LEGALLY BROWN:
The experiences of Pasifika women in the criminal justice system

Litia Tuiburelevu*

The status of Pasifika women within New Zealand's criminal justice system has not been closely examined in academic literature. There is a paucity of discussion exploring the unique challenges Pasifika women face in their interactions with lawyers, judges and the system as a whole. This article identifies some of the gaps in the current research, the attitudes of Pasifika women towards the legal profession and how their respective cultural contexts have been addressed by judges with reference to three recent decisions. It argues that Pasifika women have largely been rendered invisible within the justice system; conflated within the general "Pacific peoples" category with little attention given to their intersectional experiences. This is attributed to the fact that Pasifika women are largely underrepresented in the criminal justice system, as lawyers, judges, legislators and policy-makers. Ultimately, this article finds that the status of Pasifika women within the justice system demands attention and further dedicated research.

I INTRODUCTION

How does New Zealand's criminal justice system treat Pasifika women? The answer is unclear. The difficulty lies in the absence of dedicated research engaging with the experiences of Pasifika peoples and their interaction with New Zealand's legal system. With few Pasifika women in legal academia and the legal profession, there have been fewer opportunities and less of an impetus to explore this question.[1] This is unsurprising considering that there is a paucity

---

* BA/LLB(Hons), Meredith Connell. The author would like to thank Dylan Asafo for his support on this article. This article does not represent the views of anyone other than the author.

1 Comprehensive analysis generally comes from dedicated academic and policy research. Currently, Pasifika people comprise 1.5 per cent of all tertiary academic staff. At the time of writing, there are only three law lecturers of Pasifika descent in New Zealand: Dr Keakaokawai Varner Hemi (University of Waikato), Dr Guy Fiti Sinclair (Victoria University of Wellington) and Professor Rex Ahdar (University of Otago). See Dateline Pacific "Low Number of NZ Pasifika Academics adds to cultural burden" (6 September 2018) Radio New Zealand <www.radionz.co.nz>. I acknowledge the recent

of discussion surrounding the issues faced by Pasifika peoples and the law more generally. However, this is concerning given that New Zealand's Pasifika diasporic[2] communities have spoken, rather vocally, about their interactions with the law since their arrival to New Zealand in the early 1960s.[3] These experiences have been largely negative, marred by racism, discrimination, and unequal treatment by law enforcement agencies and the justice system.[4] While references to Pasifika women are peppered throughout articles and policy documents, they often appear as nothing more than a footnote. Thus, it is difficult to develop comprehensive analysis on a topic where no dedicated legal research exists. Pasifika women have arguably become an invisible population within our justice system; a situation which demands greater analysis and attention.

The purpose of this article is to take the first step towards filling this critical gap in criminal law scholarship by canvassing key issues and observations as to how Pasifika women are treated by the criminal justice system. From this, it is hoped that future scholarship will be able to further investigate the problems raised, as well as any other observations that have not been captured in this article. This discussion focuses on two key areas: Pasifika women's experiences and perceptions of the justice system, and their treatment by the judiciary at trial and in sentencing. The purpose of this article is to detangle the discussion from the generality of "Pacific peoples" to more closely examine the nuanced experiences of Pasifika women.

---

work of Helena Kaho: see Helena Kaho "Legislation note: 'Oku hange 'a e tangata, ha fala oku lālanga — Pacific people and non-violence programmes under the Domestic Violence (Amendment) Act 2013" [2017] NZWLJ 182.

2 By definition, "diaspora" and/or "diasporic communities" is the spread of any people from their original homeland. In the Pasifika context, this refers to the migration of persons from the Pacific Islands to New Zealand, as well as the second or third generation Pasifika persons born in New Zealand with familial connections in the Pacific Islands. The "Pasifika Diaspora" in New Zealand refers to the diverse Pasifika communities and their respective cultural identities. See Evangelia Papoutsaki and Naomi Strickland "Pacific Islands Diaspora Media: Sustaining Island Identities Away from Home" (paper presented at the 5th International Conference on Small Island Cultures, Sado Island, Japan, 2009); and Benita Simati Kumar "How does the next generation of Pacific diaspora from blended backgrounds construct and maintain their identities through the spaces they inhabit?" (PhD Thesis, Auckland University of Technology, 2016).

3 See Melani Anae "Racism was all around us" (18 June 2016) E-Tangata <www.e-tangata.co.nz>; and Barbara Dreaver "Opinion: Racial discrimination isn't new for Pasifika, any islander will tell you" (3 November 2016) 1 News Now <www.tvnz.co.nz>.

4 Tess McClure "A Racist System: Māori and Pacific Kiwis Talk About the Police" (18 September 2017) Vice <www.vice.com>.

I begin by providing a snapshot of Pasifika women in New Zealand before turning to the New Zealand Law Commission's 1999 research on *Women's Access to Legal Services*.[5] I examine the Law Commission's research on Pasifika women's attitudes towards the legal profession and offer my observations about the relevance of such findings in a 21st century context. Part III analyses Pasifika women within the courtroom by examining the extent to which judges engage their respective cultural contexts by reference to two recent decisions in the High Court and District Court. Finally, Part IV addresses Pasifika women as offenders, and the impact of cultural reporting under s 27 of the Sentencing Act 2002.

It is important to acknowledge at the outset that it is impossible to form concrete conclusions on this topic without a larger corpus of foundational research. Instead, in providing observations on key issues I ultimately advocate for further, intersectional research exploring the dynamics of race, gender and the law in the Pasifika context(s).

II A SNAPSHOT: PASIFIKA WOMEN IN AOTEAROA

Pasifika peoples currently comprise 7.4 per cent of New Zealand's total population making them an ethnic minority grouping.[6] By 2026, it is estimated this figure will increase to over 10 per cent.[7] Pasifika women make up 50.9 per cent of this figure.[8] According to Statistics NZ, New Zealand born Pasifika women have a higher youth percentage, with 77 per cent under 25 years old.[9] The growth of the Pasifika diaspora is considered "one of the defining features of New Zealand society", with Auckland cited as the Polynesian capital of the world.[10]

For the purposes of this article, I adopt the term "Pasifika" as the preferred nomenclature to "Pacific Islanders" and "Polynesians". Pasifika describes those people living in New Zealand who have migrated from the Pacific islands or who identify with one or more Pacific Islands through ancestry or heritage.

5 Law Commission *Women's Access to Legal Services* (NZLC SP1, 1999).

6 "Pacific People in NZ" Ministry for Pacific Peoples <www.mpp.govt.nz>.

7 Based on 2013 census figure projections: see Ministry for Pacific Peoples, above n 6.

8 "Ethnic Group (grouped total responses) by age group and sex, for the census usually resident population count, 2001, 2006, and 2013 (RC, TA, AU)" Stats NZ <www.stats.govt.nz>.

9 Holeva Tupou "The Effect of the Glass Ceiling on Pacific Island Women in New Zealand Organisations" (MBus Dissertation, Auckland University of Technology, 2011) at 14.

10 "Pacific women" (18 May 2012) Ministry for Women <www.women.govt.nz>.

