tikanga Māori principles a mandatory consideration in the development of responses to reduce Māori re-offending (McFarlane-Nathan 1999). For this reason, the following discussion will focus on interventions managed by the Department of Corrections

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<sup>37</sup> While at the time of their original introduction the precise role played by culture in preventing re-offending was not entirely clear (see, for example, Waitangi Tribunal's report on the Department of Corrections offender assessment policies (Waitangi Tribunal 2005), the Department has recently placed more emphasis on culture as a mechanism for motivating offenders to complete other programmes and address their behaviours (see, for example, Department of Corrections 2009b).

and is restricted to tertiary crime prevention initiatives (ie, those which target re-offending). These responses have been based around three main areas: cultural assessment tools, prison-based responses, and community-based responses. Examples of initiatives within each of these areas will be briefly outlined below.

### **Cultural assessment tools (MaCRNs and the SMCA pilots)**

Two cultural assessment tools have been developed by the Department of Corrections since 2001: the Māori Culture-Related Needs (MaCRNs) assessment and the Specialist Māori Cultural Assessment (SMCA). Each of these initiatives will be examined in turn below.

#### **Māori culture-related needs (MaCRN) assessment**

During the late 1990s the Department of Corrections added a cultural assessment component known as Māori Culture-Related Needs (MaCRNs) assessment to their basic Criminogenic Needs Inventory (CNI). The CNI was a risk assessment tool utilised by probation officers in interviews with offenders to identify factors which contributed to offending, both in terms of the immediate contextual factors which precipitated their offending, as well as longer term development aspects which were believed to have more broadly contributed to their criminality (Maynard et al 1999). The aim of the CNI was to enable the accurate identification of criminogenic needs in order to deliver appropriate sentencing plans and rehabilitation programmes that would, in turn, reduce re-offending. The introduction of MaCRNs was based on the recognition that the standard CNI had overlooked the culturally specific rehabilitative needs of Māori offenders (Maynard et al 1999). MaCRNs were therefore developed on the basis that Māori offenders had unique criminogenic needs related to Māori culture which predisposed them to offending.

The Department identified four MaCRNs including: cultural identity (ie, how strongly an offender identifies as Māori, and their general perceptions of what it means to be Māori); cultural tension (for example, their awareness of the incongruence between Māori and Pākehā values and beliefs); whānau and extended family (the level of communication with family, the nature and support of whānau for antisocial behaviours, and the identification of broader whānau incidents which may have impacted on offending); and whakawhanaunga (the formation of whānau-like relationships and the degree to which these support and precipitate offending) (Maynard et al 1999, pp49-51). MaCRNs were implemented in 2001.

In 2005 a complaint was made to the Waitangi Tribunal about the Department's risk assessment procedures, specifically including MaCRNs.<sup>38</sup> The claim alleged that MaCRNs were unjustified and prejudicial against Māori insofar as they were seen to imply that Māori culture was in some way criminogenic. The Tribunal found no evidence of any prejudicial effect stemming from MaCRNs; however, it criticised the Department for its failure to consult adequately with Māori<sup>39</sup> or conduct a pilot prior to implementing MaCRNs. The Tribunal also questioned the rationale for introducing MaCRNs, pointing out that no new cultural

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<sup>38</sup> The claim specifically related to both MaCRNs and the Department's RoC\*RoI (risk of re-conviction/risk of reoffending) measure (see Waitangi Tribunal 2005).

<sup>39</sup> On this matter, the Tribunal found that the Department had breached the principle of partnership laid out in the Treaty of Waitangi (Waitangi Tribunal 2005).

programmes had been developed since the introduction of MaCRNS. They expressed further concern that despite the fact that MaCRNs had been operating for over three years there had been no concerted attempt on the part of the Department to “verify their soundness nor point to any quantifiable benefits that flow to Māori offenders who are assessed with MaCRNS” (Waitangi Tribunal 2005, p151).

During the same year the Ministerial Review Unit within the State Services Commission examined programmes across the state sector to ensure that they were “based on need not race” (cited in Evaluation Associates 2007). The aim was not to prevent programmes being targeted on the basis of ethnicity, but to make sure that the rationale for ethnically targeted programmes was clear and supported by credible theory and/or evidence. While the report noted that the Department of Corrections was justified in implementing cultural interventions on the basis that they would be more effective than mainstream interventions, it noted that the Department lacked sufficient evidence about the effectiveness of its cultural programmes (Evaluation Associates 2007). Following the publication of the report, Cabinet directed the Department to evaluate its cultural programmes to assess whether they were successful in reducing offending by the targeted groups.

MaCRNS were the first initiative to be evaluated following the review. The evaluation uncovered a number of problems with the implementation of MaCRNS (Evaluation Associates 2007). It found that staff were often uncomfortable with asking MaCRN-related questions and many saw little benefit in doing so, while some believed that asking these questions could have a detrimental impact on offenders. As a consequence, the evaluation found that MaCRN assessments were significantly under-utilised by Department staff. The evaluation further revealed that only 20 percent of offenders who had a MaCRN identified subsequently took up a culture-related activity. Moreover, five percent of offenders on cultural programmes had not had any MaCRNs identified during their CRN assessment, suggesting that cultural needs could be met independent of the MaCRN assessment process. The evaluation further found that both staff and offenders were uncertain about the purpose of MaCRNs. More fundamentally, the evaluation raised questions about the motivational capacity of the initiative, finding that: only half of the offenders assessed for MaCRNs could recall being assessed 15 days later; only one in three offenders who had MaCRNs identified could recall this; only one in five offenders said they understood the assessment questions; and only half of those with MaCRNs identified felt they needed to change their attitudes or behaviour following their assessment.

Following the completion of the evaluation in 2007, the MaCRN assessment process has been discontinued.

### **Specialist Māori Cultural Assessment (SMCA) Pilot**

The Specialist Māori Cultural Assessment (SMCA) pilot began in Auckland and Hamilton in 2002 following the introduction of MaCRNs. SMCAs involve a more detailed cultural assessment of Māori offenders serving sentences of 26 weeks or more, whether in prison or the community (Department of Corrections 2007c). The assessment is obtained *via* an interview conducted with the offender by a kaumātua or other Māori community



representative prior to developing the offender's sentence plan (Gardiner and Parata Ltd 2003). SMCAs were intended to be undertaken when the initial MaCRN assessment indicated a follow-up interview was required, a person's cultural-related needs were unclear after the initial MaCRN assessment, or an offender was not motivated to address their cultural needs.

The SMCA interview addresses four cultural dimensions: taha whānau (kinship connection); taha hinengaro (mental well-being); taha tinana (physical well-being); and taha wairua (spiritual well-being). Following the interview, the kaumātua produces a detailed report outlining key cultural needs and recommending suitable responses that may be self-directed (for example, involving offenders doing research into their tribal history or registering with their iwi) or Department-directed (for example, transferring offenders to Māori focus units in prisons or tikanga programmes in the community).

An initial process evaluation undertaken by Gardiner and Parata Ltd in 2003 revealed that offenders typically preferred the SMCA process to the MaCRN assessment, as the latter was often perceived to be a superficial attempt to link Māori cultural identity with offending. Despite this, the evaluation found that recommendations in SMCA reports were rarely integrated into sentencing plans (and, when they were, appeared to be done so coincidentally rather than intentionally). Probation officers also reported problems integrating lengthy SMCA content into sentence plan templates, and noted that some of the recommended sentencing options either did not exist or an offender was ineligible for them due to the seriousness of their current offending (Gardiner and Parata Ltd 2003).

The Department published the results of a more recent evaluation in August 2007 (Department of Corrections 2007c; Kāhui Tautoko Consulting Ltd 2007). The evaluation found that the SMCA process increased offender motivation to attend rehabilitative programmes, but noted that this motivation diminished over time, especially in cases where the assessment was not followed by participation in culture-related interventions. It also noted that when it was offered to them, a high proportion of offenders agreed to be assessed and were generally positive about the experience. In a similar vein to the first evaluation, however, the research found little evidence that the recommendations from SMCAs were integrated into sentencing plans. This was attributed to the fact that SMCAs were often not completed before sentencing plans were drafted. Staff acknowledged that they had difficulties in interpreting SMCA reports, noting their unfamiliarity with the concepts and terminology used in the reports, and their fears of being culturally inappropriate. There was also a lack of organisational data available to confirm whether participation in particular interventions was the direct result of a recommendation made in the SMCA (Kāhui Tautoko Consulting Ltd 2007). The Department concluded that these problems were not about the assessment tool itself, but related to the processes surrounding it (Department of Corrections 2007c).

The Department is currently reconsidering whether the processes surrounding SMCA should be redesigned to more closely align with sentence planning, or alternatively whether there is merit in utilising SMCA as a stand-alone motivational tool. Decisions about whether to extend the pilot nationally are also being considered (Department of Corrections 2007c).

## Prison-based cultural programmes

A number of prison-based tikanga programmes<sup>40</sup> have been developed since the late 1990s. These programmes typically run alongside mainstream prison processes and interventions, and involve offenders being immersed in a tikanga Māori environment. Most of these programmes are accessible to both Māori and non-Māori prisoners. Examples include Māori focus units, the Māori Therapeutic Programme Pilot, the New Life Akoranga Programme and the Saili Matagi Violence Prevention Programme. Each of these will be briefly discussed below.

### Māori focus units

The first Māori focus unit (MFU) was established in late 1997 with the opening of Te Whare Tirohanga at Hawkes' Bay Regional Prison (Pfeifer, Buchanan and Fisher 2005). The unit was set up as a traditional Māori community where a diverse group of prisoners could support and mentor each other, and undergo intensive Māori programmes in Te Reo and tikanga Māori (Quince 2007). Architecturally indistinct, the MFU occupies a single 60-bed unit with comparable regimes and security requirements to the rest of the prison. Prisoners are required to sign a contract before entering the unit promising to abide by and support the kaupapa of the unit (Pfeifer, Buchanan and Fisher 2005; Cram, Kempton and Armstrong 1998).

The unit is managed by a rūnunga (council) that includes prison staff, kaumātua and kuia, as well as community and prisoner representatives. It also has a Whānau Liaison Officer (WLO) who assists with the wellbeing, rehabilitation and reintegration of unit prisoners, and liaises with their whānau. Since the establishment of the Hawkes' Bay MFU, a number of other MFUs have been opened in North Island prisons, including: Te Whare Whakaahuru at Rimutaka Prison in 1999; Te Ao Marama at Waikeria Prison in 2001; Te Hikoinga at Tongariro and Rangipo Regional Prison in 2002; and Whanui at Kaitoke Prison in 2003. In addition, in November 2007, a Pacific focus unit (Vaka Fa'aola) opened at Spring Hills Correctional Facility. Like MFUs, the unit operates within a cultural framework and addresses issues of cultural identity (Department of Corrections 2008a).

A formative evaluation of MFUs was undertaken by a group of Canadian academics in 2005 (Pfeifer, Buchanan and Fisher 2005). The evaluation noted that participants generally considered tikanga programmes to be effective and reported increased knowledge of Māori culture, language, whakapapa or ancestry, as well as enhanced levels of cultural pride (see also Cram, Kempton and Armstrong 1998). They also found that participants reported lower levels of anger and aggression when compared to a matched group of mainstreamed prisoners and portrayed less criminal attitudes towards violence (Pfeifer, Buchanan and Fisher 2005, p9). However, the evaluation also expressed concern about a lack of intervention logic in the programme in terms of precisely how MFUs would reduce re-offending, and found disagreement about whether their purpose was to motivate offenders to

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<sup>40</sup> The Saili Matagi Violence Programme Pilot is underpinned by a Pacific cultural framework, which, while sharing some similarities with a tikanga Māori framework, has some different emphases and should be considered distinct.



address generic risk factors through mainstream programmes or whether the development of cultural identity in and of itself was intended to reduce offending. As the evaluation was formative, no attempt was made to measure the effectiveness of MFUs in terms of whether participants went on to successfully complete other general rehabilitative programmes, or whether participants were less likely to be reconvicted and/or re-imprisoned after release from prison.

The Department of Corrections completed a further evaluation of MFUs in May 2009. The evaluation found that MFUs were being implemented as anticipated, and represented a “positive and pro-social environment” viewed as being conducive of learning and change (Department of Corrections 2009b, p4). Participants were found to have strengthened cultural knowledge and an enhanced sense of cultural identity, and were found to display more positive attitudes and beliefs about criminal lifestyles. The research found some evidence of a reduced rate of reconviction and re-imprisonment for MFU graduates in comparison to a matched group who had not been on the programme; however, the differences were not statistically significant.<sup>41</sup> Consequently, the evaluation concluded that it was not possible to definitively assess whether MFU participants were less likely to be reconvicted and/or re-imprisoned than the comparison group. As was the case in earlier evaluations, the research found problems associated with the high turnover of prisoners within MFUs, as well as issues associated with the referral of suitable prisoners into the units, with MFUs being used to manage muster issues within the broader prison system (Department of Corrections 2009b). For these reasons it was concluded that MFUs were still to achieve their full potential.

### **Māori therapeutic programmes (MTP) pilot**

This pilot involves the implementation of several tikanga-based therapeutic programmes in prisons to address substance abuse and relationship-management training. Housed within Māori focus units, these programmes look to address problematic behaviour within a Māori paradigm and involve immersion in Mātauranga Māori (Māori knowledge and practices). They require a commitment from participants to address the gap between tikanga Māori and their offending behaviour (Porima and Wehipeihana 2001).

A process evaluation of several Māori therapeutic programmes was undertaken in 2001.<sup>42</sup> The evaluation identified a number of benefits associated with such programmes, including: the participants’ increased understanding of their cultural background and an enhanced sense of cultural pride, as well as the development of an appreciation of how their offending engendered collective, as well as individual, responsibility. The evaluation also found that offenders developed better coping strategies and claimed to have greater motivation to address their offending behaviours following their participation in the programmes (Porima and Wehipeihana 2001).

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<sup>41</sup> This was considered to be due to the small sample sizes involved, and it is expected that the small positive effect observed would be statistically significant in a larger sample (Department of Corrections 2009b).

<sup>42</sup> The evaluation examined a substance abuse programme and relationship management programme run by Nga Punawai at Hawkes Bay Regional Prison and a substance abuse programme run by Kahunui Trust at Rimutaka Prison.

As noted above, the Department of Corrections recently completed an evaluation of MFUs, including Māori therapeutic programmes (Department of Corrections 2009b). The evaluation found that MTPs were being implemented as intended and were generally viewed positively by participants and staff. However, as noted above, owing to the small sample sizes involved it was not possible to conclusively determine whether reconviction and re-imprisonment rates were lower among those who had completed an MTP compared to a control group (Department of Corrections 2009b).

### **Whakakotahitonga – Te Piriti**

This prison-based child sex offender programme was established in Auckland in 1994. It involves a combination of cognitive behavioural therapy and tikanga Māori teachings (Nathan, Wilson and Hillman 2003). Tikanga Māori generally provides the environment for change to occur, with the therapy itself largely based on North American practices. The tikanga component includes knowledge of whakapapa, makutu, Māori traditional values, beliefs and protocols, as well as knowledge about the history and impact of colonisation on Māori. An evaluation of the programme in 2003 demonstrated that it significantly reduced offending for both Māori and non-Māori participants in comparison to a matched sample group (5.47 percent recidivism compared to 21 percent in the control group) (Nathan, Wilson and Hillman (2003).

### **Mahi Tahi Trust – New Life Akoranga programme**

This programme requires inmates and their whānau to participate in a four-day residential wānanga held within the prison. It involves the rediscovery of Māori principles, values and disciplines, facilitating hapū, iwi and whānau support, and mentoring (Wehipeihana, Porima and Spier 2003).

An evaluation of the programme found that it helped to reconstruct relationships, between offenders and their whānau and/or their partner or spouse, and increased participants' respect for women. It also led to increased knowledge of Te Reo, whakapapa and tribal history, as well as enhancing offenders' sense of cultural pride. However, post-release data indicated no difference in reconviction rates between programme participants and a matched sample, although there was some evidence that reconviction rates tended to be lower for those who completed the programme some time before their release from prison (Wehipeihana, Porima and Spier 2003). The evaluation thus concluded that New Life Akoranga acted as a rewena (catalyst) for making positive changes by encouraging participation in programmes that address general criminogenic needs, but did not represent the sole answer to Māori re-offending in and of itself (Wehipeihana, Porima and Spier 2003, p88).

### **Saili Matagi violence prevention programme pilot**

This programme was developed in late 2007 at the Pacific focus group unit at Spring Hills Correctional Facility. It addresses violent offending by Pacific prisoners convicted of repeated, serious violent offending who have a moderate to high risk of re-offending. Like tikanga-based programmes, the programme applies an aiga/fanau framework that focuses on

developing cultural identity and a sense of belonging, and encourages respect, teamwork, and relationship management (Department of Corrections 2008a). Given its recent introduction, this programme is still to be formally evaluated.

## Community-based cultural programmes

A number of community-based initiatives utilising a tikanga-based approach have also been developed for Māori offenders serving community-based sentences. Examples of this type of initiative include Te Wairua o Ngā Tangata Māori and Te Īhi Tū Trust habilitation centre. These will be briefly discussed, in turn, below.

### Te Wairua o Ngā Tangata Māori

This programme was originally developed in 1997 by two community probation officers in Invercargill and subsequently spread to a number of other South Island locations which developed similar initiatives, including: Te Haringa Whakatatika He o Ngā Iwi in Dunedin, Te Wairua o Ngā Tangata Māori Aoraki in Timaru, Kai Tū Tangata in Christchurch and Whaiā Te Ara Tika in Nelson (Pōtiki 2001).

While the programmes differ in terms of their precise length, offender eligibility criteria, and content, they all aim to strengthen Māori identity and increase participants' knowledge of Māori tikanga, history and beliefs to aid their spiritual wellbeing (taha wairua) and, in turn, reduce re-offending (Pōtiki 2001). Most of the programmes were developed in consultation with local iwi, and are operated by Māori service providers at local marae. The programmes are targeted at those serving community sentences such as supervision and periodic detention (until the latter was abolished by the Sentencing Act 2002). They typically run for between six to ten weeks, for a day per week, and follow a similar format: comprising cultural sessions in the morning (involving activities such as taiaha, haka, waiata, karakia, mihimihi, as well as discussions exploring whakapapa and tribal history), and more mainstream programmes in the afternoon (such as anger management programmes, substance abuse programmes, as well as employment and educational opportunity sessions) (Pōtiki 2001).

A formative evaluation of these programmes found that despite enhancing the participants' sense of cultural identity and knowledge of tikanga, there was often a lack of clarity around the main purpose of the programmes: in particular, whether cultural aspects were interventions in themselves or were aimed at encouraging participants to access other mainstream interventions. It also found significant issues with retention rates, with almost half of the clients on such programmes failing to complete them (Pōtiki 2001). Finally, the evaluation noted that few programmes had examined whether participants went on to complete mainstream rehabilitative programmes, which – if their main aim was to motivate participants to undertake further programmes – would be an important factor in determining their success.

A more recent evaluation of community-based tikanga Māori programmes was completed by the Department of Corrections in 2008 (Department of Corrections 2008c; see also Kāhui Tautoko Consulting Ltd 2008). The evaluation focused on five different tikanga Māori

programmes<sup>43</sup> and was primarily concerned with measuring the motivational effect of the courses, rather than the impact of such programmes on (re)offending. It found that the programmes were often underutilised by probation officers, who revealed a low awareness of the programmes and, when they were aware, indicated a reluctance to refer offenders to them. Of those offenders who were referred, a significant number did not go on to attend a programme. Associated with the issues of referral and attendance, the evaluation also identified that the programmes often experienced funding challenges (Kāhui Tautoko Consulting Ltd 2008).

In terms of outcomes, the evaluation found that there were “moderate but positive gains” for programme participants, and noted that none of the course participants were arrested within three months of attending a tikanga course, although it was acknowledged that the short follow-up period did not permit a reliable measurement of recidivism to be made (Department of Corrections 2008c, p3). Aside from participant assessments about their learning and motivation for positive change, the evaluation did not examine whether participants went on to complete other courses following their attendance at a tikanga programme. The degree to which such programmes contribute to increased attendance of other courses and/or a long-term reduction in offending therefore remains untested within the extant research literature.

#### **Te Īhi Tū Trust habilitation centre**

This residential programme was based in New Plymouth and first opened as a habilitation centre or half-way house in 1995, before being renamed ‘Te Īhi Tū Habilitation Centre’ and managed by a new trust from 1997 to 2008 (Department of Corrections 2008b; Thomas et al 1998).

The programme was targeted at adult males currently serving a sentence of imprisonment or supervision, or on parole or home detention, and allowed a maximum of 10 participants for each course (Department of Corrections 2008b; Thomas et al 1998). The residential programme ran for 13 weeks and involved group and individual counselling, personal goal-setting and release planning, creative expression, supervised community contact, as well as a walk or hīkoi on Mt Taranaki. Participants were encouraged to adopt a new Māori name to represent their new, positive Māori identity and to signal a departure from past offending lifestyles and behaviours. The programme had a strong kaupapa Māori focus and aimed to foster a positive cultural identity. In addition to developing knowledge of tikanga Māori and Te Reo, the programme also looked to develop independent life-skills, such as cooking and shopping and involved fitness training (Department of Corrections 2008b; Thomas et al 1998).

While pre-release interviews revealed signs of improvements among the participants, an evaluation of the programme found problems with participant retention rates, with a significant number of offenders failing to complete the course (Thomas et al 1998). Because this evaluation was a formative/process evaluation, it did not assess the outcomes of the programme.

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<sup>43</sup> These programmes were operating in Christchurch, Manawatu, Napier, Hamilton and Auckland (Department of Corrections 2008c).

The results of a more recent outcome evaluation were published by the Department of Corrections in 2008 (Department of Corrections 2008b; see also Oliver, Porima and Akroyd 2008). The evaluation found that participant retention rates, while improved, remained low (66 percent), and that although half of the participants interviewed viewed the programme positively, the remainder were either negative or ambivalent about it. An analysis of reconviction data found that rates of reconviction and re-imprisonment among participants in the programme between 1997 and 2006 were substantial and slightly higher than would have normally been expected. Comparing participants with a matched sample of offenders not on the programme, the evaluation found no differences in reconviction and re-imprisonment rates between programme participants and the control group. On the basis of the evaluation, the Department of Corrections concluded that the programme in its current form was not effective in reducing recidivism (Department of Corrections 2008b). The Department subsequently ceased funding Te Īhi Tū, leading to the centre's closure in October 2008.

### **Key advantages of cultural responses**

A number of advantages have been linked with culturally focused programmes. These include: the development of enhanced cultural identity and a greater sense of cultural pride (Department of Corrections 2008b; Porima and Wehipeihana 2001; Nathan, Wilson and Hillman 2003; Thomas et al 1998; Cram, Kempton and Armstrong 1998; Pōtiki 2001); improved relationships with whānau (Wehipeihana, Porima and Spier 2003); increased knowledge of tikanga Māori, whakapapa, Te Reo and other cultural practices (Department of Corrections 2007c, 2008c; Pōtiki 2001; Wehipeihana, Porima and Spier 2003; Pfeifer, Buchanan and Fisher 2005; Nathan, Wilson and Hillman 2003; Cram, Kempton and Armstrong 1998); and improved links with local marae (Pōtiki 2001; Thomas et al 1998). In general, participants on cultural programmes, whether Māori or non-Māori, tend to hold positive views about such programmes and typically express a greater willingness to address offending behaviour after attending them<sup>44</sup> (Pfeifer, Buchanan and Fisher 2005; Wehipeihana, Porima and Spier 2003). There is also some evidence that these programmes can be more effective in comparison to mainstream approaches for both Māori and non-Māori (Nathan, Wilson and Hillman 2003).

### **Challenges and limitations of cultural responses**

Despite their advantages, cultural programmes have experienced a number of common practical challenges and have been the subject of more fundamental criticisms in relation to their underlying approach.

Cultural programmes typically suffer from many of the same problems outlined for 'risk factor' approaches. For example, they are often under-funded and experience difficulties associated with the financial restrictions of interagency initiatives (Walters, Bradley and Tauri 2005; Ministry of Justice and Te Puni Kōkiri 1998). They also suffer from an over-reliance on a small number of highly culturally skilled staff and are consequently vulnerable to staff turnover (Pfeifer, Buchanan and Fisher 2005; Potiki 2001). There is also some evidence that

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<sup>44</sup> Although this was not found to be the case in the recent evaluation of Te Īhi Tū (see Department of Corrections 2008b).

cultural programmes are underutilised by mainstream justice agencies (Gardiner and Parata Ltd 2003; Department of Corrections 2008c, 2007c) and/or are ill-targeted insofar as they have been used for inappropriate types of offenders or for inappropriate reasons (for example, the use of Māori focus units to address prison overcrowding issues, see Pfeifer, Buchanan and Fisher 2005; see also Department of Corrections 2008b; Wehipeihana, Porima and Spier 2003; Porima and Wehipeihana 2001).

There are further issues relating to measurement of the effectiveness of cultural programmes. As the above section illustrates, outcome evaluations have often not been completed for cultural initiatives, and those that have attempted to assess the success of such programmes have often suffered from a lack of available information (such as the number of participants who go on to complete other programmes) or an insufficient follow-up period to allow a meaningful assessment of reconviction rates to be undertaken (Porima and Wehipeihana 2001; Wehipeihana, Porima and Spier 2003; Gardiner and Parata Ltd 2003; Pfeifer, Buchanan and Fisher 2005; Department of Corrections 2008b; Thomas et al 1998). In addition, as Singh and White (2000) noted in their review of youth offending programmes, owing to the holistic focus of cultural programmes there is also the problem of attempting to isolate the impact of cultural components from more general aspects of the courses. The difficulties associated with practically identifying and measuring cultural variables have been well-documented by scholars working in this area (see, for example, Marie, Fergusson and Boden 2009; Gabbidon 2007, 2010; Snowball and Weatherburn 2008).

There has often been an absence of clear intervention logic for cultural programmes, as disagreement exists over whether such initiatives should be viewed as purely motivational programmes which seek to enhance the success of mainstream programmes, or whether improving knowledge of tikanga Māori and enhancing cultural identity in and of itself is the means by which re-offending will be reduced (see Wehipeihana, Porima and Spier 2003; Potiki 2001; Pfeifer, Buchanan and Fisher 2005; Department of Corrections 2007c). This has led some authors to question the saliency of cultural programmes in addressing Māori crime. For example, Cram, Kempton and Armstrong (1998, x) have argued that “There is more to Māori offending than a lack of connection with whānau, hapū and iwi ... to assume that culture will prevent re-offending borders on the romantic”.

Further criticisms have been raised about the theories and assumptions that underpin cultural programmes. For example, scholars have argued that cultural theories are over-deterministic and cannot explain why most people from ethnic minority or indigenous groups do not offend (see Cole et al 1995; Dickson-Gilmore and La Prairie 2005). For example, Cole et al (1995, p7) have argued that:

*[culture] does not dictate what people do. Culture cannot cause people to commit crime or account for racial inequalities in prison admissions. Far from explaining anything [cultural approaches] ... promote constructions of races as real, different and unequal, and allow people to act as if such constructions were true.*

In a similar vein to more generic ‘risk factor’ approaches, some scholars have argued that cultural approaches tend to focus on cultural issues in isolation of the context of social



inequality within which they emerge (Blagg 2008; Dickson-Gilmore and La Prairie 2005; Webb 2003; Cunneen and Kerley 1995). For example, Blagg (2008, p88) argues that the focus on culture as a means of addressing Aboriginal over-representation in Australia's criminal justice system is misguided, noting that:

*[The] focus on culture has appeal to the mainstream and some Aboriginal leaders because it diverts attention away from the unpalatable truth: many Aboriginal communities exist in states of endemic crisis; meaningful reform will be long term and costly.*

Despite cultural approaches claiming to focus on the connection between historic processes of colonisation and negative cultural identity, it is often the dysfunctional cultural identity of the individual rather than the power imbalances and social inequalities brought about through the processes of colonisation that remain the focus of interventions (Webb 2003).

Finally, some scholars have argued that cultural approaches to offending in their current form represent an example of co-option (Tauri 1999; Walters, Bradley and Tauri 2005). Co-option has been defined as, "the process of selecting and utilising elements of indigenous cultures in order to i) make the 'system' more culturally appropriate, and ii) make generic programmes more likely to 'work' for indigenes" (Walters, Bradley and Tauri 2005, p139). Authors such as Tauri (1999, 1996) have argued that modern capitalist states typically use the limited devolution of power to ethnic-minority groups to maintain cultural hegemony. From this perspective, the ability of cultural programmes based on Western interventions or housed within mainstream institutions and processes to fully realise the philosophy of tikanga Māori is questionable (see Walters, Bradley and Tauri 2005; Durie 2003; Tauri 1999). For a number of Māori scholars, the structure and limited autonomy afforded by such programmes also raises more significant questions about the degree to which such interventions truly encapsulate a partnership approach or permit Māori the level of self-governance promised within the parameters of the Treaty of Waitangi (Tauri 1999; Durie 2003; Jackson 1995a).

## Principles of best practice

Regardless of the precise form that indigenous crime prevention initiatives adopt, researchers working in this area in New Zealand, Canada and Australia generally agree that their success is highly dependent on several common factors.

1. Success is contingent on indigenous groups being afforded a central role in the design and implementation of crime prevention programmes (Cunneen 2008, 2006, 2002; Weatherburn, Snowball and Hunter 2008; Australian Institute of Criminology 2004; Blagg 2008, 2003; Walters, Bradley and Tauri 2005; Williams, C. 2001; Hunter 2001; Singh and White 2000; Thomas et al 1998; Hazlehurst 1995; Chan 1997; Jackson 1988). According to Blagg (2008, p183) what is required are responses which are "community owned" rather than "community-based".
2. Successful interventions are generally those that adopt a holistic approach which addresses multiple risk factors surrounding offenders and offending (Blagg 2008, 2003; Dickson-Gilmore and La Prairie 2005; Singh and White 2000; Jackson 1988; Hazlehurst



1995). As a consequence of this multidimensional approach to crime problems, indigenous crime prevention initiatives are also typically directed towards achieving long-term goals such as improving health, education and other social justice objectives rather than short-term crime-specific outcomes alone (Hazlehurst 1995; Cunneen 2002).

3. More successful programmes have typically been found to incorporate cultural components such as songs, language, and indigenous protocols alongside other mainstream interventions and are delivered by culturally appropriate people (Cunneen 2002; Blagg 2003; Singh and White 2000).
4. Programmes which encourage collective responsibility for offending and facilitate the participation of the family and wider community appear to work best for indigenous offenders (Cunneen 2002; Singh and White 2000; Hazlehurst 1995).

## Common tensions and problems

Evidence from New Zealand, Australia and Canada also reveals that responses aiming to reduce offending and re-offending by indigenous peoples, both as an end in itself and as a means of reducing their over-representation in the criminal justice system, experience a number of common problems.

- funding problems, given the fiscal divisions in government and the more holistic cross-agency approach adopted by many initiatives developed to address indigenous offending (Walters, Bradley and Tauri 2005; Ministry of Justice and Te Puni Kōkiri 1998; Williams, C. 2001)
- the underutilisation of cultural alternatives by mainstream criminal justice agencies and/or staff (Gardiner and Parata Ltd 2003; Evaluation Associates Ltd 2007; Department of Corrections 2008c, 2007c; Kāhui Tautoko Consulting Ltd 2008; Thomas et al 1998)
- problems demonstrating that the programmes actually lead to reductions in indigenous offending/re-offending (Pfeifer, Buchanan and Fisher 2005; Pōtiki 2001; Thomas et al 1998; Department of Corrections 2008b, 2008c; Oliver, Porima and Akroyd 2008)
- a general lack of robust evaluative research, particularly outcome evaluations with sufficient measures and timeframes to adequately assess success (Thomas et al 1998; Pfeifer, Buchanan and Fisher 2005; Department of Corrections 2008b, 2008c)
- a tendency to focus on dysfunctional individuals, families and communities at the expense of addressing the role of both structural inequalities and the criminal justice system in creating and perpetuating indigenous over-representation (Webb 2003; Jackson 1988; Blagg et al 2005; Dickson-Gilmore and La Prairie 2005)
- a failure to fully acknowledge the link between colonisation, structural disadvantage and ethnic disparities in the criminal justice system (Blagg et al 2005; Blagg 2008; Jackson 1988; Webb 2003; Mikaere 2008)
- a failure to permit meaningful forms of indigenous self-determination, ownership or empowerment (Blagg 2008; Blagg et al 2005; Tauri 1996, 1999; Walters, Bradley and Tauri 2005; Dickson-Gilmore and La Prairie 2005).

Alongside these problems, approaches to indigenous offending are characterised by two dominant tensions. The first relates to cultural difference and involves the tension between recognising ethnic difference and justifying the need for ethnically and culturally-targeted initiatives on the one hand, while simultaneously resisting causal links between crime, ethnicity, and culture on the other. As this chapter and Part 1 of the report have shown, many academics and government departments have responded to the problem of ethnic disparities in criminal justice outcomes by denying the explanatory utility of ethnicity and/or culture using multivariate studies. As this chapter has demonstrated, the move to elide the relevance of culture/ethnicity has been resisted by some indigenous individuals and groups who argue that culture and ethnicity remain core factors. Proponents of this approach argue that in denying the cultural aspect academics and governments fail to examine why it is that members of certain cultural groups are over-represented in the broad range of general risk factors which do predict offending (see, for example, Jackson 1988). This tension represents a key issue which should be taken into account when developing and justifying responses to indigenous offending.

The second tension is related to issues around indigenous self-determination, empowerment and control. Much of the literature suggests that successful programmes for reducing indigenous offending are those in which indigenous communities have some degree of ownership and control. However, authors such as Blagg (2008) claim that this does not mean that indigenous communities should be left alone to resolve the problem of indigenous crime. He points out that devolving ownership and control to indigenous communities may in fact require “greater – not less – central government involvement and commitment” (Blagg 2008, p200). Commenting on this issue in the Canadian context, Dickson-Gilmore and La Prairie (2005) similarly note that the indigenous communities to which responsibility for crime problems is devolved are seldom those with sufficient levels of social capital to develop, implement and sustain successful responses. They further note:

*...insofar as non-Aboriginal policies and practices have long fed into and encouraged the poverty and dysfunction that affects too many Aboriginal lives, it is hardly fair to expect communities to walk the path to a better place alone (Dickson-Gilmore and La Prairie 2005, p229).*

This tension between facilitating indigenous self-determination and empowerment on the one hand, and transferring the responsibility for ‘solving’ indigenous crime problems to indigenous communities on the other, provides another important challenge in responding to indigenous offending and over-representation in the criminal justice system more broadly. As Blagg (2008) has acknowledged the extant research does not provide any clear direction about the precise form the relationship between the state and indigenous communities should take.

## Summary

This chapter has described responses to ethnic disproportionality that are based (albeit often implicitly) on the premise that indigenous and ethnic-minority offending needs to be addressed in order to reduce the over-representation of these groups in the criminal justice system.

It has noted that although there is much agreement within the literature about the utility of addressing indigenous and ethnic-minority offending, there is disagreement about how this can best be achieved and the role of culture in both explaining indigenous offending and developing effective responses to reduce it.

In New Zealand and internationally (notably, Australia and Canada) a number of programmes have been developed to address indigenous offending. It has been shown that these programmes typically range from those that target generic risk factors with cultural components bolted on, to those that place more emphasis on cultural factors as a prerequisite for reducing indigenous offending.

The evaluative research produced on these responses has shown that both types of responses experience a number of advantages and disadvantages. Key advantages associated with such responses include:

- the development of positive cultural identities
- increased knowledge of whakapapa/tribal history
- improved relationships with whānau/family
- increased motivation for positive change.

Common limitations include:

- problems obtaining sustainable funding
- the underutilisation of cultural programmes
- a lack of evidence that such programmes reduce offending and re-offending
- a deficit in outcome evaluations of programmes (and available data to support such work)
- a failure to permit meaningful self-determination and empowerment for indigenous people.

More fundamental criticisms of responses to indigenous offending have been expressed in the literature. These include the fact that despite identifying a range of structural factors (such as the generally disadvantaged position of indigenous groups within society) as key explanations for the offending and subsequent over-representation of indigenous peoples in the criminal justice system, responses continue to target problem individuals, families and communities rather than addressing the broader structural inequalities in which they reside.

Scholars have also pointed out that the state focus on reducing indigenous offending as a means to reduce over-representation, has often occurred at the expense of addressing the contribution of the criminal justice structures, processes and practices to the over-representation of indigenous people in the criminal justice system. As demonstrated in Part 1, explanations for indigenous and ethnic minority over-representation are multifaceted and more complex than a simple focus on reducing offending allows. Consequently, in order to successfully respond to ethnic over-representation, the extant research literature suggests that it is necessary to look towards responses that also recognise the role of the criminal

justice system in creating and perpetuating disproportionate outcomes. The following two chapters will explore the literature available about such responses.



## Part 2: Chapter 2 – Responding to direct discrimination in the criminal justice system

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### Introduction

As noted in Part 1, while accepting the impact of socioeconomic factors on indigenous and ethnic-minority offending rates, a number of authors have argued that bias on the part of the criminal justice system also plays an important role in the over-representation of these groups in the criminal justice system (Fergusson, Horwood and Lynskey 1993a; Reiner 1993; Hudson 1993a; Jefferson 1991; Jackson 1988; Department of Corrections 2007a; Cole et al 1995; Cunneen 2001, 2006, 2008; Weber 2007; O'Malley 1973; Findlay 2006; Spohn 2000; Mann 1995; Walker, Spohn and DeLone 2004). Ombudsman, Mel Smith, for example, observed in his report on the criminal justice sector in New Zealand that:

*I have no doubt that socioeconomic status has a large part to play ... But I do not accept that socioeconomic status explains all the differences. If that were so, I would expect [apprehension] rates for Māori and Pacific peoples to be more closely aligned (Smith 2007, p67).*

For those writing from this perspective, ethnic disproportionality is exacerbated by a fundamental lack of cultural understanding, sensitivity, and responsiveness on the part of the criminal justice system (whether at an individual or organisational level) which, in turn, impacts detrimentally on the relationships between particular ethnic-minority groups and the justice sector (Cunneen 2001, 2006, 2008; Weber 2007; Cole et al 1991; O'Neill and Bathgate 1993). The importance of addressing this deficit has been emphasised by a number of scholars in New Zealand, with several studies highlighting a lack of cultural sensitivity among justice personnel (especially police) and culturally inappropriate justice processes as key areas of concern (Maxwell and Smith 1998; Te Whaiti and Roguski 1998; AC Nielsen McNair 1997; Jackson 1988; Walters, Bradley and Tauri 2005; Te Puni Kōkiri 2000; Quince 2007; Webb 2003).

In responding to these concerns, criminal justice agencies have typically adopted two broad approaches: inward-focused responses and outward-focused responses.

- Inward-focused responses are directed towards improving cultural understanding and sensitivity within the criminal justice system in order to improve its responsiveness to ethnic-minority groups. Such approaches include the adoption of specific ethnic minority or indigenous organisational strategies or policy statements, the recruitment, retention and promotion of ethnic minority or indigenous staff, racism screening tests for new employees, cultural awareness training for staff, and curbing individual discretion through rule making and monitoring.
- Outward-focused responses look to improve the relationship between criminal justice agencies and the ethnic-minority communities they service. These responses have

typically been aimed at improving public accountability processes as well as increasing ethnic-minority participation in the delivery of criminal justice processes.

This chapter will explore the research literature on each of these approaches in turn. In doing so, it will identify key advantages and disadvantages which have been identified in the literature. As noted in the Introduction, for the purpose of this report responses have been broadly conceptualised to include practical policies, programmes and initiatives, organisational strategies, national inquiries, as well as academic arguments and recommendations which have yet to find expression in criminal justice policy or practice.

## **Inward-focused responses: improving cultural sensitivity and responsiveness within the criminal justice system**

Accusations of criminal justice bias have generated a range of inward-focused responses on the part of criminal justice organisations. These can be grouped into five main types:

1. commissioning government inquiries to investigate potential bias in the criminal justice system
2. developing high-level strategic government or departmental statements or agreements which formally reinforce organisations' commitment to ensuring equal opportunities and working with ethnic-minority communities
3. recruiting, retaining, and promoting ethnic minority and indigenous staff
4. the implementation of cultural awareness training for justice sector staff
5. constraining the amount of discretion available to criminal justice decision makers to ensure that the operation of discretion does not disadvantage ethnic-minority groups.

The following sections will discuss each of these responses, in turn, highlighting key advantages and limitations where appropriate.

### **Government inquiries into criminal justice system bias**

One key government response to accusations of racial bias in the criminal justice system has been to commission inquiries into the practices of criminal justice agencies (Williams, T. 1999; 2001; McDonald 2004; Clark and Cove 2004; Rowe 2004; Foster, Newburn and Souhami 2005). During the 1980s and 1990s a number of government inquiries were undertaken in England and Wales, Canada, and Australia. Inquiries in this area have often focused on police, which, as noted in Part 1, is largely attributable to the high public visibility of police work, and the fact that the police represent the 'gatekeepers' of the criminal justice system.

#### **England and Wales**

Two inquiries have played a dominant role in shaping policing and criminal justice practices in relation to ethnic minorities in England and Wales: the Scarman Report (1981) and the Macpherson Report (1999). The Scarman Report was commissioned in response to urban disorder in several metropolitan areas during the early 1980s following saturation policing



operations which entailed excessive use of stop and search practices against black citizens. It highlighted deeper problems in police and ethnic-minority community relations and resulted in a number of recommendations focused on addressing and neutralising racism in policing (Foster, Newburn and Souhami 2005; McLaughlin 2007). The Scarman Report eschewed accusations of institutional or systematic racism in policing, and instead focused on addressing individual prejudice among officers.

The report was subsequently criticised for its individual focus and received significant resistance from some police officers, who rejected the report owing to its implication that they were personally racist (Bourne 2001). Despite this, it nonetheless catalysed a series of reforms around the exercise of police discretion culminating in the introduction of the Police Criminal Evidence Act (PACE) in 1984, which sought to restrict the levels of discretion available to police in the area of stop and search practice (Brown 1997).

The Macpherson Report was commissioned in 1997 following the race-based murder of black youth, Stephen Lawrence, and the inadequacy of the investigation into his death by the London Metropolitan Police Service (MPS) (Rowe 2004). The inquiry examined broader issues of police–community relations and discrimination both among MPS staff, and in the organisation’s policies and practices (Foster, Newburn and Souhami 2005, p1). The most significant finding of the inquiry was that the MPS was ‘institutionally racist’. In reaching this conclusion, the report marked a significant shift from focusing on individual racism and the actions and behaviours of officers, to acknowledging the pervasiveness of racism within the structure of police organisations (Holland 2007; Macpherson 1999; McLaughlin 2007; Souhami 2007). However, as pointed out in the Introduction, Macpherson’s definition was not entirely straightforward insofar as his description of institutional racism problematically confused individual and organisational bias.

Again, the report was widely criticised by police on the basis that it was interpreted as accusing all staff of being racist. According to Souhami (2007) this rejection arose because officers fundamentally misunderstood the concept of ‘institutional racism’ and conflated institutional with individual racism. Conversely, it has also been suggested that the concept of ‘institutional racism’ led individual racism to be overlooked, and allowed officers to avoid taking responsibility for their racist behaviours as the problem was seen as organisational rather than personal (Bridges 2001; Souhami 2007; McLaughlin 2007).

The Macpherson Report has undeniably had a significant impact on the development of policing policy in the United Kingdom. Among its 70 recommendations were a number tightening the rules relating to stop and search practices, the need to establish and meet ethnic-minority recruitment targets, making racism by police officers a disciplinary offence punishable by dismissal, the development of an independent police complaints system, and the introduction of revised race awareness/diversity training (McLaughlin 2007).

### **Australian inquiries**

Several large-scale inquiries have examined issues relating to Aboriginal people and the criminal justice system in Australia. These include the Royal Commission of Inquiry into

Aboriginal Deaths in Custody (RCIADIC) in 1987–1991, and the Australian Human Rights and Equal Opportunities Commission of Inquiry into Racist Violence from 1989–1991.

The RCIADIC was commissioned in response to public concern over the increasing numbers of Aboriginal people dying in police custody. The Commission reviewed Aboriginal deaths in custody during the 1980s and concluded that these were not caused by police violence, but resulted from system failures and an absence of police duty of care (McDonald 2004). It further concluded that the large number of Aboriginal deaths in custody was symptomatic of the gross over-representation of Aboriginal people in the criminal justice system *per se* (McDonald 2004; Baker 2001). It emphasised the importance of more broadly addressing the disproportionate representation of Aboriginal people entering the criminal justice system (Baker 2001; Nagle and Summerrell 2002).