Pasifika peoples in New Zealand mostly come from Samoa, the Cook Islands, Tonga, Niue, Fiji, Tokelau, Tuvalu and Micronesia. Statistically, over 62 per cent of the Pasifika population are New Zealand born, with 38 per cent born in the Pacific.[11]

Although the term Pasifika is used, I acknowledge its limitations as a "pan-Polynesian" label eclipsing the plurality and diversity of the various Pacific island cultures, all of which cannot be homogenised under a single grouping. As Helena Kaho observes, "'Pacific people', in the sense of a homogenous ethnic group, do not exist".[12] Laumua Tunufa'i critically asserts: "Pacific has become tokenistic and piecemeal, as long as it is employed in policy formation in New Zealand it will continue to stigmatise and denigrate".[13] However, Pasifika peoples in New Zealand do share a number of commonalities, namely ancestral genealogy, traditions and history, as well as shared cultural values of family, faith, and collectivism. Although it would be preferable to analyse individual cultural experiences, I am confined to the existing literature that aggregates "Pacific peoples" or "Pacific Island women" without cultural specification.

A Snapshot of Pasifika women in the criminal justice system

Pasifika peoples have long been associated with high crime statistics and disproportionate representation in the criminal justice system.[14] Between 2016 and 2017, 872 adult Pasifika women were convicted of serious offences.[15] Twenty-eight resulted in sentences of imprisonment, with 331 being community based. Notably, over one third of those convictions related to 'monetary' offences.[16] Comparatively, Pasifika males had a total of 5,093 sentences: 619 were custodial sentences, 2,271 were community based, and one-fifth were for

11 "2013 Census QuickStats about culture and identity: Pacific Peoples ethnic group" (15 April 2014) Stats NZ <www.archive.stats.govt.nz> as cited in Debbie Sorensen and Seini Jensen *Pasifika People in New Zealand: How Are We Doing? (*Pasifika Futures, May 2017) at 6.

12 Kaho, above n 1, at 186.

13 Laumua Tunufa'i "Samoan Youth Crime" in Antje Deckert and Rick Sarre (eds) T*he Palgrave Handbook of Australian and New Zealand Crimonology, Crime and Justice* 175 at 179.

14 "Contemporary Pacific Status Report: A snapshot of Pacific peoples in New Zealand" (November 2016) Ministry for Pacific Peoples <www.mpp.govt.nz> at 63–65.

15 "Adults convicted in court by sentence type – most serious offences calendar year" (2018) Stats NZ <www.stats.govt.nz>.

16 "Adults convicted in court by sentence type", above n 15.

monetary offences.[17] The data did not extrapolate the nature of those offences nor did it provide explanation as to why Pasifika women featured more highly in particular types of offending. As of March 2018, Pasifika women comprised 6.1 per cent of the total female prison population, the third largest ethnic grouping behind Māori and Pākehā women respectively.[18] Since 2014 the population of Pasifika female prisoners has increased very slightly by two per cent. Comparatively, Māori women are disproportionately over-represented, comprising 56.5 per cent of female inmates.[19] However, Pacific peoples are twice as likely to be apprehended, prosecuted, and convicted, and 2.5 times more likely to receive a custodial sentence and be remanded in custody than Pākehā.[20] In contrast to Māori women, Pasifika women are only 1.7 times more likely to either be apprehended by police or given a custodial sentence, compared to Pākehā women.[21]

The Department of Corrections asserts that Pasifika offenders are offered targeted rehabilitation and re-integrative support "to motivate Pacific prisoners to address their offending behaviour by using pro-social behaviours to model Pacific values and beliefs".[22] For example, there are specific focus units for prisoners of Pasifika ethnicity under the Saili Matagi rehabilitation programme.[23] However, for Pasifika women serving custodial sentences, there are fewer culturally rehabilitative programs available. For example, New Zealand's first and only Pacific Focus Unit (Vaka Fa'aola) in Spring Hill Corrections Facility is uniquely adapted to engage Pasifika men serving sentences for violent offending.[24] This is a medium-intensity programme focussing on rehabilitative content with a strong Pasifika cultural component through the use of Pasifika

17 "Adults convicted in court by sentence type", above n 15.

18 "Inmate Ethnicity by Institution" Department of Corrections <www.corrections.govt.nz>.

19 "Inmate Ethnicity", above n 18.

20 Bronwyn Morrison "Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research" (November 2009) Ministry of Justice <www.justice.govt.nz> at 18. I note this study is over a decade old and the findings may no longer be reflective of contemporary trends.

21 Morrison, above n 20, at 18. For numerical comparison Māori women were 5.5 times more likely to be apprehended and ten times more likely to receive a custodial sentence than Pākehā women.

22 "Specialist Units" Department of Corrections <www.corrections.govt.nz>.

23 Lucy King and Sosefa Bourke "A Review of the Saili Matagi Programme for Male Pacifica Prisoners" (2017) 5(2) The New Zealand Corrections Journal 70 at 70–75.

24 "Media release: Ombudsman release's Spring Hill Corrections Facility COTA Report" (2017) Department of Corrections <www.corrections.govt.nz>.

languages, proverbs, stories, and art. The group formed a choir to sing traditional Pacific Island hymns under the tutelage of choirmaster Peter Su'a, and later produced an album.[25] These services are currently available exclusively for Pasifika men, with no comprehensive culturally responsive rehabilitative options targeted specifically at Pasifika women.

Culturally targeted interventions must permeate all aspects of the justice system. The lack of offerings for Pasifika women may be reflective of the fact that they currently comprise a smaller portion of the female prison population. However, with young Pasifika women increasingly participating in violent offending (discussed below), additional services will need to target Pasifika women. Certainly, further inter-disciplinary research must be conducted as to what types of programmes and methodologies work for Pasifika female offenders, and whether current initiatives are properly effective in reducing recidivism rates.

B Young Pasifika women and youth crime

The youthfulness of New Zealand's Pasifika population raises concerns about the increasing overrepresentation of Pasifika youth committing violent criminal offences.[26] The Pasifika population is described as a young population, with statistics indicating an increase in the number of Pasifika youth by 2.2 per cent per year.[27] Fifty-five per cent of New Zealand's total Pasifika population are under 25 years, with 22 being the median age.[28] Currently, Pasifika youth represent the third largest group of youth offenders. Whilst Pasifika youth offending has decreased overall in the past decade, violent offending has not.[29] "Violent" offences include homicide, kidnapping, abduction, robbery, grievous assaults, serious assaults, intimidation/threats, and group assemblies.[30] Of Pasifika youth offenders, the majority of violent youth offenders are male

25 "Prison choir to launch CD of Pasifika songs" (30 May 2013) The Big Idea <www.thebigidea.co.nz>.

26 Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 12 June 2018) at 7. See also *Topic Series: Pacific Offenders* (Department of Corrections, April 2015) at 3; and Tunufa'i, above n 13.

27 "Latest Pacific population projections released" (16 October 2017) Ministry of Business, Innovation and Employment <www.mbie.goivt.nz>.

28 Stats NZ 2013 Census Data "Pacific Peoples Ethnic Group" <www.archive.stats.govt.nz>.

29 Gluckman, above n 26, at 25.

30 Julia Ioane and Ian Lambie "Pacific youth and violent offending in Aotearoa New Zealand" (2016) 45 New Zealand Journal of Psychology 23 at 23.

(84 per cent).[31] The most common violent offence committed by Pasifika youth in recent years has been serious assaults, with almost half of the Pasifika youth offending population committing a violent offence as their first offence.[32] The average age of the Pasifika youth offender is around 17 years old.[33] Critically, the evidence does not provide a clear gender breakdown of violent offending amongst Pasifika youth. This makes it difficult to conclude whether Ioane and Lambie's conclusions on Pasifika violent youth offending also apply to Pasifika female youth.

Data from 2016/2017 showed that 44 per cent of offences committed by Pasifika children and young people (those under 16) charged in court were of a violent nature.[34] This was an almost 10 per cent increase in the last year, more than Māori or Pākehā youth (seven percent and four per cent, respectively).[35] An important ethnic breakdown recognised in the literature is that the majority of Pasifika youth offenders are Samoan, reflective of the fact that the majority of the Samoan population is New Zealand born and comprises the highest proportion of Pasifika peoples (49 per cent).[36] The Pasifika youth offender is typically characterised as male, born in New Zealand, urbanised, and having grown up in the most socially deprived areas.[37] However the presence of Pasifika females in violent youth offending is vastly understudied. Where the research delineates between gender, there is little explanation given as to the nuanced contexts that may trigger Pasifika females to engage in criminal offending. In the analysis that follows, I attempt to map some of the key features of Pasifika female youth offending amongst the fragmented data and literature.

Charlotte Best, Dr Ian Lambie and Dr Julia Ioane recently considered the profile of young female offenders in New Zealand.[38] Their research highlighted that the phenomenon of young female offending in New Zealand cannot

31 Ioane and Lambie, above n 30, at 661. This was based on a sample of 200 Pasifika youth offenders from New Zealand Police Databases.

32 Ioane and Lambie, above n 30, at 661.

33 At 664.

34 Gluckman, above n 26, at 25.

35 At 25.

36 Tunufa'i, above n 13.

37 Ioane and Lambie, above n 30, at 665

38 Charlotte Best, Dr Ian Lambie and Dr Julia Ioane "Who are young female offenders?" (2016) NZLJ 69.

be overlooked.[39] While youth offending has decreased overall, female youth offending is decreasing at a lower rate than male offending.[40] Between 2010 and 2014 the proportion of young females charged with violent offending increased from 29 per cent to 37 per cent.[41] In assessing the profile of female youth offenders, the research did not delineate young female offenders by ethnicity, save for recognising the overrepresentation of young Māori women in youth offending.[42] The authors recognised that:[43]

> It may be that, while offending overall is decreasing, it is not decreasing for those young females who are committing more serious offences and who pose a greater challenge to the youth justice system and will continue to do so past adolescence.

In 2014, there were 377 apprehensions of Pasifika female youth aged 17–20 years.[44] This represented a marked decrease from the number of apprehensions in 2008 (600).[45] In terms of the type of offences being committed, in 2014 Pasifika females were most commonly apprehended for acts intended to cause injury (85), theft and related offences (137), and public order offences (59).[46] In 2017, 36 Pasifika women (16 years and under) were charged in the Youth Court for serious offences.[47] Charges were proven against 12 Pasifika women, and three were convicted and sentenced in adult court. Notably, while the total number of charges has significantly decreased in the last decade, since 2013 the number of total charges proven has steadily increased.[48] Moreover, the number of serious charges proven proportionate to the total number of charges has risen. For example, in 2016 there were 33 total offences resulting

39 At 69.

40 At 69.

41 At 69.

42 At 69.

43 At 69.

44 "Annual Apprehensions for the latest Calendar Years" ANSOC (1994–2014) Stats NZ <www.stats.govt.nz>.

45 "Annual Apprehensions", above n 44.

46 "Annual Apprehensions", above n 44. This is the most recent data for Annual Apprehensions for the latest Calendar Years (ANZSOC) period ending 2014.

47 "Children and Young People Charged in court – most serious offence calendar year" (2017) Stats NZ <www.stats.govt.nz>.

48 "Children and Young People Charged in court", above n 47.

in six proven charges and zero sentences in the adult court.[49] By comparison, in 2017 the number of charges increased to 36, with the number of proven charges doubling to 12, the highest recorded figure.[50] The data indicates that the rate of young Pasifika women committing violent offences is increasingly slightly, however there is a paucity of data indicating which type of offences are being committed to accurately draw direct correlations to Ioane and Lambie's research.

However, as the population of young Pasifika women increases, it is critical to understand their involvement in criminal offending and to disaggregate the data between different Pasifika ethnic groups. Twenty-six per cent of Pasifika violent youth offenders in the last year were female, with recidivism rates of 60 per cent.[51] Importantly, Ioane identified that New Zealand born Pasifika are significantly more likely to re-offend than those born in the Pacific Islands.[52] The critical risk factors identified as contributing to this offending were "poor education, antisocial peers, exposure to family violence and poverty".[53] The role of socio-economic deprivation and exposure to family violence cannot be understated. Pasifika peoples reside in the lowest-socio economic areas. These areas are characterised by high rates of poverty, deprivation and inadequate housing. To draw an intersectional analysis, Pasifika women are some of New Zealand's lowest income-earners, and face a greater gender pay gap than Pākehā women.[54] Moreover, exposure to family violence in the home warrants specific cultural analysis as "family violence" from a Pasifika worldview(s) "is culturally defined and situationally contextualised".[55]

One of the main concerns for Pasifika women in the criminal justice system is that young Pasifika women are committing violent offences as their first-time offence, with the average age of offending being 17 years old.[56] More

49 "Children and Young People Charged in court", above n 47.

50 "Children and Young People Charged in court", above n 47.

51 Ioane and Lambie, above n 30, at 25.

52 At 25.

53 At 25.

54 "Gender Pay Gap" (15 August 2018) Ministry for Women <www.women.govt.nz>; and Anna Bracewell-Worrall "Pay inequality: Pacific women may as well work free for the rest of the year – union" (21 September 2018) NewsHub <www.newshub.co.nz>.

55 Jennifer Hand and others "Free From Abuse: What Women Say And What Can Be Done" (Public Health Promotion, Auckland, 2002) at 74.

56 At 26.

research is required to disaggregate the data into specific ethnic groups and to analyse whether New Zealand born and/or mixed–race Pasifika women are more likely to violently offend. An area for further examination is what criminogenic, sociological and psychological factors are potentially driving New Zealand born and/or mixed-race Pasifika women to engage in criminal offending, particularly violent offences. This information "is necessary to provide information for targeted prevention and intervention of this vulnerable population".[57]

The establishment of the Pasifika Youth Court in 2011 provided one culturally responsive mechanism to deal with young offenders following pan-Pasifika cultural processes.[58] A typical Pasifika Court hearing will involve a briefing between the judge and the elders to discuss how each young person is progressing with their plan. Each case will start and end with a prayer.[59] An elder that is from the same cultural background as the young person will talk to the young person and their family, offering encouragement and guidance. Since its inception, there has been little academic comment on the efficacy of the Pasifika Youth Court and its effect on young offenders, particularly in reducing recidivism rates into adulthood.[60] A potential issue that warrants further investigation is whether the Pasifika Youth Court is responsive to young, urbanised Pasifika female offenders who are largely disconnected from their respective cultures, the church and their family (both in New Zealand and/or the Pacific Islands). The Pasifika Youth Court arguably demands a level of cultural 'buy-in' in an environment which may prove alien for young urbanised Pasifika who, for whatever reason, are largely disconnected from traditional "Pasifika values" and cultural contexts. I query whether the Pasifika Youth Court is workable for this emerging demographic of young Pasifika women, who are potentially poised to form a substantial portion of future youth offenders.[61]

---

57 At 26.

58 Ministry of Justice "Rangatahi Courts & Pasifika Courts" Youth Court of New Zealand <www.youthcourt.govt.nz>.

59 "Rangatahi Courts & Pasifika Courts", above n 58.