The RCIADIC identified both system defects and institutional racism as causes for over-representation, while also highlighting the importance of underlying causes related to Aboriginal offending (McDonald 2004). A significant aspect of the RCIADIC report was the acknowledgement of the need for Aboriginal self-determination for effective change, suggesting that Aboriginal people have control over decision making processes on justice matters affecting Aboriginal groups (McDonald 2004). Furthermore, the report recommended that the principle of self-determination be applied to the design and implementation of any policy or programme affecting Aboriginal people (McDonald 2004). Like the Macpherson Report, the RDIADIC represented an important catalyst for criminal justice reform in relation to Aboriginal peoples throughout Australia.

During the RCIADIC another inquiry was commissioned to investigate the broader issues of racist violence in Australia. This was a response by the Australian Human Rights and Equal Opportunities Commission (AHREOC) to widespread public concerns that racist violence was increasing (AHREOC 1991). The inquiry found that racist violence, harassment, and intimidation against Aboriginal people, and people from other ethnic-minority groups, were endemic, nationwide and severe. In relation to policing, it concluded that racism was widespread within policing agencies, and caused serious problems in the relations between police and Aboriginal people. It recommended that policing agencies develop a code of practice for responding to Aboriginal people and improve procedures for collecting and analysing data on ethnicity and crime (AHREOC 1991).

### Canadian inquiries

Around the same time that the Australian reports were released multiple inquiries were commissioned in Canada, including: The Royal Commission on the Donald Marshall Jnr Prosecution (1990); the Public Inquiry into the Administration of Justice and Aboriginal People in Manitoba (1991); The Royal Commission on Aboriginal peoples (RCAP) published in 1996; and the Report of the Commission on Systematic Racism in the Ontario Criminal Justice System, which was established in 1992 and reported in 1994 and 1995.

The Royal Commission on the Donald Marshall Jnr Prosecution, and the Public Inquiry into the Administration of Justice and Aboriginal People in Manitoba were both commissioned as a response to specific cases involving Aboriginal individuals receiving inadequate responses

from justice agencies (Clark and Cove 2004). Both inquiries were critical of the criminal justice system, concluding that many of the problems were a result of systemic, institutional racism in the system, requiring extensive reforms (Clark and Cove 2004; McNamara 1992). Each acknowledged the failure of the justice system to account for the cultural differences of Aboriginal people, and made extensive recommendations, including the need for the justice system to be more responsive to the conditions and needs of Aboriginal people (Clark and Cove 2004; McNamara 1992). A significant aspect of the Manitoba report, not raised in the Donald Marshall report, was a discussion of Aboriginal self-determination including the recommendation that the possibility of establishing separate Aboriginal justice systems needed to be explored (Clark and Cove 2004; McNamara 1992). The Manitoba report went on to recommend that Aboriginal justice systems should be established in Aboriginal communities, beginning with the establishment of Aboriginal courts and police services (McNamara 1992).

The Royal Commission on Aboriginal Peoples (RCAP) was a broader inquiry commissioned over five years to investigate crime and punishment as part of a wider exploration of the social, economic and cultural position of Aboriginal people in Canada. It found that crime and punishment were linked to broader issues related to the “culturally inappropriate application of the law, discrimination in the criminal justice system, and the need for separate programs” (Clark and Cove 2004, p309). The inquiry found that the criminal justice system had failed to effectively serve indigenous people, and therefore recommended the development and implementation of a separate Aboriginal justice system, rather than making changes to the current system (Clark and Cove 2004). It emphasised the need to enhance Aboriginal self-determination, and recognised that the ideologies and structures of the mainstream criminal justice system fundamentally conflicted with Aboriginal values and modes of conflict resolution (Clark and Cove 2004).

The Commission on Systematic Racism in the Ontario Criminal Justice System (CSROCJS) was established in response to protests from Toronto’s black community following a series of police shootings involving black people (Williams, T. 2001). The Commission focused on ‘anti-black’ racism and adopted a ‘whole-of-system’ approach that involved investigating the police, the courts and correctional services (Cole et al 1995). It concluded that the Ontario criminal justice system was “systematically racist” insofar as its values, practices and decision making procedures resulted in black people receiving adverse treatment compared to the majority population (CSROCJS 1994, p1). Pre-empting the Macpherson report, the report emphasised that systematic racism did not require intent, as “even when there is no intention ... the rules, values and policies that shape decisions may have discriminatory consequences” (CSROCJS 1994, p1). However, in a similar vein to Macpherson the Commission’s definition of ‘systematic racism’ conflated individual racism with more entrenched forms of organisational and state bias (Williams, T. 2001). The report made 13 recommendations, including the need to re-emphasise principles of restraint in sentencing, increasing police accountability, and introducing cultural awareness-raising initiatives for police, judges, and correctional staff (Cole et al 1995; CSROCJS 1994).

## New Zealand

To date the New Zealand government has not established an equivalent style of official inquiry into the over-representation of indigenous and/or other ethnic-minority groups in the criminal justice system. However, individual departments within government have undertaken research into this issue. For example, during the late 1980s (in line with the establishment of official inquiries in other jurisdictions) both the Department of Social Welfare and the Ministry of Justice published reports examining monoculturalism and institutional racism in New Zealand's social welfare system and criminal justice system respectively (the Ministerial Advisory Committee on a Māori Perspective on the Department of Social Welfare 1988; Jackson 1987, 1988). Both reports found evidence of a lack of Māori input into policies that were likely to impact disproportionately on Māori, and concluded that apparently neutral laws, practices and policies were in fact monocultural and effectively excluded Māori cultural values and perspectives. Recommendations focused on improving government consultation processes with Māori, and increasing Māori involvement in, and ownership of, responses directed towards remedying social problems that disproportionately affect Māori.

In addition, while housed within the Department of Prime Minister and Cabinet, the Crime Prevention Unit published a report (the Doone Report) exploring ways to 'close the gap' between Māori and other ethnic groups in the context of the criminal justice system (Doone 2000). This report focused on common risk factors associated with offending, and, as noted in the previous chapter, argued that Māori over-representation was not caused by cultural or ethnic-specific factors. It recommended that the government should develop responses aimed at addressing general risk factors, adopting an 'integrated' and holistic interagency approach in order to overcome the previous 'fragmented' nature of responses in this area. It also identified the inadequate funding and support of Māori crime prevention programmes by central government as a key reason for their failure to reduce Māori offending and over-representation. The Doone Report further emphasised the need for justice sector agencies to produce formal Māori responsiveness strategies and develop common measures for testing programme success and cost effectiveness.

While not at the same level of formality as the official inquiries evident in other jurisdictions, the findings of these reports were broadly similar to those reached elsewhere at this time.

### Assessing the impact of official inquiries

All the inquiries were given general support from their respective governments at the time of their publication. For example, the United Kingdom and Canadian reports were generally endorsed by their respective governments, while the Australian government responded to the RCIADIC report by establishing the Aboriginal and Torres Strait Islander Commission (ATSIC) to promote Aboriginal self-determination, and committed \$400 million to programmes and services for Aboriginal communities (McDonald 2004; Cunneen 2006).

Despite this, these inquiries have not subsequently been considered particularly effective at reducing the over-representation of indigenous or ethnic-minority groups. As will be discussed below, many of Macpherson's recommendations have either not been implemented as intended, or have not delivered the anticipated results (Bridges 2001). For

example, recent research undertaken by the Home Office found that while the use of overtly racist language and behaviours has been largely extinguished across constabularies in England and Wales, there is evidence that a pervasive culture of racism persists (Foster, Newburn and Souhami 2005; Souhami 2007; McLaughlin 2007). Further research undertaken by the Home Office has also revealed that there is little sign of improvement in stop and search recording or ethnic disparities in stop and search statistics post-Macpherson (Bland, Miller and Quinton 2000a). Similarly, in a review of the implementation of the Macpherson recommendations in the Greater Manchester area, Holland (2007) found that police had responded to the recommendations through a series of short-term projects and operations, in what Holland terms a 'crisis response' to the problem. For sustained changes to occur, he argues, a more long-term commitment to fundamental changes in policing is required.

A similar lack of progress has been observed in Australia. Over a decade after the release of the recommendations of the Australian RCIADIC report, Baker (2001) argues that the problem of over-representation of Aboriginal people in the Australian criminal justice system has not been adequately addressed, with the disparity between Aboriginal and non-Aboriginal people in prisons increasing since the publication of the RCIADIC report (see also Fitzgerald 2009). She points out that this is because many of the RCIADIC recommendations have not been implemented, either as intended or at all, and is not because the recommendations themselves were necessarily ineffective (Baker 2001). In an earlier evaluation of the RCIADIC recommendations, Cunneen and McDonald (1996) attributed the failure of the recommendations to adequately address Aboriginal over-representation to three overarching factors:

- an inadequate regard for the need for negotiation with Aboriginal peoples in the design and delivery of services, and the broader failure to appreciate the centrality of Aboriginal self-determination to the success of other recommendations
- the existence of a wider sociopolitical climate which worked against the interests of Aboriginal people receiving fair and just treatment, epitomised by the political ascendancy of more punitive justice strategies which undermined efforts to decriminalise certain types of offending and reduce Aboriginal imprisonment (see also Blagg 2008; Pratt 2007)
- inadequate information systems which limited government accountability and prevented the accurate scrutiny of claims that over-representation had been reduced.

Despite these criticisms, in each of the three countries the inquiries have created an environment for the widespread implementation of initiatives focusing on the development and maintenance of individual or organisational changes, many of which are aimed at addressing the problematic relationship between ethnic minority and indigenous groups and the criminal justice system (Foster, Newburn and Souhami 2005; McDonald 2004; Williams, T. 2001).

In the United Kingdom, a recent Home Office evaluation examining the impact of the Macpherson Report concluded that the report was a lever for positive and substantial change in the police service (Foster, Newburn and Souhami 2005). Both United Kingdom inquiries

were particularly instrumental in the development of cultural awareness programmes and recruitment targets for hiring ethnic-minority staff. The Home Office evaluation also noted that post-Macpherson there were significant improvements in recording and monitoring of hate crime, increased consultation with local ethnic-minority communities, and a marked decline in the use of racist language among police officers (Foster, Newburn and Souhami 2005).

In Australia, McDonald (2004) has more recently pointed out that the inquiries significantly raised the profile of Aboriginal disadvantage in both the context of the criminal justice system and Australian society more broadly, and helped to catalyse a number of grass-roots justice initiatives within Aboriginal communities. For this reason, he argues, their significance in responding to the problem of over-representation should not be underestimated.

### **Ethnic strategies and policy statements**

A common managerial response to the over-representation of ethnic minorities in the criminal justice system has been the development and publication of organisational policy statements or strategies which reiterate equal opportunities legislation and/or state how justice agencies will respond to the problem of ethnic disproportionality at an organisational or strategic level.

Examples of this type of response in the New Zealand justice sector include the development of a Treaty of Waitangi Strategy, and, more recently, the Māori Strategy 2003–2008 by the Department of Corrections (Department of Corrections 2003) and the publication of Māori and Pacific Responsiveness Strategies by New Zealand Police (Te Puni Kōkiri 2002; NZ Police 2002). In Australia, a similar process occurred during the 1980s and early 1990s, whereby federal and state departments (including police) were directed to develop and publish Ethnic Affairs Policy Statements (EAPS) and later Aboriginal Affairs Policy Statements (Chan 1997). In addition, all states in Australia now have Aboriginal Justice Plans (Cunneen 2001, 2008).

In 2005 the Ministry of Justice in New Zealand published its strategic plan for 2005 to 2010 (Ministry of Justice 2005). Within the plan, Māori were identified as a key focus area and the Ministry stated its commitment to the development of “a co-ordinated strategy to enhance our responsiveness to Māori” (Ministry of Justice 2005, p42). At the time of writing, this strategy has yet to be fully developed. The Ministry’s strategic plan, however, acknowledges the over-representation of Māori within the justice system as a matter of concern (Ministry of Justice 2005, p42) and notes that the Ministry “contributes, at the Ministry and sector level, through sector strategies and approaches, to reducing this over-representation” (Ministry of Justice 2005, p42).

While scholars note that it is important that criminal justice agencies formally articulate a commitment to equal opportunities and develop policies to try to reduce ethnic disproportionality, there is some scepticism about the ability of strategies to work in practice. Thus, in relation to the adoption of Ethnic Affairs Policy Statements by police in Australia, Chan (1997, p53) observed that:



*... broad statements of policy do not provide adequate guidance in terms of everyday police work and, unless gross levels of discrimination against ethnic minorities can be proved, have minimal effect on police practices.*

Similar concerns have been expressed in New Zealand. For example, when the Department of Corrections held consultation hui on their draft Māori Strategy it discovered some level of cynicism on the part of Māori about the ability of strategic plans to effect real change (Department of Corrections 2003). Key criticisms raised by Māori stakeholders included:

- that the strategy was vague, uncertain and used hollow terminology that failed to convey any concrete changes
- strategic plans in general are rarely translated into practice, giving the impression that nothing ever changes
- what is needed is action not paper statements
- there was a lack of discussion in the strategy about how it would be monitored to ensure its objectives were actually met
- by focusing only on one agency, the strategy failed to achieve the holistic approach to crime problems deemed necessary.

Similar sentiments were conveyed by Jackson (1988, p252) over a decade earlier, when he noted that:

*If commitments to biculturalism or the interests of the tangata whenua are confined merely to policy statements of intent, or do not move beyond making people culturally aware, they effectively make no real change.*

## **Recruitment and retention of ethnic minority staff**

Another response to ethnic disproportionality has been the development of recruitment policies that aim to increase the representation of ethnic-minority groups employed in the justice system. Research on this response has focused almost exclusively on policing; consequently this will form the main focus of this section.

There have been two main arguments advanced for increasing employment of ethnic-minority people in the justice system. First, a number of authors (Fielding 1999; Home Office 2008; McDonald and Whimp 1995) propose that doing so will improve the relationship between police and ethnic-minority communities. This is based on the assumption that the relationship between the police and the public is largely influenced by whether the public consider the policing agencies to be representative of the community they serve (Fielding 1999; Home Office 2008; McDonald and Whimp 1995; NZ Police 2006). The second argument is that the recruitment of substantial numbers of ethnic-minority people will challenge racist attitudes in existing officers and police culture more broadly, and consequently bring about behavioural change (Fielding 1999; Matravers and Tonry 2003; McDonald and Whimp 1995).



Increasing employment of ethnic-minority people is commonly achieved through the use of targets. Targets are evident in police forces throughout the United Kingdom, United States, Australia, and New Zealand (Mossman et al 2008). In New Zealand, the 'People in Policing HR Strategy' (NZ Police 2001) established ethnic-based employment targets to be achieved by 2005. This specified that 12.5 percent of police staff should be Māori, and 7 percent should be Pacific peoples.<sup>45</sup> This policy also set targets for the numbers of ethnic-minority police in senior roles (NZ Police 2001). The 2005 NZ Police Annual Report, however, showed that these targets were not met, with Māori accounting for 11 percent of police staff, and Pacific peoples 4 percent (NZ Police 2005). More recently, the 2007 Police Annual Report reveals that these targets have not been reached (NZ Police 2007), while a report published in 2008 shows that the proportion of Māori recruits declined from 25.5 percent in 2000/01 to 20.7 percent in 2006/2007. The proportion of Pacific recruits, however, has remained relatively stable during this time at around four to five percent (Mossman et al 2008, p41).

Research has demonstrated a number of problems with employment targets (Chan 1997; Rowe 2004). Police departments in Australia and New Zealand have noted difficulties in attracting and recruiting ethnic-minority officers (Chan 1997; Weber 2007; Mossman et al 2008; see also Ho, Cooper and Rauschmayr 2007). In Australia, this has been attributed to a general reluctance among ethnic-minority people to join an organisation they perceive as racist, in addition to the poor historical relationship between Aboriginal people and Australian police services (Chan 1997; Weber 2007).

Some authors have argued that recruiting to achieve a more ethnically representative police service will not involve the number of ethnic-minority people required to effect real change in police racism (Chan 2005, 1997; Fielding 1999; Rowe 2004). For example, Fielding (1999) argues that ethnic-minority recruitment needs to occur in proportions substantially beyond their representation in the general population in order for fundamental change to be achieved. Other scholars dispute the ability of employment targets to guard against police racism, not because of insufficient numbers recruited, but because the initiative fails to address either the underlying police culture(s) or the structures and processes of policing that perpetuate racial bias (Chan 2005, 1997). Such concerns were recognised by the Commission of Inquiry into Police Conduct in New Zealand in 2007, which recommended that in addition to the recruitment of women and ethnic-minority staff, an independent body should undertake an annual 'health of the organisation' audit of police culture to ensure that the organisation "provides a safe work environment for female staff and staff from ethnic-minority groups" (Bazley 2007, p300).

Walters, Bradley and Tauri (2005) have critiqued responses such as ethnic-minority recruitment in New Zealand suggesting that they represent a broader state strategy of indigenisation. 'Indigenisation' is defined as "a process whereby attempts are made to increase the number of indigenous people making a positive contribution to the running of the criminal justice system" (Walters, Bradley and Tauri 2005, p138; see also Tauri 1999). Walters, Bradley and Tauri (2005) are critical of the rationale behind such responses: namely the belief that increasing the number of indigenous people working in the system will create a

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<sup>45</sup> More recent targets have been established but were not publicly available at the time of writing.

system that is more responsive to the needs of Māori. They note four particular areas of concern:

1. such policies represent a token effort and simply allow the government to be seen to be 'doing something' about indigenous over-representation as offenders and victims
2. recruiting small numbers of indigenous staff does not amount to indigenous empowerment as the justice practices, policies and philosophies remain unchallenged and are still controlled by the state
3. indigenisation practices effectively continue the colonial process by further disempowering indigenous peoples
4. such responses operate to legitimise existing colonial justice structures insofar as the aim is "to devolve a limited amount of authority to indigenous groups in order to maintain hegemony (ideological and political control) rather than relying on coercion" (Walters, Bradley and Tauri 2005, p139).

### **Racism screening tests for new employees**

Racism screening tests were recommended by the Association of Chief Police Officers (ACPO) in the United Kingdom following the airing of the BBC documentary *The Secret Policeman* in 2003, which revealed police recruits using racist language and stating that they would purposely target certain ethnic-minority groups for police contacts (McLaughlin 2007). ACPO introduced a standardised race and diversity assessment process, whereby candidates were evaluated on a number of competencies, including "respect for race and diversity" (McLaughlin 2007). ACPO also instigated covert monitoring and integrity testing to detect officers suspected of racism that were employed prior to the implementation of the screening tests. However, there is little information provided in the literature about how this competency was practically tested or measured as part of a recruitment process. There is also no published evaluative work available on these initiatives. Consequently, it is currently not possible to gauge the effectiveness of such tools.

### **Cultural awareness training**

A common response to disproportionate criminal justice outcomes and accusations of criminal justice bias has been the introduction of cultural awareness training programmes (also termed 'community race relations training' and 'diversity training') within criminal justice agencies. Cultural awareness-raising initiatives are found in the United Kingdom, United States, Australia, Canada and New Zealand (Chan 1997; Fielding 1999; Foster, Newburn and Souhami 2005; Rowe and Garland 2007; Department of Corrections 2003; Williams, C. 2001). Specific examples in New Zealand include the cultural awareness training undertaken by police recruits and probation officers, as well as cultural awareness programmes for judges.

International research on the effectiveness of cultural awareness and/or community race relations training has focused predominantly on the police, with little research exploring the impact of diversity training in other parts of the criminal justice system. To date, no New Zealand evaluations have assessed the effectiveness of cultural awareness programmes

within justice sector agencies. The findings presented in this section are therefore derived from research based on police training programmes overseas.

Research has identified a number of benefits associated with cultural awareness training. Commonly cited benefits include: the building of positive relationships between the police and the community, especially ethnic-minority communities; a reduction in racial stereotypes held by police officers; an enhanced familiarity with the outlooks, beliefs, and customs of people in minority-ethnic groups; and the development of an environment of increased cultural tolerance in policing (Harris 2002; Matravers and Tonry 2003; Foster, Newburn and Souhami 2005).

The objectives of cultural awareness training and the assumptions that underpin them are often poorly defined (Chan 1997). However, it is typically assumed that these programmes are the best mechanism for dealing with poor relations between ethnic-minority communities and police. Despite this assumption, researchers have demonstrated that these programmes are often built on a number of problematic assumptions, namely that racist attitudes arise from a lack of knowledge or education and are logically linked to racist behaviours (Rowe 2004; Cashmore 1991). It is therefore believed that by filling a gap in cultural knowledge a change in racist attitudes will ensue, leading to improvements in individual behaviours and decision making practices in relation to ethnic-minority people. These assumptions have been widely questioned by researchers (see Rowe 2004; Chan 1997; Holdaway 1996; Cashmore 1991).

The problem definition implied by this training (namely, that racist attitudes cause disparate outcomes) is generally not made explicit within such programmes, with the programme objectives, and the logic for how such programmes will improve ethnic minority–police relations, rarely made clear (Rowe and Garland 2007). Consequently, measuring the success of cultural awareness programmes has often been focused on more tangible outputs such as: the numbers of staff who completed training, the amount of racist language subsequently found among police officers, or, in the case of judges and probation officers, the level of racist language and/or obvious racial stereotyping found in the documents they produce (see Gelsthorpe 1993). While a number of evaluations of such programmes have been conducted (especially in the United Kingdom), these have largely been process evaluations and have accordingly focused on the numbers who attended, their perceptions of its utility, and the practical difficulties entailed in implementing cultural awareness programmes (Chan 1997; Rowe 2004; Rowe and Garland 2007). The evaluations produced have rarely assessed programme outcomes, and, as a result, have had little to say about their subsequent impact on participants' behaviour.

The literature has demonstrated a number of limitations with the design, implementation and outcomes of cultural awareness programmes (McLaughlin 2007; Rowe and Garland 2007; Rowe 2004; Chan 1997; see also Bhui (2009) for a critique of race relations programmes for prison staff in England and Wales). First, getting participating officers 'on side' is viewed as a significant obstacle to the success of such programmes. Evaluations have found that staff often resent cultural awareness programmes for a number of reasons including the perceived implication that they are being individually accused of being racist, a general resentment

towards 'politically correct', top-down initiatives imposed by management, and, specifically in relation to policing, the fact that such programmes are often seen to have little relevance to everyday police work (McLaughlin 2007; Rowe 2004; Rowe and Garland 2007).