60 A Masters of Social Work thesis was recently published exploring the experiences of Samoan youths in the Pasifika Youth Court. See Natasha Urale-Bake "Aua le limatete ne'i ola pala'ai fanau Samoan youths' views on their experience in the Pasifika Youth Court" (MSW Thesis, The University of Auckland, 2016).

61 I base this assertion off Ioane's findings that New Zealand born Pasifika, many of whom are urbanised,

C Focussing on Pasifika women: The importance of an intersectional analysis

Why focus on Pasifika women? The notable dearth of research dedicated to the experiences of Pasifika women demands investigation. I suggest that Pasifika women occupy a paradoxical position: on the one hand they form a very visible part of Aotearoa's rich, multi–cultural social fabric, yet at the same time they are rendered invisible within the law and legal academia. Second, there is a tendency to discuss criminal justice issues in relation to Māori and Pasifika women as though they are one in the same. Whilst both ethnic groups share commonalities in their experiences with racism and socio-economic disenfranchisement, they are mutually exclusive. The status of Māori women within the criminal justice system, particularly as offenders, must be contextualised within their indigeneity and the impacts of colonisation. By contrast, Pasifika women's experiences are centred in a diasporic matrix. Moreover, Pasifika women are routinely subsumed within the experiences of Pasifika men, producing a monolithic account of "Pasifika peoples" without the necessary gender delineation. There is seldom any attempt to differentiate the two.

In exploring how the criminal justice system treats Pasifika women, this article attempts to map some of the intersections of race and gender and identify the gaps in the current knowledge. An intersectional methodology considers the historical, social and political context to recognise the unique experience of Pasifika women based on the intersection of race, class, gender, and other sociologically relevant grounds.[62] This approach focuses on the justice system's interaction with and response to Pasifika women, considering whether the law acknowledges these relevant contexts.

III A CLOSER LOOK AT PASIFIKA WOMEN'S EXPERIENCES WITHIN THE JUSTICE SYSTEM

An appropriate starting point for this analysis is to look backwards, specifically by examining how Pasifika women perceived New Zealand's legal systems based

were significantly more likely to reoffend than those who were born in the Pacific. See Ioane and Lambie, above n 30, at 25.

62 See Carol Aylward "Intersectionality: Crossing the Theoretical and Praxis Divide" (2010) 1(1) Journal of Critical Race Inquiry 1.

on their own experiential recounts 20 years ago. In 1999 the New Zealand Law Commission (NZLC) researched the access of New Zealand women to legal services and those women's experiences therein.[63] The consultation engaged submissions from hundreds of women from a variety of backgrounds with two aims in mind; first, to learn from women about their experiences of access to justice and second, to ascertain whether there were any problematic systemic issues preventing women's access to justice.[64] The Commission consulted with over 200 women of Pasifika descent, including two practising Pasifika lawyers, and brought together 10 Pasifika women to assist in the preparation of the consultation papers.[65]

While the paper is dated, the research findings arguably retain some key points of relevance for Pasifika women. First, it noted the sense of alienation Pasifika women felt towards the criminal justice system because of the lack of cultural diversity among lawyers and judges. Pasifika women commented that this dissonance was amplified "by the fact that both women and men from those groups are significantly underrepresented in the legal profession and judiciary and in influential positions in state sector justice agencies".[66] The absence of Pasifika women throughout all aspects of the profession reified perceptions that the justice system does not value their cultural perspectives. One Pasifika woman commented:[67]

> I think that if there are a lot more Pacific Island lawyers out there perhaps I would feel more comfortable. The difference is between telling secrets to a stranger and telling your secrets to somebody that you might feel comfortable with and I know that I would feel more comfortable with one of my own people/culture.

This resulted in those Pasifika women feeling alienated from legal services, causing some to "shy away from seeking legal assistance because of the shame and humiliation of having to disclose intimate details to a complete stranger".[68]

---

63 Law Commission, above n 5.

64 At [72].

65 The paper referred to them as "Pacific Islands women" and did not delineate between different Pacific Island cultural groupings. All women remained anonymous: Law Commission, above n 5, at 90

66 Law Commission, above n 5, at 126.

67 At 144.

68 Law Commission *Women's Access to Legal Advice and Representation: A Consultation Paper* (NZLC MP9, 1997) at 8.

The major theme that emerged was that Pasifika women experienced increased frustration with the system's lack of responsiveness to their cultural needs, particularly where English was their second or third language. This confirmed "that lawyers and judges, both male and female, did not understand their lives or the significance for them of the problems for which they had sought help" and the barriers they faced.[69] Women from a range of minority ethnic groups repeatedly identified barriers of language and cultural values between them and the justice system, and particularly between them and legal service providers. It was plain that for most women from those groups, the clash between their own cultural heritage and the predominantly British/Anglo-Saxon heritage of the justice system presented the largest of all the barriers they encountered in their attempts to utilise the criminal justice system. The Commission, in addressing the "needs of diverse cultural and ethnic groups" found:[70]

> Women said that when the system failed to provide for their most basic needs (such as those already referred to, for information provided in their own languages, or from or through people who speak their languages and understand their lives) they received a clear message that their cultural values were not respected. This was described as being a major deterrent to their use of and faith in the justice system.

The perception that the justice system largely neglected their cultural contexts formed a major deterrent to Pasifika women's engagement with, and subsequent faith in, the justice system. Furthermore, Māori and Pasifika women reported having encountered patronising, ill-informed or racist attitudes among justice system personnel. Pasifika women called for legal services delivered by Pasifika people, with one suggesting creating specific Pasifika community law centres "[r]un by Pacific Islanders for Pacific Islanders."[71]

While I cannot speak on behalf of all Pasifika women, I contend that if similar research was undertaken in 2018 the response(s) would be largely, and unfortunately, similar to that of 20 years prior. I challenge whether in 2018 our legal services and legal practitioners, in both the public and private sector, have become more culturally responsive to the needs ethnic minorities.

69 At 146.

70 At 162.

71 At 137.

Although "diversity" is the word du jour in New Zealand's legal profession, the ethnic make-up of lawyers, barristers, firm partners, Queen's Counsel and the judiciary remains overwhelmingly Pākehā.[72] Although just over 50 per cent of practising lawyers are female, these women are also predominantly Pākehā.[73] Aside from a few minor changes (which I acknowledge in the following section), Pasifika women in particular continue to see themselves and their cultures as largely ignored by the law and legal decision-making. In the context of this research, the reasons as to why Pasifika women continue to see themselves as underrepresented in New Zealand's legal profession can only be found through direct consultation with Pasifika women in the community as well as the experiences of Pasifika legal practitioners, legal service staff and Pasifika judges. The provision of legal services is improved where lawyers understand and respect their client's socio-cultural context(s). This leads to better communication between parties and ultimately fosters greater trust and confidence in the justice system.

IV PASIFIKA WOMEN IN THE COURTROOM

Another observation concerns the interaction between Pasifika women and the judiciary. First, I examine the largely homogenous ethnic makeup of New Zealand's judiciary, into which only two Pasifika women have successfully entered. From this, I observe how a lack of understanding of Pasifika worldviews may impact a judge's substantive decision-making when dealing with Pasifika women who have recently appeared before the court. The nature of the adversarial process means the administration of justice is seen to occur in the environs of the courtroom. Therefore, it is appropriate to assess the attitudes of those tasked with the role of dispensing justice.

As of January 2017, there were 252 judges working in New Zealand; six at the Supreme Court, 10 at the Court of Appeal, 45 in the High Court and 176 in the District Courts.[74] Of those, three are of Pasifika descent: Judge Malosi, Judge Moala and Judge Wharepouri. These three judges comprise just over one per cent of New Zealand's total judicial makeup, all presiding in two of Auckland's District Courts. There are no Pasifika judges in any of New Zealand's superior

72 Geoff Adlam and Sophie Melligan "Snapshot of the profession" LawTalk (March 2018, Issue 915) at 48.

73 At 48–49.

74 New Zealand Law Society "New Zealand judiciary statistics at 1 January 2017" (1 January 2017) <www.lawsociety.org.nz>.

courts and no lawyers of Pasifika descent have been appointed to the rank of Queen's Counsel. This is similarly reflected in the ethnic makeup of New Zealand's legal profession, where Pasifika women comprise only 2.5 per cent of the total female lawyer population.[75] Judge Ida Malosi (from Samoa) was the first Pasifika woman appointed to the judiciary (on 24 September 2002). She currently presides over the District Court and Family Court in Manukau, and the Pasifika Youth Court. There was a fourteen-year gap between when Judge Malosi was appointed in 2002, and when Judge Mina Wharepouri and Judge Soana Moala were appointed in June and September 2016 respectively. Both Judge Wharepouri and Judge Moala were appointed to the District Court.

District Court judges sit at the coal-face of the criminal law. Moreover, it has been reiterated time and again that Māori and Pasifika peoples are overrepresented in criminal offending, with many of those same persons having to appear before the District Court for trial and sentencing. As the highest proportion of Māori and Pasifika peoples in New Zealand reside in South Auckland (Manukau),[76] they routinely appear before the Manukau District Court Judges. It is unfortunate, then, that so few of those same judges reflect the community in which they preside. Whilst judges must dispense justice equally, the system earns greater legitimacy where the judiciary and the legal profession reflect the diverse cultural values in the communities they serve. In recent years there has been greater recognition of the fact that the lack of gender and cultural diversity on the bench fosters unconscious biases that feed into substantive decision-making under the mask of neutrality and colour-blindness.[77] Such behaviours and biases have to be unlearned through targeted cultural competency training. It would not be a stretch to suggest that most of New Zealand's judges are not well versed in Pasifika cultural customs and values. Judge Moala has commented on the limited knowledge her judicial colleagues carry in relation to Māori and Pasifika peoples and the lack of awareness of their social and cultural circumstances.[78] The concern with judicial

75 Geoff Adlam "Census picture of lawyer ethnicity" LawTalk (October 2014, Issue 852) 19 at 19.

76 "2006 Census Data: Demographics of New Zealand's Pacific Population" Stats NZ <www.archive.stats.govt.nz>.

77 See generally Shiv Narayan Persaud "Is Color Blind Justice Also Culturally Blind? The Cultural Blindess in Justice" (2012) 14 Berkeley Journal of African-American Law & Policy 25.

78 Teuila Fuatai "Judges highlight cultural context for offending" (21 November 2017) *Newsroom* <www.newsroom.co.nz>.

decision-making that lacks cultural context, experience or understanding is that it may lead to "pluralistic ignorance" within the judiciary.[79]

If our judges are not representative of those who appear before them, then it is vital that they have evidence before them to help understand a defendant's cultural context and circumstances. Cultural evidence can assist a judge to remove their own ethnocentric biases and subjectivity, whilst facilitating greater understanding and objectivity of a defendant's circumstances and position. An apt illustration of this argument is demonstrated in the recent High Court decision of *R v H*.[80] The defendant was a young Tongan woman (29 years-old) charged with kidnapping in relation to the death of a 50 year-old Thai woman in a highly publicised matter. The defendant applied for name suppression:[81]

> … on the basis that publication of her name would cause her extreme hardship and would also endanger her health, relying on ss 200(2)(a) and 200(2)(e) of the Criminal Procedure Act 2011 (CPA), respectively.

Justice Thomas held that name suppression could not be granted as the principles of open justice outweighed the risks of publication. The defendant submitted that she should be granted name suppression on seven grounds:[82]

a) Her physical health, as a result of her rheumatic fever;

b) Her mental health given symptoms of depression, anxiety and stress;

c) The impact on her employment and the consequential financial impact on her family, given she is within the 90-day trial probation period in her current employment and will be unlikely to obtain new employment once details of her offending are released;

d) The flow-on effects of issues with her health and her ability to earn to her husband and children, and to her sister's family who jointly own and live in the home;

e) The potential for the defendant to lose all her equity in her house if they cannot maintain mortgage payments, exacerbated by the caveat placed on the house by legal aid;

---

79 This term was coined in relation to judges in the United States: see Justice RS French "Speaking in Tongues – Courts and Cultures" (2007) 18 FedJSchol at 45.

80 *R v H* HC Auckland CRI-2016-092-5315, 31 August 2016.

81 At [2].

82 At [15].

f) Exclusion from school involvement for the defendant and the impact on her daughter from bullying at school;

g) Exclusion from the Church for the defendant and her extended family;

h) Loss of support and respect from the Tongan community, exacerbated by the defendant's role as eldest child.

Counsel for the defendant approached the application primarily on the basis of the applicant's health concerns. The Judge considered this first, followed by an analysis of whether publication would result in extreme hardship.[83]

It is not necessary to analyse the judgment in its entirety, as my focus is on three particular points raised by the defendant: that the publication of her name would result in the exclusion from church for herself and her extended family; and the loss of support and respect from the Tongan community, exacerbated by the defendant's role as eldest child. I argue that these grounds can collectively encompass, and were put to the Judge as, cultural considerations relevant to the extreme hardship analysis stemming from the defendant's Tongan background. Notably, the Judge failed to consider any of these submissions in forming her decision, despite concluding that "I have weighed up all the factors relied on by the defendant including the presumption of innocence."[84] The Judge's failure to address the cultural arguments raised supports the argument that the Judge did not feel such matters were worthy of judicial scrutiny. The defendant's cultural considerations were rendered invisible, divorcing her from her wider cultural context. Although it was not explicitly stated by counsel, the defendant was essentially submitting to the Court that, as a Tongan woman, publication of her name would adversely affect not only herself but her wider Tongan family and community. This reflects the collectivist value of all Pasifika cultures that people are not atomised individuals but exist as part of a collective.[85] An individual's actions, good or bad, reflect not only oneself but also one's wider whānau/aiga,[86] village, or tribe. The concept of individualism is largely absent

83 At [25].

84 At [50].

85 See generally, Semisis Prescott, Agnes Masoe and Christina Chiang "The concept of Accountability in the Pacific: The Case of Tonga" (paper presented to the 6th Asia Pacific Interdisciplinary Research in Accounting Conference, Sydney, 13 July 2010).

86 Aiga is the Samoan term for family.

in the Pasifika cultural matrix, as one's "identity is constructed in conjunction with their roles of family and the church".[87] According to Michael Lieber:[88]

> The person is not an individual in our Western sense of the term. The person is instead a locus of shared biographies: personal histories of people's relationships with other people and with things. The relationship defines the person, not vice versa.