Cultural awareness training programmes have been further criticised because they are largely attended by junior or newly recruited officers, who have little power to promote change among more senior staff. Accordingly, the ability of such programmes to change the broader culture within organisations has been questioned (Chan 1997, 2005; Fielding 1999). It has been further argued that there is a general lack of needs analysis and evaluation to determine whether the training is effective in changing behaviour, and/or whether follow-up training is required (Rowe and Garland 2007). Lastly, it has been argued that there is a lack of systems and structures in place to ensure that staff implement the lessons learnt. For example, research has shown that there is often little integration of cultural-sensitivity principles into staff performance reviews and a lack of ongoing training (Rowe and Garland 2007; Rowe 2004).

More fundamental criticisms have also been expressed about the ability of diversity training programmes to address racism insofar as they fail to address the racist aspects of organisational cultures in police and other justice agencies. For this reason, scholars have claimed, the benefits of diversity training will be limited (Chan 1997; Rowe 2004; Bhui 2009). For example, the ability of junior officers to implement the lessons learnt in the training will be restricted insofar as they are compelled to conform to the common practices of their peers and senior staff in the field. In addition, research by both Waddington (1999) and Smith (1983) has questioned the link between the attitudes and behaviour of police officers, noting that racist attitudes rarely find expression in actual police behaviour. As Rowe (2004) argues, if racist attitudes do not impact on the daily work of staff, then altering racist attitudes will not necessarily alleviate racist practices. For these reasons, the potential of cultural awareness training programmes to impact on the disproportionate representation of ethnic-minority people in the criminal justice system may be questionable.

As with recruitment, this type of response has been criticised as being part of a broader indigenisation strategy, which enables the government to be seen to be doing something about over-representation, without making any meaningful changes to the bias structures which underpin criminal justice institutions (Walters, Bradley and Tauri 2005). In addition, it has been suggested that such responses are an example of 'co-option'.<sup>46</sup> The main problem with such programmes, it is argued, is that they leave the base, biased structures of the criminal justice system untouched, and imply that all that is required is "minor tinkering" to make the system 'culturally appropriate' (Walters, Bradley and Tauri 2005, p142).

### **Changing organisational incentive structures**

In addition to recruiting more ethnic-minority staff and increasing cultural awareness, it has been suggested that changing the incentive or reward structures of criminal justice agencies to recognise the value of community-orientated goals can improve the relationship between ethnic-minority groups and the police, and, in turn, reduce ethnic disproportionality (Harris

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<sup>46</sup> See Chapter 1 for a definition of 'co-option'.

2002; Chan 1997; Shine 1985, 1992, cited in Chan 1997). Shine (1985, 1992, cited in Chan 1997) asserts that incentive structures are a key mechanism for embedding and reinforcing changes in organisational culture.

Harris (2002) describes how different incentive structures have been used to encourage community policing and engagement in ethnic-minority communities in some police services within the United States. According to Harris (2002), this has been achieved by reorientating reward structures to privilege work with community groups and the promotion of good relationships with ethnic-minority communities over traditional performance measures such as arrests and resolution rates. He provides the example of the San Diego Police Department, which moved away from the traditional incentive-based system focused on arrest/convictions to one in which “officers are rewarded based on the community policing work they do and its effectiveness at reducing crime” (Harris 2002, p167). Staff are encouraged to be problem-solvers and develop long-term solutions, rather than focusing on traditional short-term solutions and performance indicators such as arrest and/or conviction rates. Common rewards involved pay increases, promotions, and better assignments.

Little research has assessed the impact of incentive structures on policing behaviours specifically in relation to ethnic-minority groups, or examined the effectiveness of this approach in terms of reducing ethnic disproportionality. However, the ability of such an approach to impact on levels of disproportionality is contingent on a number of untested assumptions: first that disproportionality is a product – at least in part – of poor police/ethnic minority relations; second, that changing reward structures to encourage community policing practices will improve ethnic minority–police relations, and third, that this will contribute to a reduction in ethnic disproportionality. As will be discussed in Chapter 3, however, models of community policing that utilise more proactive policing techniques do not necessarily result in either improved police/ethnic-minority community relations or reductions in the disproportionate rates of ethnic-minority arrests (Harcourt and Ludwig 2007; Harcourt 2006).

## **Reducing individual discretion**

Another common organisational response to potential bias in the criminal justice system has been to reduce discretion through legislative rule tightening. Such responses are commonly employed by police (particularly in England and Wales) and, to a lesser degree, courts. They generally involve introducing more stringent guidelines for decision making, improved data collection tools, audits of administrative data, and the introduction of requirements to externally publish data disaggregated by ethnicity (Rowe 2004).

One of the most widely researched examples of this approach is the introduction of the Police and Criminal Evidence Act (PACE) 1984 in England and Wales. This Act aimed to restrict the levels of discretion available to police when undertaking stop and search activities (Rowe 2004). As noted above, PACE was developed largely in response to the publication of the Scarman Report in 1981, which had highlighted the disproportionate use of stop and search against black youth as a catalyst for urban unrest. Under PACE, officers are required to keep a record of the name, age and ethnicity of the person stopped, the reason for making the stop, the outcome, and the identity of the officer making the stop (Rowe 2004; Brown 1997).

Officers are also required to provide a record of the incident to the person stopped, as well as information on how to make a complaint against police for unfair treatment (Rowe 2004).

Alongside legislative reform, a number of practical changes have been made in an attempt to improve the recording and integrity of stop and search data in England and Wales. Such changes include the introduction of additional supervision and shift debriefs for officers involved in stop and search practices, modifying data recording forms and increasing mandatory fields on electronic forms to ensure more complete data collection, and internal and external records audits (Bland, Miller and Quinton 2000b). The assumption is that improved data monitoring and publication of ethnicity and crime data will act as a deterrent for officers stopping and searching people arbitrarily (Bland, Miller and Quinton 2000a; Rowe 2004). The further requirement of making this information publicly available, moreover, is intended to enhance public trust and confidence in the police service by ensuring the practice is open and transparent, and that officers are held accountable for their actions (Bland, Miller and Quinton 2000a, 2000b; Rowe 2004).

The degree to which recording procedures and data publication have been successful in curbing the disproportionate use of police stop and search on ethnic-minority people has been questioned by researchers (Chan et al 2004; Chan 1997; Rowe 2004; Miller, Quinton and Bland 2000a, 2000b). It has been argued that recording requirements suffer from a number of limitations. Evaluations have found that, despite the requirements imposed, officers continue to significantly under-record stop and search events. For example, a Home Office evaluation of stop and search practices found that only 27 percent of eligible stop and searches were actually recorded by officers (Miller, Quinton and Bland 2000a). It has also been argued that records often lack sufficient detail; for example, many fail to include the ethnicity of the person stopped or a specific reason for the stop (Harris 2002). Researchers have also been critical of the ability of improved recording and monitoring requirements to control police discretion. This is due to officers' rejection of any initiatives, including recording requirements, which are considered to be politically-driven, police management initiatives with little obvious value to everyday policing in practice (Chan 1997; Rowe 2004).

Collectively, then, research from the United Kingdom suggests that efforts to curb police discretion have not been particularly successful in reducing ethnic disproportionality, and certain ethnic-minority groups continue to be over-represented in stop and search statistics (Foster, Newburn and Souhami 2005; Rowe 2004). Researchers have argued that a key reason for the lack of progress is due to the prevalence of organisational cultures, which represent a major obstacle to successfully reducing biased police practices (Rowe 2004; Chan et al 2004; Chan 1997, 2005). Ruess-Ianni and Ianni (2005, p297) have suggested that this is because it is "the immediate work or peer group, and not the larger organisation, that motivates and controls behaviours".

Similar discretion-limiting responses have been introduced to reduce disparate sentencing outcomes within criminal courts in the United Kingdom and the United States. Cavadino and Dignan (2002) identify two main approaches that have emerged to reduce judicial discretion and improve consistency in sentencing practice in England and Wales. First are those that attempt to confine discretion through the development of minimum mandatory sentences.



They point out that such approaches have often not been particularly well received by judges, and yet still allow for a high level of discretion to be exercised by sentencers (Cavadino and Dignan 2002). In addition, research has suggested that the use of mandatory penalties for serious forms of offending often led to more severe sentences being imposed, has few deterrent effects, and that any positive effects it has, have been found to diminish over time (Tonry 1995). In the context of the United States, Tonry (1996) has pointed out that mandatory minimum sentences are typically applied to those offence categories in which ethnic-minority offenders are most heavily represented, and, consequently, their impact is disproportionately felt by these groups. Similarly in Western Australia the introduction of mandatory sentences for property offending was found to disproportionately impact on Aboriginal youth, and significantly reduced Aboriginal access to pre-trial diversion (Blagg 2008). According to Blagg (2008) the introduction of mandatory sentences has in practical terms served to remove the ability of judges to correct discriminatory policing practices.

A second approach to standardising judicial decision making has been the introduction of statutory sentencing guidelines, which prescribe appropriate penalties for a wide range of offender/offence combinations, and either allow sentences to be read off a matrix or alternatively allow adjustments to be made to a 'standard sentence' on the basis of an agreed set of aggravating or mitigating factors (Cavadino and Dignan 2002). Research from England and Wales has suggested that the judiciary has, on the whole, been more receptive to this approach (Cavadino and Dignan 2002). This approach has also been supported by some academics. For example, Matravers and Tonry (2003, p168) argue that "the promulgation of meaningful, discretion-reducing presumptive guidelines for sentencing is the most promising way to attack unwarranted disparities".

Empirical assessments of the impact of sentencing guidelines on ethnic minority disproportionality, however, have been inconclusive (Tonry 1996). Thus, while some evidence from the United States suggests that racial disparities have been successfully reduced following the adoption of sentencing guidelines (Tonry 1996; see also Cavadino and Dignan 2002, p98), other studies have found that the impact of sentencing guidelines is less clear cut. For example, in her extensive review of race and sentencing studies in the United States, Spohn (2000) found that racial disparities continued to be pronounced after sentencing guidelines had been introduced. On this basis she concluded that "attempts to constrain judicial discretion have not eliminated racial disparities in sentencing" (Spohn 2000, p479). An analysis of sentencing guidelines in Washington found that despite an overall reduction in racial disparities, disparities continued to be found in sentencing alternatives, with members of the majority population more than twice as likely as their black counterparts to benefit from mitigating provisions for first time offenders (Tonry 1996). An evaluation of sentencing guidelines in Oregon similarly revealed that judges were more likely to make upward dispositional departures from the guidelines and less likely to make downward departures in the case of black defendants (see Tonry 1996).

While the possibility of developing sentencing guidelines has been explored in New Zealand, such guidelines have not been implemented here (Young 2008). Their impact on levels of ethnic/racial disparities in this country is therefore untested.



Responses directed towards reducing discretion implicitly assume that the key problem is too much discretion and that rule tightening will reduce discretion and therefore lead to less disproportionality. A number of research studies, however, have questioned this assumption and demonstrated that, in isolation from cultural, individual and broader organisational and/or social change, this type of response is unlikely to be successful in addressing disproportionate criminal justice outcomes (Chan 1997; Rowe 2004).

## **Outward-focused responses: improving the relationship between ethnic minority communities and the criminal justice system**

Outward-focused responses generally involve two main approaches: increasing public accountability (for example, by publishing ethnicity and crime data, improving complaints procedures, and the introduction of lay visitor schemes) and increasing community participation in justice processes and policies (for example, through the development of community consultation groups, liaison officer roles, restorative justice and/or community-based diversionary initiatives, as well as improving the provision of legal advice and access to justice services).

The assumptions underpinning initiatives aimed at the justice–community level are not always made explicit beyond simply improving relationships between justice agencies (most typically police) and ethnic minority/indigenous communities. The belief that this is inherently worthwhile and will in some way improve ethnic-minority experiences as victims and offenders within the justice system has generally been accepted uncritically. Precisely how this response is intended to impact on levels of disproportionality is often not clear.

### **Increasing accountability**

There are three main mechanisms through which criminal justice agencies have attempted to improve levels of accountability in relation to ethnic-minority groups: the publication of ethnicity and crime data; the introduction of independent complaints procedures; and the introduction of lay visitor schemes. These initiatives will be addressed, in turn, below.

#### **Ethnicity and crime data publication**

Better data collection methods are widely endorsed as an appropriate organisational response to identifying and responding to potential bias in the criminal justice system (Dickson-Gilmore and La Prairie 2005; Miller, Quinton and Bland 2000a; Fitzgerald 1999). Moreover, as demonstrated in Part 1, the lack of available and reliable criminal justice ethnicity data has been bemoaned by authors in the United Kingdom, Australia, Canada and New Zealand (Bland, Miller and Quinton 2000a; Jeffries and Bond 2009; Blagg et al 2005; Dickson-Gilmore and La Prairie 2005; Doone 2000; Statistics New Zealand 2009). However, some academics and justice agencies, most typically policing organisations, have raised questions about the utility of collecting and publishing crime and ethnicity data (Chan 2000; Findlay 2000; New South Wales Police 2000). In 2000, a conference was held in New South Wales in Australia to discuss the future of ethnicity and crime data (Ethnic Affairs

Commission 2000). This conference identified three main challenges associated with the collection and publication of ethnicity data:

1. the logistics of collecting ethnicity and crime data
2. the biased nature of the data collected
3. the subsequent interpretation (and misreporting) of the data.

Each of these three areas will be discussed briefly below.

### *Logistic issues*

An overriding issue identified in recording ethnicity data is the difficulty associated with its collection. Ethnicity data for the criminal justice system in New Zealand, for example, is initially captured by police and then transferred to court records (see Morrison, Soboleva and Chong 2008). However, as New South Wales Police have pointed out, police are not always in the best position to obtain this data, as they cannot possibly ask the multiple questions required to get an accurate picture of a person's ethnicity (New South Wales Police 2000). Difficulties in the initial collection of ethnicity data have also been found in New Zealand, where police have acknowledged that suspects and/or offenders can be uncooperative and may refuse to answer questions about their ethnicity (see Morrison, Soboleva and Chong 2008, p24). In such circumstances police may use their knowledge or judgement to determine a person's ethnicity (in effect making a racial categorisation). Some research has also shown that the method of ethnicity data collection can itself lead to accusations of racism, especially when ethnicity questions are only asked to 'non-white' individuals and when no ethnicity data is recorded if the defendant is 'white' (see Chan 2000, p6). Police have also pointed out that neither victims nor offenders are legally required to disclose their ethnicity to justice agencies (New South Wales Police 2000).

There is also the more fundamental problem of how ethnicity is to be defined. Research has shown that people do not always respond as anticipated to ethnicity questions. For example, Parker (1995 cited in Collins 2000, p11) found that immigrant groups may often adopt the dominant ethnicity of their host country, finding that in the United Kingdom just under a quarter of Chinese people identified themselves as Chinese, one third identified themselves as British, and one-third identified themselves as Chinese-British. New Zealand research, moreover, has shown that people may change their ethnic identities over time, transitioning from one ethnic group to another depending on life circumstances, as well as using different ethnic categorisations in different contexts for different types of question (Statistics New Zealand 2005).

Research has also demonstrated that there are inconsistencies in the application of ethnic categorisations across different agencies. For example, Chan (2000) notes that within England and Wales different methods of defining ethnic group (and different ethnic categorisations) are utilised by police, the prison service, the probation service, and the

national census.<sup>47</sup> This inconsistency, Chan (2000) acknowledges, arises largely from the different operational imperatives and information needs of justice agencies, as well as administrative convenience (for example, it is easier to get prisoners to provide ethnicity information than people on the street). This, in turn, raises questions about the comparability of ethnicity data across the justice sector and whether the data under consideration can always accurately be described as 'ethnicity' data.

### *Biased data*

It has also been argued that ethnicity data suffers from the problem of selection bias (Mukherjee 2000, 1999). This is because offender ethnicity data is based only on those crimes for which an offender was apprehended. Mukherjee (1999) found that only 40 percent of all crime was reported to Australian police, of which only 25 percent was resolved. Consequently, she estimated that offender ethnicity data was potentially only available for 10 percent of all crimes occurring in Australia (Mukherjee 1999). She consequently warns that making assumptions about the ethnic composition of the 'real' offender population based on a small subsection of captured offenders is problematic and brings into question the practical utility of collecting ethnicity data; for it cannot be assumed that those apprehended are representative of the total offending population. In short, the sample of known offenders suffers from selection bias making it impossible to draw conclusions about the 'actual' offender population (Findlay 2000).

### *(Mis)Interpretation*

Chan (2000) points out that the interpretation of ethnicity and crime statistics is not clear-cut. She notes that figures demonstrating that particular ethnic groups are significantly over-represented in the criminal justice system should not be interpreted as evidence that these groups offend more. She argues that such findings should be correctly interpreted as the product of a complex interaction of factors including social and economic disadvantage, substance abuse, stereotyping and discrimination (Chan 2000). She recommends that the public should be made more aware of this complexity and educated about the fact that "even the most sophisticated and detailed analysis cannot always provide simple answers to why there is such a problem, let alone clear remedies in the form of policy or programmes" (2000, p2). For Chan, therefore, the collection and publication of ethnicity information can be counter-productive unless a concerted effort is made by criminal justice agencies to contextualise the data they report.

Researchers note there is an inherent danger in publishing ethnicity and crime data insofar as it narrows discussion of the issue by implying direct causal links between ethnicity and crime and minimising the large number of other factors which contribute to crime (NSW Police 2000; Chan 2000; Findlay 2000; Fitzgerald and Sibbitt 1997). Findlay (2000) warns that publishing ethnicity and crime data may lead to speculation about the causal links between crime and ethnicity based on incomplete data, and while this link cannot be proven

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<sup>47</sup> In New Zealand the Department of Corrections has traditionally been the only justice agency to apply the Statistics New Zealand standard for collecting ethnicity data. This involves utilising the census ethnicity question that allows respondents to self-identify with up to six ethnic groups (Statistics New Zealand 2005, 2009).

or dispelled, the stigmatisation of particular ethnic groups “inevitably results through the association” (Findlay 2000, p23).

### *Best practice in ethnicity and crime reporting*

While most academics and government agencies concur that the publication of ethnicity data may lead to increased accountability and permits important analysis to be undertaken to identify and address problems, the potential for misuse and misinterpretation is high (Findlay 2000; Fitzgerald and Sibbitt 1997; Chan 2000). To avoid the misuse of ethnicity and crime data, academics have recommended that there is a high level of honesty and sophistication in reporting, and that the methods of collection and limitations of this data are made patently clear. Doob (1991) suggests that unambiguous statements should be made about the data’s usefulness and that guidelines for its use be released alongside the data. He also suggests that resolution rates should be reported alongside ethnicity data to indicate the full extent of missing data, with the implications this has for its interpretation clearly set out. Doob (1991) further recommends that the release of ethnicity and crime data should ideally be co-ordinated with the release of commentaries from academics and other experts about the meaning of the data.

The collection and use of ethnicity data in the justice sector in New Zealand was recently reviewed by Statistics New Zealand (Statistics New Zealand 2009). The review concluded that “there is a clear need for all [justice] datasets to be able to be disaggregated by ethnicity (and by age, gender, and location) to establish and monitor the extent of offending by, victimisation of Māori, interventions that work well for Māori, and Māori rehabilitation” (Statistics New Zealand 2009, pp22–23). It further noted that ethnicity data collected by NZ Police (and also utilised by the Ministry of Justice) did not comply with the New Zealand Statistical Standard for Ethnicity, and, as a consequence, NZ Police data was not compatible with ethnicity data from other official sources. The review noted that lack of quality ethnicity data in the justice sector was “a major shortcoming, given the over-representation of some ethnic groups in the criminal justice system and the associated policy interest in them” (Statistics New Zealand 2009, p47). It recommended that a consistent ethnicity data standard should be implemented across the justice sector in compliance with the Statistical Standard.

### **Independent complaint procedures**

A common criminal justice response to accusations of bias has been to improve procedures for responding to public complaints. The literature on complaint procedures is largely centred on police. The main reason provided for this focus is that complaint procedures have been highlighted as problematic within larger inquiries into policing (for example, the Scarman Report 1981; the Macpherson Report 1999; and the Australian Royal Commission Inquiry into Aboriginal Deaths in Custody 1991). These inquiries found that complaint procedures were underutilised by ethnic-minority communities, and that ethnic-minority people had little trust that the complaints process would be fair and impartial, or that their complaints would be properly investigated (Rowe 2004; Bowling, Phillips and Shah 2003; McDonald and Whimp 1995).

Research has shown that ethnic-minority people are more likely to complain about police conduct than ethnic-majority population members, and, in the event they do complain, are less likely to have complaints upheld (Bowling, Phillips and Shah 2003; see also Cole et al 1995). This, in turn, can encourage negative perceptions of police and lead to resentment (Gallen 2000). Accordingly a process that is considered fair, impartial and effective, it is argued, may also work to increase ethnic-minority communities' trust in police (McDonald and Whimp 1995).

Little systematic research has been undertaken on complaints against police in New Zealand. However, the Sir Rodney Gallen Report on police complaints published in 2000 received submissions which indicated that Māori and Pacific peoples had particular concerns about making complaints against the police. As the report noted:

*The Brixton situation outlined in the Scarman Report makes it apparent that where suggestions of racism arise against the police, these must be dealt with rapidly and effectively to avoid the building of entrenched attitudes which are dangerous to society and police alike (Gallen 2000, pp35–36).*

The Gallen Report questioned the ability of the existing Police Complaints Authority (at that time housed within NZ Police) to impartially investigate complaints and elicit a sense of fairness among complainants. The Commission of Inquiry into Police Conduct reported similar concerns when it reported back in late 2007 (Bazley 2007). Both reports recommended the introduction of a completely independent organisation to investigate complaints against police and led to the establishment of the Independent Police Conduct Authority (IPCA) in 2007 (Bazley 2007; Gallen 2000).

Public inquiries have identified a number of factors required for effective public complaint procedures. It has been suggested that bodies investigating complaints should be completely independent from the police and should use independent investigators. It is further suggested that representatives from ethnic-minority communities should sit on tribunal panels when complaints involve ethnic-minority people. Internationally, refinements to complaints procedures have also included increasing the eligibility of those who can make a complaint to include witnesses of an incident, and increasing the scope of those who can be the subject of a complaint to include senior officials, special constables, and community safety wardens (McDonald and Whimp 1995; Rowe 2004; Gallen 2000). In New Zealand, the Gallen Report also observed the cultural barriers entailed in the legal requirement for all complaints to be made in a written format. The report recommended altering legislation to enable more culturally appropriate methods for submitting complaints, such as 'face-to-face' oral submissions. At the time of writing, the IPCA continues to receive written complaints only.