In *R v H*, the defendant was cognisant that public knowledge of her involvement in serious criminal offending could potentially attach shame and stigma to her wider family unit, and, at worst, cause them to be condemned and ostracised. In essence, the submission was based on a need to protect the integrity of her family's name, a status that is based on the collective opinion of the Tongan community (both in Aotearoa and in Tonga).

The submission about the defendant's exclusion from her church should not have been overlooked either. Participation in the church community is integral to many Pasifika communities and is widely considered an integral cultural value. Ninety per cent of Tongans in New Zealand are affiliated with the Christian church, the highest percentage of all Pasifika cultures in New Zealand.[89] Exclusion from the church community would denote a loss of identity, culture and community — not only for the defendant but for her affected family. The church is largely seen as the cultural base for the Pasifika diaspora as a site "for reaffirmation and reconstitution of cultural identity".[90] For a Tongan, to bring shame upon your parents (which, in the case of the defendant, would have been exacerbated by her role as the eldest child), your family, your community and your church, is seen as highly dishonourable and can only be rectified through forgiveness. I cannot precisely conclude why Thomas J did not lend substantive discussion to these issues. It could be argued

87 Helen Morton "Creating Their Own Culture: Diasporic Tongans" (1998) 10 The Contemporary Pacific 1 as cited in Evangelia Papoutsaki and Naomi Strickland "Pacific Islands Diaspora Media: Sustaining Island Identities Away from Home" (paper presented to the 17th AMIC Annual Conference, Manila, July 2008) at 6.

88 Michael D Lieber "Lamarckian Definitions of Identity on Kapingamarangi and Pohnpei" in Jocelyn Linnekin and Lin Poyer (eds) *Cultural Identity and Ethnicity in the Pacific* (University of Hawaii Press, Honolulu, 1990) 71 at 72.

89 Lesieli Ikatonga Kupu MacIntyre "Tongan Mother's Contributions to Their Young Children's Education in New Zealand: Lukuluku 'A E Kau Fa'e Tonga' Ki He Ako 'Enau Fanau Iiki' 'I Nu'u Sila" (PhD Thesis, Massey University, 2008) at 123.

90 Morton, above n 87, at 13.

that on a plain reading of the Act, the high threshold test for name suppression focuses on whether an individual would experience extreme hardship resulting from publication.[91] Arguably, the s 200(2) definition of "extreme hardship" is confined to the individual defendant as an atomised agent. Persons connected to the defendant are considered in circumstances where those persons may also suffer extreme hardship as a result of the publication. In *R v H*, it may have been considered that such a causal nexus could not be established and therefore was not relevant to the assessment. However, the Court of Appeal has recently held that:[92]

> … in assessing whether another person would be likely to suffer extreme hardship from publication of a convicted person's name, a court considers everything of relevance to that assessment. A person's religious and cultural backgrounds, the characteristics of their community and their place within it, will all be included in the assessment to the extent they are relevant.

Considering that the defendant in *R v H* expressly put these cultural and community considerations before the court, their relevance to the "extreme hardship" assessment required analysis.

I am not suggesting that these cultural considerations would justify name suppression when weighed against the other factors Thomas J was bound to consider. However, these matters did deserve at least some judicial acknowledgment.

Part of the problem with the judgment in *R v H* stems from the lack of cultural competency training offered in New Zealand's law schools, legal professionals courses and within the judiciary to educate practitioners and judges on relevant cultural matters they might never have been exposed to. Second, the plurality of Pasifika cultures means there is no singular Pacific legal jurisprudence for judges to draw upon. Doing so would risk homogenising the plurality of Pasifika cultural identities that demand a more nuanced understanding of individual Pasifika ethnicities. However, embracing a rudimentary level of engagement with Pasifika legal issues, values and customs is the minimum expectation. Long-term, the issue could be sufficiently mitigated through encouraging greater cultural diversity within all levels of New Zealand's legal profession.

---

91 Criminal Procedure Act 2011, s 200(2)(a).

92 *Beshara v R* [2018] NZCA 66 at [7].

Moreover, increased cultural and gender diversity increases the pool of knowledge and experience for judges to draw upon, creating a more well-rounded bench. This is not to suggest that non-Pasifika judges cannot acutely understand Pasifika cultural values. However, unlearning entrenched unconscious biases and undergoing cultural competency training takes time and effort. Where the bench is predominantly and historically occupied by an identifiable gender, ethnic and class demographic, it feeds unconscious bias into substantive decision-making despite a veil of neutrality and "colour-blindness". This alienates minority groups, many of whom are negatively over-represented in the dock. In addressing the 25th Australian Institute of Judicial Administration, Robert French J, at the time a judge of the Federal Court of Australia, aptly summarised the importance of cultural understanding in a judge's work:[93]

> It is essential, however that people involved in the work of the courts are educated to an awareness of difference that transcends their own experiences of life. For those experiences and the worldviews that go with them are necessarily culturally conditioned.

His Honour acknowledged that in increasingly multi-cultural societies (such as Australia and New Zealand), administering justice equally becomes increasingly problematic when it cuts across cultural boundaries, particularly in criminal practice.[94] Although his Honour did not address the criminal justice system specifically, New Zealand courts are challenged by the over-representation of ethnic minorities as criminal offenders. The appointment of three Pasifika individuals into positions that have been historically monopolised by Pākehā marked a significant milestone for Pasifika peoples in seeing themselves reflected in legal decision-making. But there is more to be achieved. More than a decade passed between the appointments of Judge Malosi and Judge Moala, leaving one to ask whether it will take another 14 years (or more) before there is another Pasifika judge.

I contrast Thomas J's approach with that of a recent sentencing decision involving a young Samoan woman convicted on two charges of theft by a person in a special relationship: S*erious Fraud Office v Papu*.[95] Ms Papu was the

93 French, above n 79, at [4].

94 At [3].

95 *Serious Fraud Office v Papu* [2017] NZDC 21687.

daughter of the Pastor at a Samoan church. For a period of four years she had transferred money from the Church into her personal account. The amount taken totalled $1,056,222.[96] In many ways, the defendant was rather fortunate to appear before Tongan Judge Moala in the Manukau District Court. It is clear from the decision that Judge Moala, also from a Pasifika background, could converse with the defendant in a way that conveyed a sense of understanding. By way of example, the Judge said:[97]

> That money comes from the blood, sweat and tears of many Samoan families. Their children and their families have gone without so that they can contribute to the church because God and the church is a priority and is everything to these people. … I do not need to tell you, you already know that.

And further:[98]

> Everything I have read on the file tells me that your remorse is genuine and the regret is there. … I can only imagine how [your father] must feel about your offending and the trust that you have breached by taking your money from the church.
>
> …
>
> I know that if your father raised you right, you have had a conscience, you would have been thinking about it every time you took that money.

The comments regarding the offender's father might seem condescending. However, from a Pasifika cultural standpoint, such censure is appropriate given Judge Moala's position of authority and her ability to understand the complexity of the offender's familial relationship to her father, the Pastor of the victim Samoan church. These statements speak directly to both the offender and her aiga, emphasising the harm caused to her father; thus having a greater impact on the defendant because of the extensive consequences of her offending on her family, church and wider Samoan community. Importantly, Judge Moala's starting point was to contextualise the offending against the offender's cultural and family background, rendering those factors of equal importance to the other purposes and principles of sentencing. The Judge was

96 *Serious Fraud Office v Papu* [2017] NZDC 21687.

97 At [11] (emphasis added).

98 At [14] and [21] (emphasis added).

not provided with a cultural report under s 27 of the Sentencing Act, which would have allowed the Court to hear about the personal, whanau, community and cultural background of the offender. Second, none of these cultural factors were explicitly stated in the defence counsel submissions. Judge Moala just knew. As such, the Judge was able to factor in the cultural considerations when applying a 25 per cent discount for mitigating features, including the offender's previous good character, efforts at rehabilitation, personal circumstances at the time of offending, and the defendant's gambling problem. An additional 25 per cent discount was also given for the defendant's guilty plea.[99]

It is unlikely that this level of understanding could have been achieved by a non-Pasifika judge without the assistance of a cultural report. In comparison to *R v H*, it is evident how the justice system becomes hindered, if not stagnant, when cultural understanding is limited or non-existent. Conversely, the *Papu* case lends weight to the comments from Pasifika women in the Law Commission's report that where Pasifika peoples are at the forefront of delivering justice, their approach is imbued with a level of cultural respect and understanding. The presence of Pasifika, particularly Pasifika female judges, in the courtroom is a significant step in reducing the sense of dissonance many Pasifika women felt, and arguably still feel, towards the justice system.[100]

V SENTENCING AND CULTURAL CONSIDERATIONS

The previous discussion highlighted the importance of judicial recognition of cultural contexts and the risk of "pluralistic ignorance" where such recognition is not delivered. The scarcity of Pasifika (and, more particularly Pasifika female) practitioners and judges diminishes the opportunity for these worldviews to be fully realised and drawn upon in substantive judicial decision-making. Until such time as the embracing of Pasifika worldviews becomes automatic within the profession and the courts, such information must be decisively put before a judge. At present, the primary (and arguably, only) mechanism for the court to consider an offender's cultural context is through cultural reports issued under s 27 of the Sentencing Act.

Section 27 was introduced to encourage courts to consider alternatives to imprisonment when sentencing offenders of Māori descent or from

99 At [26].

100 Referring to the statements of Pasifika women in Law Commission, above n 5.

other ethnic minorities.[101] The section provides courts with appropriate and relevant material necessary to make an informed sentencing decision about an offender, including the potential for more culturally relevant rehabilitative options instead of a custodial sentence. Judge Moala, speaking extra-judicially, commented that in her time as a judge, there has been a strong shift by the judiciary to better understand Te Ao Māori,[102] as well as exploring alternatives to imprisonment. She noted "many of us [judges] are keen to change the way we do things in order to make positive changes."[103] Cultural reports can be considered a type of "cultural evidence", providing the judge with an individualised taxonomy of the offender to be considered in conjunction with other relevant considerations.

Justice Whata, in the recent High Court decision of *Solicitor General v Heta*, demonstrated how successfully s 27 can be used in sentencing, and observed that:[104]

> Section 27 mandates consideration of the full social and cultural matrix of the offender and the offending … inclusion of all material background factors in the assessment aligns with the underlying premise of s 27 just mentioned and it better serves the purposes and principles of sentencing to identify and respond to all potential causes of offending, including where relevant, systemic Māori deprivation.

He continued:[105]

> [It] mandates and enables Māori (and other) offenders to bring to the Court's attention information about, among other things, the presence of systemic deprivation and how this may relate (if at all) to the offending, moral culpability and rehabilitation.

The decision is noteworthy because the s 27 report itself did not itself draw

101 Te Puea Matoe "The Relevance of Cultural information at sentencing for Māori in the Criminal Justice System of Aōtearoa" (Ngā Pae o te Māramatanga and Michael and Suzanne Borrin Foundation, June 2018) at 10–11; Thomas Clark "Ko Ngā Take Ture Māori: Sentencing Indigenous Offenders" (2014) Auckland U L Rev 245 at 260; and Judge O'Driscoll "A powerful mitigating tool?" [2012] NZLJ 358 at 358.

102 Te Ao Māori refers to the Māori world/worldview(s).

103 Judge Soana Moala "Cultural Reports obtained under section 27 of the Sentencing Act" (paper presented to the Legal Research Foundation Manukau Seminar Update on Sentencing, Auckland, 2 May 2017) at [78].

104 *Solicitor-General v Heta* [2018] NZHC 2453 at [41].

105 At [49].

linkages to "systemic Maori deprivation", Ms Heta and her offending.[106] Interestingly it was Judge Moala in the District Court who first observed that Ms Heta's life circumstances reflected "the significant post-colonial trauma and disruption of the cultural identity experienced by Maori whanau, hapu and iwi, where alcohol and poverty has resulted in offending of this type."[107] As a result of these factors, Whata J applied a markedly liberal approach in recognising the discretion afforded to Judges in the sentencing exercise to acknowledge the broader sociological, historical and criminogenic factors that impact offenders (in this case, of a Māori woman). The decisions in *Heta* illustrate the importance of diversity in the ethnic and cultural makeup of the judiciary. Both Judge Moala and Whata J, being Tongan/Māori and Māori respectively, employed their own understandings of the cultural and historical factors affecting Ms Heta's offending. Their doing so is unsurprising as both have spoken extra-judicially about the importance of analysing an offender's cultural and personal circumstances, and have pushed towards normalising this in sentencing.[108]

Retired Australian Chief Justice Robert French has stated that the inclusion of cultural factors allows judges to engage in a type of "informed awareness into a world (or, worldviews) he or she might not otherwise have been aware of".[109] In New Zealand, the use of s 27 cultural reports has seen a marked resurgence in recent years, with increasing awareness of the impact an offender's cultural, familial, and socio-economic background has on their offending. However, Judge Moala observed that in many cases involving Māori and Pasifika persons, the use of s 27 cultural reports has been "rare".[110] The focus of s 27 cultural report discussions have thus far understandably centred on Māori offenders, as the section was introduced into the Sentencing Act to specifically address the systematic over-incarceration of Aotearoa's indigenous population.[111] As observed, there is an absence of literature discussing the use of s 27 reports by Pasifika offenders and Pasifika female offenders more

106 *Heta*, above n 104, at [65] per Whata J.

107 *R v Heta* [2018] NZDC 11085 at [9]–[10] per Judge Moala.

108 Teuila Fuatai "Judges highlight cultural context for offending" *Newsroom* (21 November 2017) <www.newsroom.co.nz>.

109 Justice RS French, above n 79, at 3.

110 Fuatai, above n 78.

111 Matoe, above n 101, at 10–11; Clark, above n 101, at 260; and Judge O'Driscoll, above n 101, at 358.

specifically. There has been little explanation offered or research undertaken from the Law Commission or Law Society as to why s 27 reports have been seldom used by Pasifika offenders and what impact this is having on their sentencing outcomes (if any).

The practical benefit of putting a cultural report before a judge, specifically in regards to Pasifika women, is evidenced in the very recent decision of *R v Momoisea*.[112] This case involved a 41 year-old Samoan woman convicted of the murder and attempted murder of her ex-partner and his new girlfriend, respectively.[113] The Crown submitted that at sentencing, the minimum period of imprisonment should be no less than 17 years, as this was an "especially bad" murder.[114] Defence counsel supplied a s 27 cultural report to assist in its submission of the relevant mitigating factors to be considered. Specifically, counsel submitted that the Judge should only impose a minimum period of imprisonment of 10 or 11 years on the defendant, partly to reflect the banishment imposed on the defendant and her family from her village in Samoa following the offending.[115] Justice Downs commented:[116]

> You were born and raised in a Samoan village. You moved to New Zealand seven years ago or so. But, you have tended to mix only within the Samoan community. As observed, your English is poor. Because of your offending, you have been banished from your village. This is significant. In traditional Samoan culture, being part of the village is part of a person's identity. You and your children will not be able to return. Accordingly, you cannot visit or care for your parents when you are eventually released from prison. Unless, of course, the village decides to accept you. That remains possible.