As several authors have pointed out, while effective complaint procedures are intended to address the behaviours of individual officers, they are not designed to address the broader issues of racism in police culture or biased institutionalised practices and policies (Chan 1997; Dixon 1997; Rowe 2004). It is therefore not the function of independent complaints authorities to scrutinise the larger structures and systems involved; but because the

structures of racism within policing remain unchallenged, authors have argued that this type of response does not necessarily guard against racism (Rowe 2004, Chan 1997).

### **Lay visitor schemes**

Following the publication of the Royal Commission of Inquiry on Aboriginal Deaths in Custody (RCIADIC), a number of lay visitor schemes have been established in Australia (Divakaran-Brown and Williams 1998). While the first lay visitor schemes preceded the RCIADIC, since the early 1990s lay visitor schemes have been extended to a large number of country and metropolitan stations. The schemes are funded by State Aboriginal Affairs and hosted by the Aboriginal Legal Rights Movement. Visitors are volunteers who are paid an honorary remuneration to visit detainees at any time day or night in police cells to determine their wellbeing and general safety. An evaluation of the scheme has confirmed that it is very successful, having substantially reduced the number of deaths in custody at the stations where it was in operation, and that the visits had a calming effect on prisoners (Divakaran-Brown and Williams 1998). However, the evaluation also revealed that the volunteer model was unable to meet the demands placed upon it and recommended the development of a salaried service model.

### **Increasing ethnic minority/indigenous community participation**

Possibly one of the most prevalent responses to the issue of indigenous over-representation has involved increasing 'cultural sensitisation' within the criminal justice system through increased indigenous and/or ethnic-minority community participation in justice processes. This has been attempted using two main approaches. The first involves increasing indigenous/ethnic-minority community participation in traditional mainstream criminal justice processes. The second approach involves the development of 'alternative' justice processes that are deemed to be more culturally attuned to the needs of indigenous/ethnic-minority offenders and are often operated – although not necessarily controlled – by indigenous and/or ethnic-minority communities.

#### **Increasing participation in mainstream processes**

A number of responses have focused on increasing the involvement of ethnic minority/indigenous communities in mainstream criminal justice processes in order to make them more appropriate for, and accountable to, these groups. Such approaches include: community magistrates; the use of community liaison officers in police, courts and prisons; the development of indigenous legal aid services; the inclusion of cultural statements in criminal court hearings; and the development of community consultative groups. These initiatives will be briefly discussed below.

#### ***Community magistrates***

Community Magistrates schemes began in Canada in the 1970s and were first piloted in New Zealand in 1999 (Hong, Hungerford and Spier 2000; Hazlehurst 1995). These schemes typically involve the selection and training of community representatives (often with an explicit focus on recruiting people from ethnic-minority communities) to hear non-serious criminal



(and occasionally family law) cases. Two examples of this initiative include the Aboriginal Justice of the Peace Scheme in Canada and the Community Magistrate Programme in New Zealand. Each of these programmes will be discussed below.

### *Native Justices of the Peace*

Since the 1970s Native Justices of the Peace (JPs) have been appointed in different provinces in Canada at the request of the Minister of Indian Affairs (Hazlehurst 1995, xiv). While usually appointed in locations which have a high population density of Native peoples, Native JPs service both Native and non-Native peoples (Hazlehurst 1995, xiv). They are intended to operate as a buffer between police and indigenous peoples, and are able to offer alternative sentence options for indigenous offenders, although Canadian researchers note that this aspect of the role has been significantly underutilised in practice (Hazlehurst 1995, xiv). While research shows that community magistrates are often preferred by indigenous defendants and their families, a number of problems have been identified with this scheme, in particular:

- there has often been inadequate training and support for Native JPs by the mainstream justice system
- Native JPs have limited authority and status, and their role as a JP has been seen to undermine their relationship with the Native community
- the scheme is under-resourced and Native JPs receive poor remuneration
- Native JPs have encountered difficulties in resolving tensions between legal and community interests (Hazlehurst 1995, xiv).

Concerns have also emerged regarding self-determination and the low status of Native JPs within the mainstream legal system, with questions raised about whether this programme should remain lodged within the framework of the Euro-Canadian justice system or whether it can function in parallel to this system (Hazlehurst 1995, xv).

### *Community Magistrates Pilot*

A similar initiative has been undertaken in New Zealand. In 1999 a Community Magistrates Pilot Programme began in four court locations in the North Island (Hong, Hungerford and Spier 2000). While the general aim of the pilot was to increase community participation in the court system *per se*, over a quarter of the community magistrates recruited identified as Māori. Community Magistrates initially operated in pairs but may now sit alone, and typically hear less serious cases so that District Court judges may focus on more serious charges.

An evaluation of the programme revealed that it was deemed a success insofar as it increased Māori participation in the legal system and was generally believed to provide a more culturally appropriate form of justice (Hong, Hungerford and Spier 2000). However, Māori Community Magistrates raised several concerns about the programme. For instance, there was some ambivalence about whether Māori defendants benefited from the presence of Māori Community Magistrates, with some finding the experience of being judged by a Māori judge more embarrassing and shameful (Hong, Hungerford and Spier 2000). In



addition, concerns were raised about the degree to which the programme represented a partnership approach to Māori offending, as Māori Community Magistrates were effectively operating within a non-Māori system, with some noting that this negatively impacted on their ability to meet the needs of Māori defendants (Hong, Hungerford and Spier 2000).

### *Community liaison officers*

Community liaison programmes are effectively underpinned by the same assumptions as Community Magistrates schemes: namely, that ethnic disproportionality is at some level a product of culturally insensitive justice processes that operate to alienate ethnic minority/indigenous communities from the justice system. Community liaison positions have been established in Australia, Canada and New Zealand, and can be found in police organisations, the criminal courts, and prisons. Specific examples of these schemes will be discussed below.

### *Police models*

There are a number of examples internationally of specifically indigenous community liaison and policing initiatives (although similar schemes also operate for other ethnic-minority groups internationally, see for example, Chan 1997). As Blagg (2008, 2003) has argued, a number of different types of initiative have been developed to assist police–community liaison. These tend to sit on a continuum, from those controlled by police and more closely aligned to mainstream policing activities (for example, indigenous liaison officer roles), to those controlled by indigenous communities, and which have broader social functions (for example, Night Patrols in Australia) (Blagg 2008). Initiatives ranging across this spectrum will be examined below.

#### ➤ *Aboriginal community liaison officers*

Various forms of community liaison roles have existed within Australian police services since the 1980s (Weber 2007; Cunneen 2001; Chan 1997; Divakaran-Brown and Williams 1998; O'Neill and Bathgate 1993). Aboriginal Community Liaison Officers (ACLOs) are civilian (non-sworn) staff, although in some areas they are provided with police uniforms (Weber 2007). The role of ACLOs is typically very broad and includes:

- working alongside police to actively liaise with Police and Aboriginal communities
- assisting police to diffuse tension in arrest situations
- overseeing the welfare of Aboriginal prisoners held in police custody
- organising and attending key social events involving police and the Aboriginal community
- delivering cultural awareness training for police
- organising educational seminars for the Aboriginal community on police practices
- undertaking foot patrols and visiting licensed premises to oversee programme implementation in Aboriginal communities (Chan 1997; Weber 2007).

In New South Wales the role of Community Group Consultants (CGC) was also established, with separate positions for Aboriginal consultants and ethnic-minority consultants. The role of CGC was to operate at state level, reporting directly to the police executive team on Aboriginal and ethnic minority policing issues, and initiating programmes to address ethnic disproportionality – particularly Aboriginal over-representation in the NSW criminal justice system (Chan 1997, p138).

While some have credited the creation of these positions as having “dramatically” improved relationships between police and ethnic minority communities (Chan 1997, p144), others have suggested that their results are more mixed. As Cunneen (2001, p219) has argued, ACLOs “cannot be categorised as a success or a failure. The results have been mixed, much depending on the utilisation at a local level”.

Evaluations have revealed a number of issues associated with these roles, including that:

- the roles are frequently under-resourced. For example, no separate funds were allocated for transport between stations and indigenous communities, or, in the case of the CGC, no funds were available for travel across the state (O’Neill and Bathgate 1993; Chan 1997)
- the nature of the role is ill-defined, which has placed considerable pressure on ACLOs and CGCs to meet the unrealistic expectations of Police and indigenous communities (Chan 1997; Cunneen 2001)
- the positions caused ethnic-minority matters to become ‘siloes’ within the police, insofar as such matters are perceived to be the sole preserve of ACLO, rather than ‘owned’ by operational police staff more generally (Chan 1997)
- difficulties have been found in recruiting and retaining ACLOs (Cunneen 2001; Weber 2007). It is suggested that this may be linked to the low-level career path for ACLOs, which permits little opportunity for staff development
- a general lack of trust extended by Police towards ACLOs. Evaluations have shown that ACLOs have been denied access to parts of the station and to Aboriginal prisoners, and held stringently accountable for their time allocation (O’Neill and Bathgate 1993; Chan 1997; Weber 2007)
- ACLOs have been afforded a lower status than sworn officers insofar as they have been denied benefits available to other staff, including the ability to be paid overtime or accrue time off in lieu, a particular issue when they were expected to attend community events outside of work hours (Chan 1997; O’Neill and Bathgate 1993)
- ACLOs have also reported experiencing intimidation and racist remarks from sworn police officers (Weber 2007; Chan 1997).

➤ *Iwi liaison officers*

NZ Police introduced the position of Iwi Liaison Officer (ILOs) following the adoption of the Māori Responsiveness Strategy in 1996. In contrast to ACLOs in Australia, these

positions are filled by a mix of sworn and non-sworn staff. There are currently 36 ILO positions distributed across all Police Districts, although the majority (27) are located in the North Island. To date there has been no research published on the role or effectiveness of ILOs.

➤ *Māori wardens*

In addition to Iwi Liaison Officers, as noted in Chapter 1, a voluntary Māori warden service operates in New Zealand. There has been a resurgence of government interest in Māori Wardens in recent years, and the allocation of additional funding in 2007 has resulted in the establishment of the Joint Māori Wardens Project (Walker, Fisher and Gerring 2008). While the project is still being implemented, a process evaluation completed by Walker, Fisher and Gerring (2008) found that Māori wardens experience many of the tensions and difficulties shown to be associated with the ACLO role in Australia. For example, while recognising that wardens are a voluntary Māori-run community organisation and ALCOs are a salaried police-based initiative, wardens have historically experienced similar problems with staff retention and have struggled to obtain ongoing funds for resources, training and equipment. Walker, Fisher and Gerring (2008) also noted some concern on the part of wardens about negotiating the competing needs of the Māori community and Police, and the dangers of being considered to be more aligned with Police, rather than community, interests.

➤ *Night patrols*

A similar function to that of Māori wardens is undertaken in Australian indigenous communities in the form of Aboriginal night patrols (Blagg 2003; Cunneen 2008). While the exact nature of patrols varies across different communities, they generally involve groups of Aboriginal volunteers patrolling public areas at key times in order to reduce harm and offending and increase community peace, security, and safety (Blagg 2003, 2008; Australian Institute of Criminology 2004). In his review of patrols, Blagg (2003, p77) noted that the evidence – although “patchy and anecdotal” – was nonetheless encouraging, suggesting that night patrols can reduce indigenous crime.

Night patrols, however, have experienced some problems. For example Blagg (2003) points out that crime prevention represents only one aspect of the work of patrols, which are intended by members to serve a much wider social function. Focusing solely on their ability to reduce crime, he suggests, may therefore underplay the more general social value of indigenous patrols. The tension between the crime prevention function and broader social role of night patrols was particularly apparent in the case of the Nyoongar Patrol in Perth (Blagg 2008). While members of the Nyoongar Patrol wished to retain a broad social remit, police and local business owners believed the patrol should focus more narrowly on controlling and/or removing Aboriginal youth occupying public spaces. Eventually, a youth curfew was imposed, with the patrol placed in a difficult position of trying to respond to the opposing needs of Aboriginal communities and local and state authorities.

Patrols have also led to cultural conflict (Blagg 2008). For example, when local authorities opened a sobering-up centre in Fitzroy, Western Australia, it was assumed that the local night patrol (the Marrala Patrol) would be active in delivering Aboriginal offenders to the centre. However, in the Fitzroy area the forcible removal of Aboriginal people from public spaces without their consent was prohibited by local customary law. As a consequence of the patrol's failure to provide an effective conduit for referrals to the sobering-up centre, funding was subsequently withdrawn and the patrol was eventually disbanded (Blagg 2008).

Both these examples demonstrate the tensions arising from indigenous policing initiatives. As Blagg (2008, p122) points out:

*There are dangers ... of indigenous initiatives being co-opted as subordinate instrumentalities of new security 'networks' meeting the needs of non-indigenous players rather than the needs of indigenous people.*

#### ➤ Native Police

In contrast to the models discussed above, paid native policing models operate in both the United States and Canada (Wakeling et al 2001; the First Nations Chiefs of Police Association (FNCPA) 1999). In the United States there are over 200 American Indian policing departments operating on American Indian reservations. While these adopt a number of different forms, they are typically geographically constrained to particular locations and are often state-controlled, rather than Indian-controlled. Like the models described above, Indian police services are often characterised by conflicting expectations from the community they police and the state, and are characterised by low levels of staff morale and high levels of staff turnover, as well as under-funding (Wakeling et al 2001). More fundamentally, such models have been criticised for failing to permit Indian communities a sufficient level of self-determination, with evidence suggesting that more successful services are typically those that permit greater levels of tribal control (Wakeling et al 2001). In Canada, similar types of model operate, although generally greater control is devolved to First Nations groups (FNCPA 1999), with the aim of providing more culturally appropriate services to First Nations communities. Like their American equivalents, similar concerns about indigenous self-determination and empowerment have been raised about these models (FNCPA 1999).

#### *Court models*

In a similar vein to the policing models outlined above, indigenous liaison positions have also been established in criminal courts in Canada and, more recently, New Zealand. Each of these models will be briefly outlined below.

#### ➤ Native court worker programme

The Native court worker programme was initially established in Canada in 1970. Native court workers facilitate the arrangement of legal aid for Native defendants, explain court procedures, and provide information about legal rights and the law to Native defendants

and their families. They may also communicate with the defendant's family and organise bail (Hazlehurst 1995). In addition to these tasks, court workers may also brief lawyers, interview witnesses, obtain character references for the defendant, and help prepare sentencing options. They can also request adjournments for the collection of further cultural information about the defendant, and act as interpreters (Hazlehurst 1995). Native case workers may also represent the accused in cases of minor offending, when legal aid provision is not available, and often attend hearings to provide support to the defendant and their family. While in principle the scheme has been well received by both courts and defendants, it has been criticised in practice for being under-resourced (both in terms of staff and funding). It has been noted that, as a result of poor resourcing, court workers are often not available immediately following arrest to explain the nature of the charges, legal rights, or eligibility for accessing legal aid (Hazlehurst 1995).

➤ *Youth Court Pacific community liaison service*

In New Zealand, while neither Māori nor Pacific community liaison officers have been introduced to adult criminal courts,<sup>48</sup> a Pacific liaison service was implemented in Manukau Youth Court in 2001.<sup>49</sup> The service was comprised of a full-time Youth Court Pacific Community Liaison Officer (CLO) and a Youth Court Community Resource Panel (Faleafa, Nuimata and Perese 2002). The programme was instigated by the judiciary, who had noted the poor familial support for Pacific defendants in the Youth Court, and the low level of Pacific family attendance at Family Group Conferences. In addition to addressing these issues, it was anticipated that the Pacific CLO would undertake a number of other tasks, including:

- supporting Pacific defendants in the Youth Court process (including meeting with the defendant and their family prior to their first hearing)
- liaising with the Pacific community and youth workers to better identify offender needs and the most appropriate means of addressing those needs (particularly in relation to programmes delivered by Pacific providers)
- developing and maintaining data management systems on Pacific offenders and monitoring Pacific offending patterns in South Auckland
- educating the Pacific community about Youth Court processes and services, and promoting cultural awareness amongst youth justice workers, court staff, and the judiciary (Faleafa, Nuimata and Perese 2002).

The role of the Panel was to manage the Pacific Liaison Service and to develop and foster links between the court and the Pacific community, analyse the data recorded by the CLO, and identify gaps in service for Pacific youth offenders.

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<sup>48</sup> There is no formal Māori or Pacific liaison officer scheme in operation at a national level in New Zealand criminal courts. However, Māori wardens regularly attend court to provide support for Māori defendants, victims and their families (Walker, Fisher and Gerring 2008). Māori liaison officers do operate in Māori Land Courts; however, as this chapter is concerned only with criminal courts this role is not discussed here.

<sup>49</sup> The Pacific Community Liaison role at Manukau Youth Court was vacated in 2007 and was disestablished in 2009.

A process evaluation of the programme was completed in 2002 (Faleafa, Nuimata and Perese 2002). Overall, programme staff and stakeholders generally agreed that the Pacific Liaison Service had improved Pacific family attendance at Youth Court hearings and family group conferences. Participants also noted that the CLO had helped to reduce court delays and adjournments through the provision of better information about the young person and the availability of culturally appropriate interventions. It was further felt that the provision of information about the young person and their family had enabled more culturally appropriate programmes and conference plans to be developed, which were more achievable as a result (Faleafa, Nuimata and Perese 2002).

In a similar vein to other community liaison programmes internationally, the study raised several issues about the programme. In particular, the programme was seen as being judicially driven rather than emerging from, or empowering, Pacific communities (Faleafa, Nuimata and Perese 2002). The evaluation also noted concerns about the formal language used in recruitment advertisements for panel members and the CLO position, as well as the cumbersome and prolonged appointment process. It also found that some informants felt that communication and consultation with Pacific communities had been insufficient (Faleafa, Nuimata and Perese 2002).

#### *Prison models*

Ethnic liaison roles have also been established in prisons. In New Zealand, Whānau Liaison Workers (WLWs) have been established in Māori focus units (MFUs), and at the Northland Region Corrections Facility (Department of Corrections 2008a). The role of WLWs is to develop support mechanisms to assist the wellbeing, rehabilitation and reintegration of Māori prisoners through liaison with whānau, hapū, iwi, and community agencies (Department of Corrections 2008a). They work directly with inmates and their whānau to help resolve or manage key issues, and make links with community agencies to assist inmates' sentence management and reintegration needs, such as post-release accommodation or employment (State Services Commission 2005).

While no research has singularly focused on the effectiveness of the WLWs in isolation from MFUs, a preliminary evaluation of MFUs in 2005 found that the role of WLW often lacked clear direction and leadership, and that it was unclear precisely how this role was contributing to the rehabilitation of Māori prisoners (Pfeifer, Buchanan and Fisher 2005). This evaluation also found that 80 percent of MFU participants were unsure about the precise role of the WLW, and revealed low levels of satisfaction in relation to the support received from WLWs (Pfeifer, Buchanan and Fisher 2005). In addition, as part of the consultation hui undertaken in relation to the development of its strategic plan between 2001 and 2003, the Department of Corrections documented some concern by Māori stakeholders about the role of WLWs. In a similar vein to ACLOs in Australia, this related to the vast scope of the role and concern that a lot of pressure was consequently being placed on a single person to meet whānau and prisoner expectations (Department of Corrections 2003). A further evaluation of MFUs has recently been completed by the Department of Corrections; however, this did not focus in depth of the role of the WLW (Department of Corrections 2009b).



### *Improving access to justice*

As noted in Part 1, unequal and inadequate access to legal representation is often identified as a contributory factor to the over-representation of indigenous and ethnic-minority people in the criminal justice system (Spohn 2000; the Law Commission 1999; Hood 1992a, 1992b; Rungay 1995; Jackson 1988; O'Malley 1973). In response to this problem, some jurisdictions (most notably Australia) have developed indigenous legal aid services, while efforts have been made elsewhere to improve the cultural appropriateness of existing services and generally improve the accessibility of legal aid services for ethnic minority and indigenous groups.

The Aboriginal and Torres Strait Islander Legal Services (ATSILS) is an example of an indigenous legal aid service, which was established to improve Aboriginal access to justice and provide a voice for Aboriginal people in court (McDonald and Whimp 1995). Under Aboriginal Justice Agreements, police have signed local-level agreements with local offices of the ATSILS, outlining how the organisations will interact and work together. These agreements have established a process whereby ATSILS are notified by police whenever an Aboriginal person is detained or arrested (McDonald and Whimp 1995).

A key role of ATSILS is to assist with bail applications. The bail application process had been found to have a disproportionately negative effect on Aboriginal people, with many experiencing difficulty in obtaining bail due to financial constraints, the bureaucratic process of bail supervision, and not having a permanent address (McDonald and Whimp 1995). ATSILS aims to reduce the process requirements for requesting bail, and thereby increase the number of Aboriginal people applying for, and obtaining bail (McDonald and Whimp 1995). While McDonald and Whimp (1995) argue that providing legal services for Aboriginal people should in principle reduce convictions and prison sentences, it is not clear from the literature what, if any, effect the ATSILS has had on reducing Aboriginal disproportionality.

An evaluation of ATSILS completed by the Office of Evaluation and Audit (OEA) (Indigenous Programs) in 2003 found that it provided a significantly lower cost service in comparison to mainstream legal aid services; however, the evaluation found that there was no difference in client satisfaction levels between ATSILS and mainstream services, with Aboriginal clients reporting that they were highly dissatisfied with both services (OEA 2003). It also found that while ATSILS dealt with 89 percent of cases which received legal aid support, a large majority of Aboriginal prisoners (83 percent) did not have any legal support present when they were interviewed by the police (OEA 2003). The evaluation also reported that the ATSILS experienced a number of problems associated with high staff workload and turnover, and low staff morale (OEA 2003).

The importance of improving Māori access to legal advice in order to address their over-representation in the criminal justice system has been recognised for over three decades in New Zealand (Jackson 1988; Te Puni Kōkiri 2000; the Law Commission 1999, Ministry of Justice and Te Puni Kōkiri 1998; O'Malley 1973). In particular, research undertaken by the Ministry of Justice and Te Puni Kōkiri in 1998 found that Māori did not receive adequate legal advice because of the high costs involved, a commonly held view from Māori offenders that little could be done to defend or reduce any charges against them, and the fact that Māori



believed that lawyers, court staff, and the judiciary behaved inappropriately and insensitively towards them (Ministry of Justice and Te Puni Kōkiri 1998). The report concluded that a lack of adequate legal advice resulted in Māori offenders being poorly informed about their rights and the criminal court process (Ministry of Justice and Te Puni Kōkiri 1998).

In his now dated research on Magistrates' Courts, O'Malley found that Māori were less likely than non-Māori to receive legal advice, were half as likely to have legal representation, and were less likely to arrange surety for bail (O'Malley 1973). For this reason, he concluded, Māori were more likely to plead guilty, which, in turn, contributed to conviction disparities between Māori and European defendants. Similarly, a more recent report by the Department of Corrections on the over-representation of Māori, quoted findings from an unpublished analysis produced by the Ministry of Justice in 2002, which indicated that Māori were more likely to plead guilty and that "the initial plea was the factor most strongly related to the eventual conviction" (Department of Corrections 2007a, p18). On this basis, the report recommends that ethnic disparities around plea decisions are worthy of further analysis.

There is not currently an equivalent of the ATSILS scheme in New Zealand for either Māori or Pacific peoples. However, there are 27 Community Law Centres (CLCs) funded by the Legal Services Agency,<sup>50</sup> four of which are exclusively dedicated to working with Māori (although all CLCs have a strong Māori focus) (Law Commission 1999). Māori CLCs are located in Auckland, Wellington, Christchurch and Hamilton. The current Wellington Māori CLC, Te Ratonga Ture was established in 2000. It aims to provide legal advice, representation and information to Māori, and promote legal education of Māori in the Greater Wellington region. It includes members from all four local iwi, has two solicitors, a legal researcher, and benefits from the volunteered services of Māori law practitioners, and Māori and non-Māori legal interns and law students.<sup>51</sup> To date no evaluation has been undertaken to determine the effectiveness of Māori CLCs, or CLCs more generally.

A further development in the area of legal aid in New Zealand has been the introduction of the Public Defender Scheme (PDS) pilot in Auckland and Manukau in 2004 (Paulin, Kingi and Mossman 2008). It was intended that the PDS would increase access to justice and offer a more culturally appropriate service to Māori and Pacific clients. During the pilot, Māori comprised 38 percent of PDS clients, and Pacific people, 40 percent. The evaluation found that PDS clients were more likely to plead guilty compared to non-PDS clients receiving legal aid, and were less likely to receive prison sentences. However, views about whether PDS better met the cultural needs of Māori and Pacific peoples were mixed. While a number of stakeholders argued that the ethnic mix of PDS lawyers (with greater proportions of Māori and Pacific lawyers) made the programme more culturally appropriate than legal aid provided by private lawyers, private lawyers did not agree that this was the case, arguing that PDS lawyers lacked the time and resources to appropriately respond to the cultural needs of their clients (Paulin, Kingi and Mossman 2008).

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<sup>50</sup> This information was found on the Legal Services Agency website [www.lsa.govt.nz](http://www.lsa.govt.nz) accessed on 21 November 2008.

<sup>51</sup> This information was obtained from the Māori Legal Services website, [www.ture.org.nz](http://www.ture.org.nz) accessed on 21 November 2008.

### **‘Culturally attuned’ alternatives to mainstream court processes**

In addition to efforts to more fully include members of indigenous and ethnic-minority groups in mainstream justice processes, the last two decades has seen the development of a number of initiatives which seek to move beyond increasing participation in existing structures towards the development of alternative modes of justice, which are considered to be more culturally appropriate. Examples of these approaches include: indigenous courts in Australia, Canada and the United States; and adult pre-trial diversion programmes, restorative justice conferencing, and marae-based justice initiatives in New Zealand.

A number of these approaches aim to increase the self-determination of indigenous groups and have consequently been developed by and for indigenous communities; however, this is not always the case, and varying levels of self-determination are evident across different initiatives. It is also important to note that while a number of these initiatives are generally restorative, insofar as they focus on restoring balance, restitution, rehabilitation and reintegration, they do not always strictly fall under the traditional ambit of ‘restorative justice’ (Marchetti and Daly 2004; Cunneen 2008; Crime and Justice Research Centre with Triggs 2005).

A key response to indigenous over-representation has been the development of restorative justice programmes that aim to increase indigenous participation in the justice system and provide a more culturally sensitive alternative to mainstream legal processes. A large number of these initiatives have been reserved for youth offenders and are consequently beyond the scope of this review. However, in the last decade restorative justice initiatives have increasingly emerged alongside adult criminal courts. Examples of such initiatives include: Koori Courts, Nunga and Aboriginal Courts, Murri and Rockhampton Courts, and Circle Sentencing in Australia; sentencing circles in Canada and the Gladue (Aboriginal Persons) Court in Toronto; and tribal courts in the United States.

#### ***Australian Indigenous Courts***

Since the late 1990s, indigenous communities have been involved in sentencing indigenous offenders (Marchetti and Daly 2004). Indigenous courts generally consist of two broad types: those operating in urban areas which involve urban courts setting aside several days a month for sentencing indigenous offenders (for example, Nunga and Aboriginal Courts in South Australia, Koori Courts in Victoria, Murri and Rockhampton Courts in Queensland and Sentencing Circles in New South Wales); and those operating in remote areas to which judicial officers travel on circuit (for example, sentencing circles in more remote parts of Western Australia and New South Wales and Justice Groups in Queensland). A key aim of the courts is to reduce the level of Aboriginal offending, divert Aboriginal offenders from prison, and consequently reduce the overall over-representation of Aboriginal people in the criminal justice system. They also aim to increase the positive participation of Aboriginal communities in the justice process (Marchetti and Daly 2004; Cunneen 2008; Hulls 2002).

While there are variations in indigenous courts both across and within states they are based on a number of common factors. The offender must have pleaded guilty, and be charged with an offence that can normally be heard in the magistrates’ court. The offence must also have

been committed within the geographical region covered by the court. Court hearings are typically more informal, with the magistrate and an Elder<sup>52</sup> or respected member of the Aboriginal community sitting at eye level with the offender (Marchetti and Daly 2004). At some courts the Aboriginal community representatives, the offender, and members of the public gallery may speak; however, in other courts this is restricted. Aboriginal justice officers and/or court liaison officers also play an active role in assisting prosecutors, offenders, and defence council to devise a suitable sentencing plan. Typically, the court is not adjourned prior to sentencing and the discussion of sentencing options occurs with everyone present in order to enhance perceptions of transparency (Harris 2006).

Research has suggested that indigenous courts have a number of advantages. An evaluation of the Koori Court pilot programme conducted between 2002 and 2004 found that the programme was a “resounding success” (Harris 2006, p8). It documented a reduction in reconviction rates among Aboriginal offenders dealt with by Koori Courts, as well as a significant reduction in breaches of community sentences. The introduction of indigenous courts has more generally coincided with an increase in the proportion of indigenous offenders showing up at court for sentencing, and has been found to have a positive impact on offender attitudes (Harris 2006). It has also been suggested that the courts help to improve the cultural understanding of judicial and other legal officials, and serve to empower indigenous Elders and communities to deal with crime-related problems (Marchetti and Daly 2004; Cunneen 2008).

Despite these successes, several limitations with indigenous courts were identified in the evaluation of the Koori Court initiative. For example, a key limitation was that each case took significantly longer to be heard compared to mainstream justice process. For example, while a standard Magistrates’ Court could hear around 50 to 60 cases a day, a Koori Court was only able to hear five to 10 cases; although for the Koori Courts to be effective, participants considered it essential that adequate time was given for all aspects of the case to be heard and dealt with. In addition, despite the attempts to incorporate Aboriginal methods of consultation and the inclusion of Aboriginal Elders or respected persons in the hearing process, it has been argued that the Koori Courts remain a Crown initiative, based on Eurocentric values and laws (Cunneen 2001). Furthermore, despite representing a ‘partnership approach’, it has been acknowledged that the Koori Court model does not fully empower Aboriginal people to deal with their own legal issues, as the Magistrate remains the ultimate decision maker (Harris 2006). As noted in Chapter 1 in Part 2, similar criticisms have been made of cultural initiatives in New Zealand (Quince 2007; Tauri 1999, 1996; Jackson 1995a, 1995b, 1988; Walters, Bradley and Tauri 2005; see also Cunneen 1997 in relation to family group conferencing models in Australia).

### *Tribal courts, United States*

Courts of Indian Offences were introduced in North America over 100 years ago, and were later replaced by tribal courts. Tribal courts of the Navajo Nation were initially established in 1958, supplanting traditional Indian laws and adopting adversarial procedures that replicated

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<sup>52</sup> The precise number of Aboriginal community members present differs across different models, typically ranging from one to four.

those available within the federal court system. For this reason, such courts did not answer Navajo concerns for greater legal self-determination in regard to justice (Hazlehurst 1995). Since the early 1980s, however, Navajo judges and Navajo customary legal principles have been incorporated into tribal court procedures. In 1982, the Navajo Peacemaker Court was created. Building on tribal courts, this court was more closely modelled on traditional Navajo approaches to justice, and included dispute resolution processes and family group decision making. Collectively, tribal courts handle a significant proportion of court workload within the Navajo Nation, and their jurisdiction includes minor criminal cases (including domestic violence) and family court matters such as divorce as well as other familial/criminal matters, such as child neglect and sexual abuse (Hazlehurst 1995).

### *Adult pre-trial diversion, restorative justice and marae-based court processes*

There are no equivalents to tribal or indigenous courts in New Zealand; however adult pre-diversion programmes, restorative justice and marae-based justice initiatives share some features in common with programmes found overseas. These will be discussed below.

#### *Adult pre-trial diversion*

Adult pre-trial diversion programmes were first piloted in New Zealand during the 1990s in three locations: Timaru (Project Turn-around); Rotorua (Second Chance) and West Auckland (Te Whānau Āwhina) (Maxwell, Morris and Anderson 1999). Both Second Chance and Te Whānau Āwhina were run 'by Māori for Māori' and had a strong tikanga Māori focus (Maxwell, Morris and Anderson 1999).

The Second Chance programme assumes that there are parallels between restorative justice and whānau hui. The aim is to hold offenders tribally accountable for their offending and make whakapapa links through a conference attended by the victim, the offender, their supporters, and local community representatives, including a kaumātua. The kaumātua may take the place of the victim in the event that they do not wish to participate (and for this reason it has been argued that the programme does not strictly represent a truly restorative approach). A sentence plan is then produced, signed and monitored to ensure compliance (Paulin et al 2005). An evaluation of the programme did not find that it reduced rates of reconviction in comparison to a matched group going through mainstream justice processes (Paulin et al 2005).

Te Whānau Āwhina is a marae-based programme that claims to be consistent with indigenous models of justice. It involves a conference between the offender, the victim (although victims do not always agree to participate) and a community panel. The aim is to confront offenders with the impact that their offending has on the victim, their whānau, and Māori more generally, and looks to reintegrate the offender through the provision of employment action plans and marae-based rehabilitative programmes. Again, because the victim does not form a central role, this programme is not considered to constitute restorative justice in a strict sense.

An evaluation of the programme found that 68 percent of the agreed plans had been completed to the satisfaction of police, while participants found the experience both

meaningful and intimidating. Reconviction data revealed that in comparison to a matched group experiencing mainstream services, participants in Te Whānau Āwhina had lower reconviction rates, while levels of offence seriousness also declined (Maxwell, Morris and Anderson 1999)

#### *Adult court-referred restorative justice programmes*

Adult court-referred restorative justice programmes were first piloted at District Courts in New Zealand during 2001. The aim of such programmes is to increase victim satisfaction and reduce re-offending by those offenders referred to the programme (CJRC with Triggs 2005). While not explicitly stated as an objective of the programme, the development of restorative justice conferencing in New Zealand has typically been predicated on a belief that these processes are more culturally responsive to Māori and Pacific offenders than mainstream justice processes. This has been emphasised in research that has suggested a link between restorative justice processes and traditional Māori cultural resolution practices (CJRC with Triggs 2005; Sharples 1995; Jackson 1988).

In order to be eligible for a court-referred restorative justice programme, an offender must plead guilty and be charged with an eligible offence (those charged with drug offences, home invasion, and domestic violence offences<sup>53</sup> are ineligible). A case is initially referred by a judge to a coordinator, who liaises with the victim and offender to ascertain whether a conference is possible. Importantly, there cannot be a conference in the event that the victim declines to take part. The conference is informal and involves the victim, the offender, their support people, and a facilitator, and may also include police, probation and defence lawyers. The victim and offender both speak and cultural protocols such as karakia (prayers) may be included. At the end of the conference a sentencing plan is agreed, which is then provided to the judge who can choose to integrate all or part of the plan into the final sentence.

An evaluation of the pilot found that Māori were significantly less likely to be referred for a restorative justice conference than other ethnic groups, although this difference disappeared once offence seriousness and previous offending history were taken into account (CJRC with Triggs 2005). The majority of Māori participants (victims and offenders) in the study stated that the conference took into account their cultural needs, although levels of satisfaction with the process were found to decline over time. While a number of attempts were made to increase the cultural relevance of the programme, the evaluation found that cultural protocols such as karakia were only undertaken in half the conferences involving Māori, and that there was a lack of Māori facilitators and coordinators, with only one-third of the cases involving Māori having a Māori facilitator, and only one conference taking place on a marae (CJRC with Triggs 2005). As the evaluation noted, “court-referred restorative justice obviously takes place within a court and criminal justice system which is, more generally, seen as dominated by conventional rather than Māori values” (CJRC with Triggs 2005, p298). Importantly, the evaluation found no evidence that participating in a restorative justice conference reduced the re-offending of programme participants compared to a matched sample who experienced mainstream justice services.

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<sup>53</sup> In some programmes such as the Wanganui Adult Restorative Justice Programme offenders convicted of domestic violence may take part in a conference (see Paulin, Kingi and Lash 2005).

### *Marae-based Youth Court*

Since May 2008, a marae-based Youth Court has been operating as part of the Gisborne Youth Court. This is a judicially led initiative that enables young people's progress with their Family Group Conferencing plans to be monitored in a marae setting. It does not represent a separate justice system for Māori, and both Māori and non-Māori youth are eligible for marae-based hearings. The aim is to reconnect young people with their culture and their communities in order to reduce re-offending. As is the case for other restorative justice processes, only those who have pleaded guilty are offered the option of having their next hearing at the marae. This initiative is still relatively new and no formal evaluation work has been completed to gauge its effectiveness.

## Summary

This chapter has outlined responses to ethnic minority and/or indigenous over-representation that are premised (albeit often implicitly) on the belief that direct bias on the part of the criminal justice system contributes to ethnic disproportionality. There have been a number of criminal justice responses, which, while not necessarily explicitly directed to reducing ethnic disproportionality, have nonetheless attempted to make the criminal justice system more responsive to ethnic minority and indigenous groups.

Two broad approaches were identified within the literature: those which focus inwards on improving the cultural awareness and sensitivity of criminal justice agencies; and those which focus outwards on enhancing the relationship between criminal justice agencies and ethnic-minority groups.

Research has shown that both types of responses can help to improve cultural understanding and responsiveness within the criminal justice system, and can increase indigenous and ethnic-minority confidence in, and satisfaction with, the criminal justice system. However, as this chapter has demonstrated, responses in this area have experienced a number of common problems, including:

- policies not moving from strategy to practice, or not being implemented as intended
- under-resourcing and an over-reliance on ethnic minority/indigenous volunteers
- difficulties in achieving sustainable interagency cooperation
- a lack of clearly defined objectives, roles, and outcomes
- a lack of evaluation, monitoring and accountability (related in part to issues with data availability as well as an absence of fully developed intervention logic for many initiatives)
- a failure to effectively negotiate, consult or empower indigenous/ethnic-minority groups
- an inability to fully address the tensions arising between the objectives of indigenous/ethnic-minority communities and mainstream criminal justice institutions



- a failure to fully address the base structures and organisational cultures within the justice system (ie, indirect bias).

Perhaps most fundamentally, several decades of criminal justice responses aimed at increasing cultural sensitivity and improving relationships with indigenous and ethnic-minority communities has failed to arrest rising levels of ethnic disproportionality. Reflecting on this fact in relation to Canada, Dickson-Gilmore and La Prairie (2005, p229) point out that:

*Providing for Aboriginal people to be arrested by Aboriginal cops, defended by Aboriginal lawyers before Aboriginal judges, and sent to places of healing rather than correction did not reduce the sheer number of them in the system or improve the risk factors for their recidivism; if anything the number continued to climb.*

An overarching finding from the literature reviewed in this chapter, therefore, is that responses aimed at addressing direct bias within the criminal justice system on their own are unlikely to make significant inroads into the over-representation of indigenous and/or ethnic-minority groups. As noted in Part 1, the complex causes of the problem necessarily require responses that are multidimensional and target the different aspects of the problem. Towards this end, Chapter 3 summarises responses targeted at addressing indirect forms of discrimination and disparate outcomes more generally.





## Part 2: Chapter 3 – Responding to indirect discrimination and disparate outcomes

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### Introduction

While considerable attention has been focused on differential offending rates and direct forms of criminal justice bias as causes for ethnic disproportionality, a number of scholars have instead examined the ways in which apparently racially neutral practices and decision making criteria systematically operate to the disadvantage of certain ethnic-minority groups (Haslip 2000; Blagg et al 2005; Cole et al 1995; Matravers and Tonry 2003; McMullen and Jaywardene 1995; Hudson 1993b). As noted in Part 1, international research has highlighted a number of instances where this occurs. For example, the Commission of Inquiry into Systematic Racism in the Ontario Criminal Justice System noted that bail criteria, which emphasises the importance of employment status and income, fundamentally operate to the disadvantage of black defendants and other ethnic-minority groups who are more likely to be unemployed and have a low income (Cole et al 1995). To the extent that those held in custody pre-trial are more likely to be convicted and receive a custodial sentence, the consideration of these social factors can be understood to contribute to the over-representation of ethnic minority/indigenous people in prison (Matravers and Tonry 2003).

The guilty plea discount represents another example. As discussed in Part 1, Hood (1992a, 1992b) discovered in his study of Crown Courts in the United Kingdom that black defendants were less likely to plead guilty, meaning that they were also less likely to benefit from a discount at sentencing (see also Spohn 2000; Cole et al 1995). In a similar fashion, sentencing guidelines that take into account seriousness of current offence and offending history will in practice work systematically against ethnic-minority defendants, who are more likely to have multiple police contacts and arrests (as noted in Part 1, these are factors which are also potentially the product of over-policing) and are more likely to be charged with more serious offences (Tonry 1996, p57; see also Sabol 1989). Similar arguments have been made in relation to parole decision making (Blagg et al 2005; Welsh and Ogloff 2000; Hudson 1993b).

The notion that neutral processes and decision making criteria result in disparate outcomes is not new, and was well recognised in official inquiries in Canada, Australia and the United Kingdom during the 1990s, where this phenomenon was variously referred to as either 'institutional bias/racism' or 'systematic bias/racism'. However, as demonstrated in Chapter 2, the types of responses that have typically resulted from these inquiries (including, for example, cultural awareness training, the recruitment of ethnic-minority staff, and the cultural sensitisation of existing practices) have continued to address the problem at an individual level and have therefore been directed towards addressing overt, conscious forms of discrimination, while largely ignoring the more subtle forms of discrimination built into the system itself (Matravers and Tonry 2003).

Scholars writing about the racially disparate impact of 'neutral policies' have often focused on different aspects of the problem: on the one hand, critical criminologists have largely focused on documenting how and why social, economic and political inequalities in society have impacted on criminal justice policies and operations (Hudson 1993a; Jackson 1988; Webb 2003; Tonry 1996; Hall et al 1978; Garland 2001). For those writing from this perspective, the emphasis has been on exposing the power differentials in society that underpin the social construction of crime in such a way that certain behaviours, people and areas are more likely to be constructed as 'deviant' (ie, criminalised) (Webb 2003; Jackson 1988; Cunneen 2006; Tonry 1996; Reiner 1993; Jefferson 1991; Hall et al 1978). Proponents of this position have argued that the criminal justice system "functions to reinforce the positions of powerful sections of society over the less powerful" (Cavadino and Dignan 2002, p310). They argue that powerless groups (including certain ethnic-minority groups) are inevitably disadvantaged by legal definitions of criminality, policing deployment, and sentencing decision making criteria, regardless of how uniformly or fairly these are applied or carried out.

Other authors, however, have been less concerned about exposing power imbalances and have adopted a more pragmatic approach to the problem. From this perspective, the existence of disparate outcomes for ethnic-minority groups and/or their over-representation in the criminal justice system is viewed as the central policy issue that must be addressed, regardless of how or why these disparities have arisen (Matravers and Tonry 2003; Harcourt 2006). Authors such as Matravers and Tonry (2003) have therefore eschewed the controversy surrounding terms like 'institutional racism' and have questioned whether the term 'racism' (with its emphasis on conscious beliefs and intentional discrimination) can be meaningfully or usefully applied to a discussion about remedying ethnically disparate outcomes. For those writing from this perspective, the focus is no longer on identifying causes, but is instead on harm reduction.

A number of 'harm reduction' strategies have been proposed to address the disparate outcomes derived from racially neutral laws and criminal justice processes. These include: the removal of race-correlated factors from sentencing decision making; the introduction of differential sentencing for indigenous offenders; reducing imprisonment *per se*; the decriminalisation of certain types of offence in which ethnic-minority groups are over-represented; the introduction of randomised policing models; and the use of disparate impact statements in policymaking. This chapter will explore these responses in turn, outlining both the advantages and difficulties associated with each.

It is important to note at the outset that in comparison to the responses discussed in Chapters 1 and 2, many of the responses discussed in this chapter have emerged from academic literature and have yet to find full expression in government policy. In addition to responses aimed at existing legal frameworks and processes, in New Zealand and Canada a number of scholars (and government inquiries in the case of the latter) have recommended that one way to respond to cultural biases built into mainstream justice systems is through the development of separate indigenous justice systems. The final section of this chapter will examine the arguments made for separate indigenous justice systems.

## Removing race-correlated factors from sentencing

As demonstrated in Part 1, a number of authors have pointed out that legally relevant factors which are taken into account in decisions surrounding bail, sentencing and parole appear *prima facie* to disadvantage certain ethnic-minority groups (Hudson 1993a, 1993b; Sabol 1989; Free 2002; Tonry 1996; Spohn 2000; Cole et al 1995; Hood 1992a, 1992b). This is because factors viewed as key predictors of pre-trial flight, sentence non-compliance, reconviction and re-imprisonment (such as unemployment, poor job prospects, poor residential location, troubled familial context, little or no community ties, low income, low educational attainment, drug and/or alcohol problems) are nonetheless highly racially correlated (Hudson 1993b). Consequently, a common response has been to call for the removal of such factors from judicial decision making criteria (Matravers and Tonry 2003; Hudson 1993a, 1993b). This has led to a number of sentencing commissions in the United States forbidding judges to give weight to socioeconomic factors, such as education, employment, and family stability that are known to be correlated with race in bail and sentencing decisions (Tonry 1996).

Rather than improving sentencing outcomes for ethnic-minority groups, however, such restrictions have tended to operate to the disadvantage of ethnic-minority defendants (Tonry 1996; Matravers and Tonry 2003; Garland 2001). According to Tonry (1995) the key problem with this approach is that it assumes that mitigating extra-legal factors such as employment, education, and family context operate to the benefit of middle-class defendants and to the detriment of lower-class, ethnic-minority defendants. However, because there are comparatively few middle-class offenders convicted of felony offences, the offenders most likely to benefit from having their personal circumstances considered as mitigating factors are actually the most disadvantaged people: a population, he notes, in which ethnic-minority people are disproportionately represented (Tonry 1995). A further problem, he argues, is that removing consideration of 'extra-legal' factors fails to address the fact that "the 'neutral' criteria of current offence and criminal history has the same effect" (Tonry 1996, pp57-8). In short, even if social and demographic factors are discounted, the legal factors of criminal history and current offence similarly operate to reinforce ethnic disparities.

According to Garland (2001) a more fundamental problem with constraining judicial discretion (typically through the provision of sentencing guidelines) is that it results in "punishing-at-a-distance", whereby it is less likely that the peculiar facts of the case and the individual characteristics of the offender will shape the outcome (Garland 2001, p179). For Garland, the key problem associated with the movement away from individualised discretionary decision making to uniform sentencing guidelines, is that "it has the effect of focusing attention firmly upon process and away from outcome" (Garland 2001, p120). In this sense, he argues, the fact that such guidelines are complied with and applied in a uniform manner is viewed as evidence of success regardless of the disparate outcomes to which they give rise.

These problems may therefore go some way to explaining why, as noted in Chapter 2, the introduction of sentencing guidelines has engendered mixed results in terms of reducing racial disparities (see Spohn 2000; Tonry 1995).

## Differential sentencing

Recognising that the problem of racial disproportionality cannot be fully addressed through simply removing racially correlated factors from sentencing guidelines, both Canada and Australia have introduced legislation which has explicitly sought to limit the use of imprisonment for Aboriginal offenders (Haslip 2000; Doob and Webster 2006; Edney 2004, 2005).

### Canada

A new Act to amend the Canadian Criminal Code was passed in 1996. Section 718.2(e) of the Act stated that, "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention paid to the circumstances of Aboriginal offenders*" (cited in Haslip 2000, p2, italics added). While initially applied only to adults, a similar clause was recently introduced for youth offenders (Doob and Webster 2006). Despite causing considerable controversy at the time it was passed, the Act has been found to have a very limited impact on levels of Aboriginal over-representation. According to Haslip (2000) the principal reason for this is that sentencing reforms *per se* are very limited in their capacity to reduce Aboriginal over-representation.

There was also some confusion, however, about whether section 718.2(e) merely represented a recodification of existing sentencing practice in which imprisonment already represented a sanction of last resort, or whether this section meant something different for Aboriginal offenders. This issue was resolved by the Supreme Court of Canada (SCC), which recognised that Aboriginal people possessed different worldviews compared to non-Aboriginal people about the substantive content of justice and the way that justice is achieved. They also recognised that imprisonment was "culturally inappropriate" for Aboriginal peoples, and that in order to treat Aboriginal offenders "the same" it was necessary to treat them differently (Haslip 2000). The SCC therefore considered that the purpose of the section was 'remedial' and that Aboriginal offenders should be treated differently with a greater emphasis placed on culturally appropriate sanctions such as restorative justice in lieu of imprisonment (Haslip 2000).

Despite this clarification, a number of problems have been associated with the implementation of section 718.2(e). A primary problem is that section 718.2 is inherently contradictory insofar as it recommends that Aboriginal offenders should be treated differently, while also emphasising that similar offences should receive similar sentences. Consequently, in the absence of a hierarchy of purposes, it is often not clear which sentencing objective should take precedence (Haslip 2000). A further problem has been that the provision assumes that judges have discretion in their sentencing decisions, when in reality their discretion is often limited (Haslip 2000). In addition, section 718.2(e) has been viewed by some as creating a race-based justice system, effectively constituting a 'get out of jail free card' for Aboriginal offenders (Haslip 2000).

Further issues have been raised about the presumption in favour of imposing restorative justice sentences for Aboriginal offenders. Haslip (2000) points out that while the SCC suggested that all offences were appropriate for restorative justice, it is questionable whether offenders convicted of assault, non-payment of fines, and alcohol-related offences represent appropriate cases for restorative disposals. She also points out that the communities from which the bulk of Aboriginal offenders are derived may lack the necessary resources to provide restorative community-based programmes, noting examples of cases where prison sentences were imposed because suitable community-based sentences were not available. Finally, she notes that placing Aboriginal offenders back into their communities may place those communities at greater levels of risk and, consequently, needs to be balanced against victim protection goals (Haslip 2000). This concern is reiterated by Dickson-Gilmore and La Prairie (2005, p230) who observe that:

*Most of the Aboriginal offenders to whom the sentencing reforms applied have Aboriginal victims, and there is no less imperative to consider their interests and ensure that they are treated fairly ... by focusing on Aboriginal offenders, we may harm Aboriginal communities.*

Haslip (2000) makes a number of recommendations as to how the use of section 718.2(e) could be improved. She argues that the Act should be altered to state that restorative justice principles override retributive objectives in the sentencing of Aboriginal people, and that the legislation must clearly state that this will result in the differential treatment of Aboriginal and non-Aboriginal people (Haslip 2000). She also recommends that both judges (and the public more generally) should be educated about the importance of restorative responses for Aboriginal people and the damaging impact of imprisonment. She further argues that a legal onus should be placed on judges, as well as Crown and defence counsel, to ensure that specific cultural factors associated with offending and culturally appropriate sentencing options are presented to the court. Finally, she points out that it will be important to provide greater levels of funding for Aboriginal-run community-based rehabilitative programmes.

## Australia

Recommendation 92 of the Royal Commission of Inquiry into Aboriginal Deaths in Custody (RCIADIC) suggested that prison should become a sanction of last resort for indigenous offenders (Edney 2004). In response to this recommendation, the Victorian Department of Justice introduced a clause to this effect in its sentencing guidelines. However, according to Edney (2004, p42) this has had "little, if any, apparent effect". A primary reason for this, he argues, is that there was already a long-standing common law principle of parsimony operating in Victoria and other Australian states prior to the RCIADIC, which applied equally to Aboriginal and non-Aboriginal offenders. The problem was therefore that Recommendation 92 simply echoed existing law and consequently did not go far enough (Edney 2004).

According to Edney (2004) a higher custodial threshold needs to be introduced for indigenous offenders in order for Recommendation 92 to have its desired effect. He argues that new legislation should be introduced which places an onus on courts to request a Prison Impact Statement (PIS) for Aboriginal offenders in all cases where imprisonment is being

considered. This should include information from the offender's family, indigenous elders, indigenous liaison officers, social workers, drug and alcohol counsellors, as well as information about their correctional history, including the rehabilitative programmes they have completed. He further suggests that a PIS could incorporate an assessment of the likely psychological, social and economic impact of imprisonment on the offender and their family, in addition to a summary of the community resources available to assist them (Edney 2004). In response to criticisms of differential treatment, Edney argues that such critiques "assume that the equality of the law is self-fulfilling when the historical experience of indigenous offenders suggests this is not the case" (2004, p4). He acknowledges, however, that the introduction of impact statements does not represent a panacea for the over-representation of indigenous people in the criminal justice system, and notes that the wider levels of social, economic and cultural exclusion experienced by Aboriginal communities play a more significant role in their over-representation (Edney 2005).

## New Zealand and elsewhere

There is no equivalent clause in New Zealand, although following the publication of Jackson's report in 1988, the Courts Consultative Committee noted that the issue of cultural defence was "an area which would benefit from future study" (Courts Consultative Committee 1991, p33). The right to include cultural statements prior to sentencing under section 27 of the Sentencing Act 2002 is the closest equivalent in New Zealand; however, this does not specify the need to treat ethnic groups differently, as all groups have the ability to make cultural statements (Chetwin, Waldegrave and Simonsen 2000). The intended utility of cultural statements has also been impeded by the same problems outlined in relation to cultural sentencing clauses in Canada and Australia, with most offenders who use cultural statements receiving custodial sentences either due to the seriousness of their current offence and/or the lack of appropriate community-based programmes (Chetwin, Waldegrave and Simonsen 2000).

Another variation of this type of practice in New Zealand is the Specialist Māori Cultural Assessment (SMCA) tool used by the Department of Corrections. As discussed in Chapter 1, and in a similar vein to cultural statements, this initiative has been found to have a limited impact on sentencing practices due to the seriousness of the current offence and/or the lack of appropriate community-based programmes available.

In the United Kingdom, Matravers and Tonry (2003) have argued that culturally differentiated sentencing options would be unrealistic. They suggest that one implication of such legislation is that certain ethnic-minority groups are less morally autonomous and responsible than majority-ethnic groups, and, for this reason, are less deserving of punishment. They assert that such an approach would effectively reinforce racial difference and be deeply stigmatising for ethnic-minority groups, and could, in turn, elicit a majority-ethnic group backlash about differential treatment. They further point out that the adoption of such legislation could potentially diminish the deterrent effect of criminal justice sanctions (such as this exists) on ethnic-minority people, and could lead to increased criminality amongst these groups (Matravers and Tonry 2003, p170).



## Reducing imprisonment

Given the problems associated with cultural sentencing initiatives – in terms of the inability of these initiatives in their current form to reduce ethnic-minority imprisonment – several authors have suggested that reducing imprisonment across all groups may represent the best option for reducing the number of ethnic-minority people in prison (Matravers and Tonry 2003; Baker 2001; Haslip 2000). As Matravers and Tonry (2003) have argued, even if rates of ethnic disproportionality remain the same, reducing overall levels of imprisonment is likely to disproportionately benefit ethnic-minority people. To illustrate this point they offer the following example:

**Table 1: The impact of reducing imprisonment by 50 percent versus reducing disparities between the black and ethnic-majority prisoner populations**

	<b>Black prisoners</b>	<b>Ethnic-majority prisoners</b>	<b>Black/Ethnic-majority ratio</b>
Imprisonment rate per 100,000	560	80	7:1
Imprisonment rate if ethnic disparity reduced by 14%	480	80	6:1
Imprisonment rate if imprisonment level is halved	280	40	7:1

They point out that 3 ½ times more black people would be spared imprisonment if the total prison population was reduced by half, than if the ratio of disproportion was reduced by 14 percent, which, they argue, is on the high side of what is likely (Matravers and Tonry 2003, p44). This raises questions about precisely what the problem is that needs to be addressed: in particular, whether it is the large number of ethnic-minority people in the criminal justice system *per se*, or their disproportionate representation in comparison to majority-ethnic groups that is considered problematic?

Baker (2001) has explored similar options for reducing Aboriginal imprisonment rates in Australia. She argues that by substituting community-based sentences for short sentences (ie, those less than six months) it would be possible to achieve a 54 percent reduction in the number of indigenous people sentenced to imprisonment, while removing 12-month prison sentences would stand to reduce the number by 84 percent (Baker 2001). This would mean that the proportion of indigenous people sentenced to imprisonment would be reduced from 17 percent to 3 percent. While smaller reductions would be found, she suggests that even eliminating three-month sentences would reduce the number of indigenous people sent to prison by 23 percent. She points out, however, that any reductions made in the number of indigenous prison sentences would need to be balanced against the need to protect indigenous communities (Baker 2001). She acknowledges that it may not always be appropriate to divert people from imprisonment, and such an approach would be unlikely to work for either serious or repeat offenders, especially those who had repeatedly breached community-based sanctions (Baker 2001).

While not exploring this in depth, Haslip (2000) has suggested that the possibility of ‘capping’ the number of Aboriginal peoples in Canadian state and federal prisons could represent a fruitful direction for reducing their over-representation in these institutions.

## Decriminalisation

A further response to address the ethnically uneven impact of existing laws has been to decriminalise or under-police certain categories of offence in which ethnic-minority persons are most over-represented. An example of this type of response has been the decriminalisation of public drunkenness in Australia, which was recommended by the Royal Commission of Inquiry into Aboriginal Deaths in Custody. This recommendation envisioned that drunken Aboriginal persons would be placed in community-based 'sobering up' centres rather than being arrested and placed in police custody for public order offences (Cunneen 2002). However, as Cunneen (2001) has noted, the recommendation to decriminalise drunkenness has yet to be fully realised in most Australian states. This, he argues, is largely because a number of areas have passed bylaws to ban liquor in particular public spaces which result in Aboriginal people being charged under the new bylaws. A number of communities have also resisted the establishment of sobering-up centres in their local area (Cunneen and McDonald 1996).

Walker and McDonald (1995) have pointed out that, broadly speaking decriminalisation would only really work to reduce Aboriginal over-representation to the degree that all but the most serious offences they commit are ignored. For this reason, decriminalisation is only likely to reduce ethnic disparities arising from less serious offences, and cannot address the disproportionate rates of imprisonment associated with more serious forms of offending, such as violent offences. More crucially, Cunneen and McDonald (1996) point out in their evaluation of the RCIADIC recommendations that the current political climate has tended to favour more punitive approaches to offenders (including those who commit public order offences and low-level incivilities). This has meant that there has been a lack of political will to invest in decriminalisation projects that could be perceived as 'soft' approaches to crime. A similar point has been made by Blagg (2008) in relation to policies such as diversion and similar strategies seeking to reduce the over-representation of Aboriginal people in Australia's criminal justice system. According to Blagg (2008, p1)

*However firm the commitment of government and policymakers may be to the idea of diversion and the construction of credible alternatives to involvement in the system, the fact remains that these policies co-exist with a suite of laws, practices and mentalities that tend to cancel them out.*

## Randomisation

According to Harcourt (2006), racial disproportionality in prison populations can be attributed – at least in part – to the rise of actuarial measures in the area of criminal justice (see also Harcourt 2004a, 2004b, 2003). Actuarial methods are defined as “the use of statistical methods on large datasets to predict past, present or future behaviour” (Harcourt 2006, p1). Harcourt (2006) argues that while it appears commonsensical to target policing resources on those groups that have been found to commit more crime in the past, doing so will effectively distort the characteristics of the arrested population. The impact of targeting is particularly problematic, he asserts, in the case of racial profiling because targeting police resources against certain ethnic-minority groups will, in turn, increase their representation in the prison

population over and above their real levels of offending. This is because rather than sampling the actual offender population randomly to obtain a representative sample of the offending rates for each group, focusing police resources on certain groups (or certain places) means police sample in greater numbers from some groups, thereby skewing the 'sample' results. Each time policing agencies utilise the distribution of past arrest data to deploy their resources, the number of arrests overall would be expected to increase, as police are targeting their resources more effectively. At the same time, however, each time this process occurs, the proportion of arrests that involve members of the targeted groups will also increase. This represents what Harcourt refers to as "the ratchet effect" (2006, p156).

To illustrate the 'ratchet effect' Harcourt asks us to imagine a situation where the total population ( $n = 1,000,000$ ) is comprised of 80 percent majority members and 20 percent minority members, and actual offending rates are higher in the minority group (8 percent) compared to the majority group (6 percent). If the police have resources to stop 1 percent of the population (a total of 10,000 searches) and assuming that both groups have an equal probability of being stopped, then it would be expected that this would result in 2,000 minority group and 8,000 majority group people being searched, producing 160 minority arrests and 480 majority arrests (a total of 640 arrests). The minority group would then comprise 25 percent of arrests and the majority group 75 percent. However, if the decision was made to target the minority group because their offending rate was higher, the arrest distribution becomes skewed. For example, assuming the same population composition, offending rates, and police resources exist, and police decide to stop double the number of minority group persons, this would be expected to result in 320 minority arrests and 360 majority arrests (a total of 680 arrests), meaning that the minority group would now account for 47 percent of arrests. This illustrates two key trends: first, once police resources are allocated to focus more on the minority group, their representation in the arrest population becomes increasingly disproportionate; second, the more police target their resources on the basis of past arrest statistics, the more efficient policing becomes as the same number of searches nets a greater number of arrests (Harcourt 2006).

Targeting police resources in this way, Harcourt hypothesises, may lead to more crime because of the 'relative elasticities' of different ethnic groups. He uses the term 'relative elasticities' to refer to the ability of different groups to adapt to police targeting. His argument is that the targeted group (because of their higher levels of social disadvantage and higher level of criminogenic needs) may be less able to reduce their levels of offending in response to police targeting. Consequently, he argues, that targeting this group is unlikely to lead to a reduction in their offending. At the same time, however, he proposes that non-targeted groups may potentially increase their offending safe in the knowledge that police resources are focused elsewhere. On this basis, Harcourt (2006) argues that racial profiling (and other forms of profiling) represents an inefficient form of policing.

Harcourt argues that the only solution to this problem is to employ a randomised policing model. He asserts that:

*Somewhat counter-intuitively the only way to produce a prison population that mirrors that offending population is to sample randomly from the general population – to engage in essentially random searches ... or random policing. Barring randomisation, our results will be distorted (2006, p29).*

## Challenges to the randomisation thesis

There have been a number of criticisms directed towards Harcourt's 'randomisation thesis' on practical (Stenson 2007; Barnes 2008), theoretical (Moskos 2008), technical (Moskos 2008) and moral bases (Alschuler 2002; Margalioth 2008; Zedner 2008; Barnes 2008).

Practically speaking a number of academics have questioned whether Harcourt's model of randomised policing is realistic. As Stenson (2007) has argued, the notion of statistically randomised policing is naïve, and is neither politically nor operationally practical, given that most middle-class constituencies would reject it. Barnes (2008) has also questioned its practical application, noting that randomisation would represent an entirely inefficient form of policing resulting in already insufficient resources being wasted, and calling into question the true goal of policing, namely: to minimise the harm caused by crime. Stenson (2007) also points out that a randomised policing approach would potentially ignore the very real social problems associated with disadvantaged communities.

Barnes (2008) argues that Harcourt's definition of randomisation is 'hazy', and he does not articulate precisely how his theory would be translated into practice. She argues that Harcourt implies that all criminal justice decision making currently based on 'risk assessment' or 'profiling' should be randomised, but that this would be impossible as human judgement must always exist somewhere in the process. In the case of stop and search practices, then, she notes that a number of decisions would still require some form of human judgement. She also points out that constitutional searches require some grounds for reasonable suspicion, meaning that human judgement inevitably enters into the equation and asks who would decide which areas were patrolled, how often, and at what time of day? Should scarce policing resources be focused on more serious forms of offending, or should this also be subject to randomised methods? At the very least, she argues, "someone has to create the randomisation programme" (Barnes 2008, p698).

At a technical level, Moskos (2008) points out that in order for Harcourt's randomisation model to work, the population itself would need to be randomly dispersed across both time and space. This is, of course, not the case and Moskos (2008) therefore questions how police based in a predominantly black community could put principles of randomisation into action. Theoretically, he further questions Harcourt's over-reliance on rational-choice theory insofar as he assumes that people respond rationally to police targeting. He states that the average street-level offender "lacks both the long-term introspection (and perhaps the basic math skills) to weigh variances in either sentence length or likelihood of apprehension" (Moskos 2008, p1476). Focusing on the example of drug offending used by Harcourt, he contends that it is unlikely that majority-ethnic groups will engage in more crime as a result of police profiling black offenders, and questions whether drug 'king pins' have access to a racially diverse pool of drug couriers in order to adapt to police practices and increase their

levels of drug trafficking. Similarly, Margalioth (2008, p251) has argued that as 'real' levels of offending remain unknown, we cannot assume that black people or other ethnic-minority groups are less 'elastic' to police targeting than other groups.

Despite these criticisms, Barnes (2008) has argued that the principle of randomisation could potentially be usefully applied in order to check both levels of 'real' offending and how different groups respond to police targeting. She therefore advocates for the use of 'intermittent randomisation' whereby police undertake randomised traffic stops on certain days or at certain times, and compare the results in terms of both the 'hit rates' and the ethnic distribution of arrestees to develop a better basis for future targeting.

## Disparate impact statements

A different response to the problem of ethnically-disproportionate outcomes is the introduction of compulsory disparate impact statements for all criminal justice policies. The utility of disparate impact statements lies in their ability to help criminal justice agencies understand how policy choices, which appear neutral, nevertheless impact differently on different ethnic groups (Matravers and Tonry 2003).

The aim of disparate impact statements would be to assess the likely nature and extent of disproportionate outcomes resulting from new criminal justice policies and practices for different groups (for example, different ethnic, gender, and age groups) prior to their introduction (Matravers and Tonry 2003). Matravers and Tonry (2003) point out that this type of analysis is relatively commonplace in other areas of public policy; for example estimates of lost lives are regularly weighed against the cost of road building and vehicle design, and for Matravers and Tonry, similar 'trade-offs' ought to be discussed in relation to race and the criminal justice policies. While recognising that such a proposal does not appear particularly radical, they claim to have found no evidence of any jurisdiction routinely employing such analyses as a forerunner to the introduction of criminal justice policies.

The reason that such analyses have rarely been undertaken, they argue, is often due to political imperatives surrounding criminal justice policies insofar as it is often politically expedient for governments to be seen to be reacting to particular crime problems (Matravers and Tonry 2003). They note the example of drug legislation introduced in the United States during the 1980s, which led to the creation of harsher penalties for dealing in crack cocaine compared to pharmacologically similar powdered cocaine. Because black street-level dealers were more likely to deal in crack cocaine this legislation disproportionately negatively impacted on lower-class black people compared to middle-class people from majority-ethnic groups who were more likely to deal in powdered cocaine (Matravers and Tonry 2003; Tonry 1996, 1995). Tonry (1995) has stated that "anyone with knowledge of drug trafficking patterns and of police arrests could have foreseen that the enemy troops in the War on Drugs would consist largely of young, inner-city, ethnic-minority males" (Tonry 1995, p5).

Harcourt and Ludwig (2007) found that similarly predictable levels of ethnic disproportionality resulted from the introduction of zero tolerance policing of misdemeanour marijuana offences (namely, smoking marijuana in public) in New York City. Between 1994 and 2000, the arrest

rate for this offence increased by 2,670 percent, with the majority of arrests involving African Americans or Hispanics, who, while comprising 25 percent of the residential population, accounted for 52 percent and 32 percent of arrests respectively. They also found that African American and Hispanic arrestees were more likely to be detained prior to their arraignment and were more likely to be convicted than their majority ethnic counterparts. Despite its disparate impact on ethnic-minority groups, Harcourt and Ludwig (2007) observed that there is little evidence that this policing strategy contributed to a decline in the types of serious crime as was originally anticipated. On the contrary, Harcourt and Ludwig found that the increase in arrests for marijuana offences coincided with an increase in arrests for violent crime.

For these reasons, Matravers and Tonry (2003) argue that it is vital to make policymakers decide whether a policy's presumed crime prevention objectives outweigh the foreseeable racial/ethnic disparities it will cause. Policymakers will then be forced to make "explicit choices between crime control policy goals and goals of social/racial inclusion" (Matravers and Tonry 2003, p172).

Disparate impact analyses have been introduced in Australia as a response to the over-representation of Aboriginal people in custody. In Australia these are known as 'Aboriginal Impact Statements' (Cunneen 2002, p9). Aboriginal impact statements were proposed as part of the Aboriginal Justice Agreements developed by states throughout Australia during the 1990s. Similar to the approach proposed by Matravers and Tonry (2003), it was recommended that all legislative and Cabinet proposals developed by the Attorney-General should contain an assessment of the potential impact on Aboriginal people (Cunneen 2002). To date, no research has been published on the use or effects of Aboriginal Impact Statements. Consequently, the ability of this initiative to reduce Aboriginal disproportionality is currently unknown.

Within New Zealand it is not common practice to include ethnic disparity statements in either legislative or Cabinet proposals.<sup>54</sup> The Cabinet Guide (2008) generally notes that proposals must avoid discrimination insofar as they are required to comply with the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1999. It also states that the gender implications associated with proposed policies or practices should be identified in papers submitted to the Cabinet Social Development Committee, including whether a gender analysis was undertaken, and, if not, why this was the case. In addition, the guide states that 'where appropriate' proposals should consider the impact of policies and proposals on disabled people (Cabinet Office 2008).

## Indigenous justice systems: the case for legal pluralism

A number of authors have argued that more fundamental changes to the structures of the criminal justice system are required in order to reduce ethnic disproportionality for indigenous offenders and fully empower indigenous communities (Hazlehurst 1995; Jackson 1988, 1995a; Webb 2003; Quince 2007; Wickliffe 1995).

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<sup>54</sup> While some agencies require an ethnicity impact statement to be included on new policy proposals (for example, NZ Police); there is no requirement to undertake (or provide evidence of undertaking) any analysis to inform this statement.



Those writing from this perspective have advocated for justice programmes and services to be developed, designed, and implemented by indigenous populations for indigenous populations. Similar arguments have been advanced in Australia, Canada and New Zealand and are often grounded in constitutional documents, which acknowledge the right of indigenous peoples to self-determination (Havemann 2004). Consequently, such arguments are typically restricted to indigenous populations and have not been proposed for ethnic-minority immigrant groups.

While calls for self-determination have typically led to the introduction of the types of cultural initiative discussed in Chapter 1, a number of authors such as Jackson (1988, 1995), Quince (2007), Webb (2003) and Tauri (1996, 1999) have questioned whether operating indigenous programmes within mainstream legal frameworks truly permits self-determination or addresses the monocultural biases built into mainstream colonial legal frameworks and criminal justice processes (see also Poananga 1998, cited in Webb 2003; Walters, Bradley and Tauri 2005; Mikaere 2008). Those adopting this perspective have argued that a key solution to indigenous over-representation is the development of a separate system based on customary laws and traditional indigenous practices.

Literature on the development of indigenous legal systems has been largely restricted to Canada and New Zealand. As there are currently no working examples of completely separate justice systems in operation, this literature has been mostly theoretical in nature. Within this literature, three main arguments have been advanced for the development of a separate system. First, that a separate system is part of indigenous people's right to self-determination and self-governance, which cannot be achieved through limited delegation of responsibility within mainstream justice systems (Jackson 1995b; Tauri 1996, 1999). As noted in Chapter 2, this right was formally recognised in several government inquiries into Aboriginal people and the criminal justice system in Canada (see for example, Clark and Cove 2004; McNamara 1992). Second, it is argued that mainstream justice systems and sanctions are incompatible with indigenous cultures and methods of conflict resolution (Clark and Cove 2004; Jackson 1988; Webb 2003). Third, it is held that existing levels of disproportionality suggest that mainstream justice systems have failed to provide equality of justice to indigenous peoples (Edney 2004, 2005; Aboriginal Justice Implementation Commission 1999; Jackson 1988).

Supporters of indigenous legal systems emphasise the failure of past initiatives such as cultural awareness training and indigenous recruitment to reduce the over-representation of indigenous people in the criminal justice system (Quince 2007; Jackson 1995b). Within New Zealand, Quince (2007), Jackson (1988, 1995b) and Tauri (1996, 1999) have been critical of initiatives such as marae justice, family group conferencing and adult restorative justice, which they have argued are branded as Māori but are typically imposed by the state, and are based on monocultural values and processes. According to Jackson (1995), the fact that the justice sector adopts Māori traditions that fit its objectives, whilst continuing to deny Māori a separate justice system, represents a continuation of the colonisation of Māori. He states, "the denial of a final right to care for one's own, and to sanction them when they do wrong, is part of the dispossession of colonisation" (Jackson 1988, p34).



There is very limited research about precisely how a separate indigenous justice system (or series of systems) would actually operate in practice. In New Zealand Hakiha (1999, cited in Webb 2003) has argued that Māori justice processes would be based on a tikanga model of dispute resolution. He identifies a number of core concepts that would be associated with the delivery of Māori justice, including: whakawhanaungatanga (inter- and intra-family relationships); akoako (consultation during conflict resolutions); aarita/pāngia (touching); waiata (singing) and whakatakotoranga ('lie down' used to mean little input from the offender). He further envisions a process not dissimilar to that found in existing restorative justice approaches, including: prayers (karakia), speeches by victims, offenders and their wider family or whānau, discussion of whakapapa (genealogy), discussion of the matter at hand and some form of consensual resolution (Hakiha 1999, cited in Webb 2003: 264; see also Wickliffe 1995).

Aside from identifying guiding concepts and processes, little has been written about what the implementation of a separate indigenous system (or systems) would practically entail (Clark and Cove 2004; Tauri 1996; Morris and Tauri 1995; Webb 2003; Wickliffe 1995). In the New Zealand context, then, it is not precisely clear whether all Māori offenders/victims would go through the indigenous system, regardless of whether they wished to do so. In the event that a crime was inter-ethnic, in which court would the case be heard, and who would make this decision?<sup>55</sup> How would urban Māori connect with iwi-based justice systems located in traditional tribal areas? How would a traditional Māori model of justice operate in urban locations where Māori live in fragmented communities rather than traditional kin-based groupings? (see Webb 2003; Tauri 1996; Morris and Tauri 1995; Maaka 1994, cited in Webb 2003, pp268–9; similar issues have also been raised in the Canadian context, see La Prairie 1999b). In Canada it has been suggested that regardless of the ethnic identity of those arrested, all persons arrested within the boundaries of an indigenous court's jurisdiction would be processed through that system. The relevance of this type of system in New Zealand, however, is questionable given the urbanised and geographically dispersed nature of modern Māori communities (Webb 2003, see also Morris and Tauri 1995).

Blagg (2008) has raised concerns about the cultural implications of developing separate indigenous justice systems. He notes that such approaches may run the risk of positing culture as both the cause of, and solution to, indigenous offending (in a similar vein to the approaches discussed in Chapter 1 of Part 2). He further points out that Aboriginal crime in Australia is:

*...a manifestation of damage caused to the fabric of Aboriginal law and society by the intrusion of some of the most negative and destructive aspects of non-Aboriginal culture [he notes drug and alcohol abuse and the impact of institutionalisation as examples]. These have generated a number of problems which Aboriginal law and culture was never designed to handle (Blagg 2008, p178).*

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<sup>55</sup> Morris and Tauri (1995) suggest that in line with the wider victim-centred ethos of restorative justice this decision would inevitably fall to the victim.

Blagg (2008) also points to the international tensions surrounding the development of separate indigenous justice systems. Namely that while the United Nation's Declaration on Indigenous Rights allows for the recognition of indigenous rights to self-govern on the one hand, there is a danger that aspects of Aboriginal justice (he provides the example of the Aboriginal practice of 'payback'<sup>56</sup>) may be in conflict with international human rights law, and, consequently, run the risk of further criminalising the Aboriginal men who exact these forms of justice in the name of Aboriginal women and children.

## Summary

This chapter has examined a number of responses that seek to address indirect or subtle forms of bias or attempt to reduce disparate outcomes *per se*. These responses have focused on the disproportionate effects of racially/ethnically neutral criminal laws and criminal justice policies. They have included the removal of race-correlated factors in sentencing, the introduction of differential sentencing legislation, the reduction of imprisonment across the board, the decriminalisation of certain offences, the introduction of randomised policing models, the use of disparate impact statements in policy formation, and the development of separate indigenous legal systems.

The chapter has illustrated the importance of examining how the practices and policies of the criminal justice system interact with broader structural disadvantage to bring about disparate outcomes for ethnic minority and indigenous groups. However, it has also noted that many of the responses here have yet to be put into practice, and has discussed a number of reasons for why this is likely to be the case, including that these responses are:

- not always practical and/or may lead to inefficiencies in the system (ie, the randomisation thesis)
- often perceived to be in tension with the crime control objectives governing many contemporary justice systems (for example, the move towards more punitive responses to offending and a greater emphasis on victims' rights)
- viewed as being contrary to the achievement of other, long-established justice objectives and principles such as deterrence, ensuring community safety and guaranteeing 'fairness' or equity in justice processes.

More generally this chapter has demonstrated that tweaking criminal justice policy settings without also examining the other factors which contribute to ethnic disproportionality (particularly the pronounced structural inequalities affecting certain ethnic minority and indigenous groups) is unlikely to bring about a dramatic reduction in current levels of ethnic disproportionality.

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<sup>56</sup> Based on traditional customary laws, this practice involves stabbing an offender in the leg with a spear by way of punishment for offending (see Blagg 2008).



## Part 3: Conclusion

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### Introduction

This report has critically examined research findings on effective practices for identifying and responding to bias within criminal justice decision making. It has provided an overview of key New Zealand research findings and has situated these findings within the context of four decades of international research. As such, it represents the most comprehensive effort within New Zealand to date to summarise research on ethnic disproportionality.

The review canvassed an extensive amount of literature derived from both New Zealand and international jurisdictions, including: England and Wales, the United States, Canada, and Australia. It found that the bulk of research produced on this subject has emerged from England and Wales and the United States, with comparatively little recent work undertaken in New Zealand. It also identified that a considerable proportion of the literature has focused on the possibility of bias in police and court decision making, with significantly less research published on other stages of the criminal justice process such as prosecution, imprisonment and parole.

As the preceding chapters have demonstrated, research findings in this area are typically complex, inconsistent, contradictory and contested. As a consequence, it is often challenging to identify general findings and dominant themes within the literature. Despite these difficulties, however, a number of key findings and themes have emerged from the review. The aim of this chapter is to succinctly summarise the most salient messages of the review and consider the implications these hold for future research and policy development. In doing so, it will suggest a possible framework through which responses to the problem of ethnic disproportionality could be developed.

### Main findings

This review set out to answer a number of questions about the nature and extent of bias in criminal justice decision making. As the previous chapters have documented, easy answers have seldom been forthcoming. Nevertheless, through describing the complexities and contradictions associated with these questions, the current review has revealed a number of core issues pertinent to determining future directions for both research and policy. The key questions and the issues arising from them will be summarised below.

#### **Do ethnic disparities exist at key discretion points in the criminal justice system?**

There is widespread evidence of ethnic disparities in criminal justice outcomes. International and New Zealand research has conclusively shown that certain ethnic-minority groups are over-represented in adverse criminal justice outcomes. This is true across different stages of the system, from initial stop, search and arrest outcomes, through to parole outcomes.

The extent to which such disparities are caused by bias, however, is not clear and has been the subject of considerable debate within the literature. What is apparent, however, is that the role of race/ethnicity in predicting criminal justice outcomes is far more complex than the straightforward comparison of ethnic differentials initially suggests.

Research has consistently shown that a number of factors other than race/ethnicity contribute to differential outcomes. For example, the role of race/ethnicity in predicting criminal justice outcomes is mediated by legal factors (such as current offence seriousness and offending history) and extra-legal factors (such as gender, age, socioeconomic status, and the situational context of the alleged offence(s)). The exact level of disparity also varies across different stages of the system, and between different offence types, courts, and regions. Any bias that may be operating against ethnic-minority groups, then, is unlikely to be systematic in nature.

Following this recognition, the key question becomes not, 'is the criminal justice system biased?' but rather, 'in what particular contexts might bias be occurring?'

### **Why do these disparities exist? What role does bias play in the production of ethnic disparities?**

The review identified two major explanations for ethnically disproportionate outcomes within the literature: the differential involvement thesis and the discrimination thesis. The differential involvement thesis holds that levels of ethnic disparity are largely, if not solely, the product of differential offending by certain ethnic-minority groups. In short, these groups are over-represented because they offend more. The discrimination thesis argues that levels of ethnic disparity should be understood (at least in part) as the result of both direct and indirect discrimination within the criminal justice system and society more broadly.

Despite being portrayed as oppositional, these perspectives are not mutually exclusive. It is plausible, therefore, that they operate simultaneously to bring about disparate outcomes. Crucially, the possibility that bias in some way contributes to ethnic disparities cannot be ruled out.

More recently, scholars have pointed out that the debate surrounding the contributions that differential offending and discrimination make to ethnic disparities is counterproductive and inimical to the development of sound policy responses. They have argued that policymakers must move beyond this debate to focus on disparate outcomes – regardless of their origin – as this represents the basic policy problem to be solved.

### **Is it possible to definitively measure the nature and extent of bias in criminal justice decision making?**

While the possibility of bias cannot be discounted, the precise contribution that it makes to levels of ethnic disproportionality cannot be neatly disaggregated from other, as yet unmeasured, factors that could potentially account for some of the unexplained variance between different ethnic groups.

Quantitative studies that have claimed to uncover definitive evidence that bias exists are therefore misleading and have erroneously equated unexplained variation between ethnic groups with bias. Studies that conclude that bias is not operating when no disparity remains once legal and extra legal factors are taken into account are equally misleading. This is because finding 'no disparity' does not exclude the possibility that bias may be occurring at earlier stages of the system or operating at a more localised level.

A major finding of the review, then, is that it is not currently possible from the extant research to identify the nature and extent of bias. However, it is likely that ethnic disparities arise from a complex interplay of differential offending rates, direct forms of discrimination, and indirect forms of discrimination (within the justice system and society more broadly). Collectively these factors can be understood to have created and compounded the problem of ethnic disproportionality.

### **How have criminal justice systems responded to ethnic disparities?**

Few responses have been explicitly directed towards addressing bias in criminal justice decision making. This is hardly surprising given the difficulties associated with identifying why ethnic disparities are occurring and the lack of definitive evidence about the precise role bias plays within this. Consequently, in comparison with the large volume of literature produced on identifying bias in the criminal justice system, much less attention has been afforded to examining how to respond to it.

In lieu of directly addressing possible bias, criminal justice responses have typically focused on achieving intermediary outcomes that can, in turn, be understood to indirectly contribute to the reduction of ethnic minority over-representation. Such responses have targeted different aspects of the problem, and – while not explicitly informed by competing perspectives on the causes of ethnic disparity – have nonetheless developed in parallel, and are implicitly underpinned by them. As such, responses to the problem of bias fall into three overarching categories:

1. responses targeted at reducing offending and re-offending by indigenous and ethnic-minority peoples
2. responses aimed at addressing process-related factors within the criminal justice system that implicitly target more overt forms of discrimination
3. responses that focus on the problem of discriminatory outcomes which arise from the neutral application of legislation, operational policies and decision making criteria.

### **Establishing what works**

There are a number of challenges associated with defining what works in addressing the over-representation of particular ethnic groups in the criminal justice system. Identifying 'best practice' in this area is difficult because the nature of the problem is often localised and contextual. Consequently, responses for one group in one location are not necessarily appropriate for addressing that experienced by other ethnic groups in different contexts.

Questions also arise about what it means for responses to 'work'. In the absence of conclusive outcome evaluations it is often not clear from the literature which initiatives are successful. Establishing 'what works' is further impeded by the recognition that both international and New Zealand research indicates that levels of ethnic disparity are increasing (see, for example, Fitzgerald 2009; Blagg 2009, Gabbidon 2010). The degree to which responses can be understood to be successful in this context is therefore questionable.

What is apparent from the literature is that there is no single, straightforward panacea for ethnic disproportionality. Given the multifaceted and complex aetiology of the problem, it is likely that solutions will also need to be multifaceted, target the different components of the problem, and take into account the different contexts in which ethnic disparity arises.

Despite the absence of an obvious solution or easy fix, a number of factors essential to successful policy responses to this problem were identified in the literature. These included:

- that ethnic minority and/or indigenous peoples should be afforded a central role in the design, implementation and governance of programmes and initiatives
- successful initiatives should incorporate cultural components and adopt a holistic approach to the issue of disproportionality, looking beyond the remit of the criminal justice system in order to address broader social, economic and political inequalities
- responses should be well resourced and supported by criminal justice agencies and should not rely solely on the good will of indigenous and ethnic-minority volunteers
- progress towards reducing over-representation needs to be closely monitored through the systematic collection and publication of appropriate information
- given the holistic focus of many responses, it may be necessary to adopt a longer-term view to establishing 'what works' and it is likely that different, more innovative, indicators of success will be required
- it should be recognised that policies for reducing ethnic disproportionality may be in tension with other criminal justice objectives, such as the move towards introducing more stringent measures for dealing with certain types of offenders and offences.

The review also found a number of common difficulties associated with developing successful responses to disproportionality. These included:

- issues with funding due to the holistic focus of many responses and the fiscal divisions across government departments
- problems associated with empirically 'proving' that programmes/initiatives work to reduce offending and/or levels of ethnic minority over-representation
- a disproportionate focus on dysfunctional individuals, families and communities at the expense of addressing the role of structural inequalities and/or the role of the criminal justice system in creating and perpetuating ethnic disproportionality
- a failure to fully acknowledge the link between colonisation, structural disadvantage and ethnic disparities in the criminal justice system



- a failure to achieve any meaningful level of indigenous self-determination, ownership or empowerment
- a lack of government accountability for collecting and publishing relevant administrative data on ethnic minority/indigenous disproportionality in the criminal justice system
- competing state and indigenous/ethnic-minority group views about the purpose of programmes responding (albeit often implicitly) to ethnic disproportionality
- tensions between crime-control objectives and goals of social/racial inclusion
- a general failure to fully accept and address the different aspects of the problem, namely differential offending, direct bias, and indirect bias.

### **Future directions: where to from here?**

Four decades of international and New Zealand research has failed to deliver definitive answers about the nature and extent of bias against ethnic-minority people and how this should be successfully addressed. Moreover, countries which have invested far greater time and resources in investigating and responding to this issue have yet to ‘solve’ the problem of ethnic over-representation. It should, therefore, be recognised that ethnic disproportionality in the criminal justice system represents a challenging problem to research and remedy.

The following discussion will briefly consider the implications of this recognition for undertaking further research and developing a policy framework for addressing ethnic disproportionality in the New Zealand context.

### **Opportunities for future research**

The current review has demonstrated that there are significant gaps in knowledge about ethnic disproportionality and bias in New Zealand. While it may be natural to conclude the answer to ethnic disproportionality lies in further empirical research, it is important to accept the fact that even the most sophisticated international studies have failed to provide a successful policy blueprint for addressing ethnic disparities. Any future research must therefore start from the recognition that even a sophisticated, large-scale multivariate study will inevitably fall short of providing decisive answers about whether any part of the system is biased.

There are a myriad of methodological and interpretation problems associated with research on this subject that has limited the impact of such work on policy development. This cannot be attributed solely to the use of flawed methodologies, but should be understood as the result of the ontological limitations of the subject. Deciding whether bias exists is principally a matter of perspective rather than empirical investigation.

This is not to suggest that further research efforts should be abandoned altogether. As this review has noted throughout, there are significant gaps in the current knowledge about ethnic disparities in this country and the existing research is often small-scale and considerably dated. There is also some evidence that the results of New Zealand studies differ in important ways from international results. However, any future quantitative research effort

should focus on the issue of ethnic disparity or disproportionality *per se* rather than entering into the chimerical search for pure discrimination or bias. This research should aim to elucidate the varied contexts in which disparity occurs in order to help identify where policy solutions can be most productively targeted.

It is also important to qualitatively examine the processes that lead to disparate outcomes, rather than simply focusing on outcomes alone. In doing so, it may also be pertinent to consider other methods for identifying bias, such as finding out which stages and processes within the system are perceived and/or experienced as discriminatory by those groups who are most over-represented within it. Such an approach would enable policymakers to focus on those aspects perceived as most problematic and, in doing so, ought to improve ethnic minority/indigenous views of, and experiences within, the criminal justice system.

Crucially, however, future research should not occur at the expense of developing policy responses for reducing ethnic disparities.

### **Towards a framework for action**

Although the precise contribution made by differential offending, direct discrimination and indirect forms of discrimination to ethnic disparities cannot be isolated, research suggests that the ethnic disparities in criminal justice outcomes arise from a complex combination of these three factors. A comprehensive policy framework for addressing ethnic disproportionality would therefore incorporate responses targeted at addressing each of these three dimensions, including:

- responses directed towards reducing ethnic minority and/or indigenous offending and re-offending, including a broader focus on addressing the structural inequalities that contribute to differential offending rates
- process-orientated responses aimed at enhancing cultural understanding and responsiveness within the justice sector, increasing the positive participation of indigenous and ethnic-minority people within the system, and increasing government accountability through the monitoring and publication of information related to rates of ethnic over-representation
- policy-level responses that identify and seek to correct the disproportionate impact of neutral laws, structures, processes, and decision making criteria on particular ethnic-minority groups.

In addressing each of these dimensions, it is also important to keep in mind the contextual and varied nature of ethnic disparities. This means recognising that a national-level, one-size-fits-all response is unlikely to be appropriate for addressing all forms of ethnic disparity, in all locations, at all stages of the system, or for all offence types and all offenders. The local specificity of disproportionality should therefore form a key consideration in the development of policy solutions to the over-representation of Māori and Pacific peoples in New Zealand's criminal justice system.

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