The seriousness of banishment cannot be overemphasised. In Samoan custom, banishment is recognised as the most important sanction a village can impose. As a response, it sits above other forms of penalty such as fines or ostracism from the village community. Banishment can be characterised as one of the most significant punitive measures, denoting complete extrication of the defendant from her community. It must be noted that this was Ms Momoisea's first

112 *R v Momoisea* [2018] NZHC 1577.

113 At [2]–[15] and [35].

114 At [22].

115 At [36(d)].

116 At [53].

offence and the victims were also Samoan. To restore the harm she imposed, Ms Momoisea engaged in the Samoan custom of ifoga, the traditional system of justice as practised in Samoa to seek forgiveness. This involves submitting to a ritual and public humiliation in return for the forgiveness by the offended party.[117] As Cluny Macpherson and La'avasa Macpherson highlight:

> The word ifoga currently means a "ceremonial request for forgiveness made by an offender and his kinsman to those injured" and comes from the word ifo that literally means to bow down and, among other specific usages, to "make a formal apology".

Significantly, both victims' families accepted the ifoga in this case. Acceptance by the victims' families (ole taliga ole ifoga) represents a willingness by the victimised parties to engage in reconciliation and indicates that the defendant has, and must continue to, accept responsibility for her actions. Acceptance is not the default response and comes after careful consideration. Justice Downs referenced the ifoga but did not highlight its importance as a separate factor from the banishment imposed. I suggest more detailed analysis of this culturally significant ritual beyond a cursory mention might constitute a separate, mitigating feature as evidence of remorse and reparation. Nevertheless, the s 27 report was a critical ingredient in the Judge's decision to impose a minimum period of imprisonment on Ms Momoisea that was two and half years less than that proposed by the Crown.[118] A twelve-month discount was given for her "earlier good character and the cultural matters".[119] Whilst a non-custodial sentence was not possible because of the seriousness of her offending, this case demonstrates the importance of counsel supplying cultural evidence for Pasifika offenders.

In cases where a custodial sentence does not have to be imposed, Pasifika defendants would benefit from counsel raising alternative and culturally appropriate rehabilitative options as a more appropriate form of punishment. There is a clear gap in the research about the use of s 27 reports by Pasifika offenders, and female offenders particularly. This information would prove useful in formulating attempts to increase their uptake.

---

117 George B Milner *A Dictionary of the Samoan Language* (Oxford University Press, London, 1976) as cited in Cluny Macpherson and La'avasa Macpherson "The Ifoga: The Exchange Value of Social Honour in Samoa" (2005) 114 Journal of the Polynesian Society 109 at 109.

118 *Momoisea*, above n 112, at [57].

119 At [57].

A "Cultural reports" — under threat?

On 29 June 2018 the Ministry of Justice determined that "cultural reports" (included court ordered s 27 reports) issued under s 27 of the Sentencing Act were no longer to be funded by the Ministry.[120] While a judge is not required under the Act to order a report, they may recommend that one is issued where they believe it would assist in the sentencing exercise.[121] The Act provides little guidance on the practical issue of funding, leading many to assume that they would be funded by the court. The Pacific Lawyers' Association expressed concern at the Ministry's recent decision, commenting that:[122]

> The flexibility the 2002 Act provides in sentencing processes and principles means there can be a reconciliation between the "traditional" criminal justice system and the precepts of Māori and Pacific customary practices through these reports in trying to fit appropriate sentences to Māori and Pacific offenders.
>
> Without funding for section 27 cultural reports, offenders will be at a significant disadvantage and will be denied access to justice. This cost-cutting measure will erode an offender's rights to have their cultural background considered at sentencing because they will not be able to afford a report writer who can give the Court information directly relevant to the imposition of a more appropriate sentence.

It seems paradoxical for the Government to wax lyrical about combatting the over-representation of Māori and Pasifika peoples in the criminal justice system yet make decisions that make it more difficult for those same people to put necessary cultural evidence before a judge. Whilst an offender can still raise cultural arguments via their counsel's written and oral submissions, this is predicated on counsel possessing the requisite cultural competence to adequately raise such arguments. As highlighted in the previous discussion, the lack of Pasifika and Pasifika female lawyers means this pool of knowledge is spread thin amongst defence lawyers, affording their defendants less opportunity to have their circumstances and worldview accurately submitted before a judge.

120 Marty Sharpe "Ministry stops funding court reports that examine cultural context of crimes" (28 August 2018) Stuff <www.stuff.co.nz>.

121 Sentencing Act 2002, s 27.

122 "Cultural report funding cut concerns Pacific Lawyers Association" (1 August 2018) New Zealand Law Society <www.lawsociety.org.nz>.

Whilst an offender can apply to have a s 27 report funded through a disbursement extension under legal aid, this is given on a discretionary basis, absent of any clear qualifying criteria.[123] This raises concern for those individuals who exceed the threshold for legal aid funding yet cannot afford to fund a report privately — specifically, those Pasifika women who earn lower incomes but sit just above the criminal legal aid threshold. Obtaining a written report is a costly and timely endeavour. It is estimated that report-writers charge approximately $120 to $150 per hour and that reports can take six to eight weeks to prepare.[124] Considering that Pasifika women are among the lowest income earners with little disposable income, such expenses are grossly unaffordable. Moreover, there is a dearth of public information available directing offenders to cultural report writers and services specifically for Pasifika people.

I believe that the removal of funding will make s 27 reports much harder to acquire for Pasifika persons who can neither access nor fund the necessary cultural resources to assist in their sentencing. This will be even more pronounced for Pasifika women. While some might be fortunate enough to have a judge who takes their cultural background into account, in the absence of a cultural report this prospect is unrealistic in the majority of cases and means that the needs and circumstances of Pasifika women in the criminal justice system are not being taken into account.

VI CONCLUSION AND FUTURE DIRECTIONS

The purpose of this article is to fill a gap in the current legal literature that overlooks the interactions Pasifika women have with the criminal justice system. Through observing a series of relevant issues across New Zealand's criminal justice system, this analysis shows that the issues facing Pasifika women are intrinsically interlinked in a cycle of socio-economic inequality and intersectional discrimination, which leads to the underrepresentation of these same people in the legal profession and relative overrepresentation as criminal offenders. Furthermore, the lack of critical scholarship engaging with these issues means these correlations are not readily acknowledged nor, ultimately, addressed. Indeed, this article does not conclusively answer the question posed at the outset. If anything, this article has revealed the complex web

123 "Cultural report funding cut", above n 122; and Sharpe, above n 120.

124 Tu Puea Matoe "Cultural Speaker Fact Sheet" (June 2018) Michael and Suzanne Borrin Foundation <www.borrinfoundation.nz>.

of interactions, experiences and neglect Pasifika women face in the criminal justice system, thereby posing more questions, rather than offering answers.

However, three key observations emerge. First, Pasifika women have long been over-looked within legal academia and policy. New Zealand's legal and academic profession cannot purport to be culturally diverse if they fail to raise awareness of the legal issues facing ethnic minorities. There are clear gaps in the research which, if filled, would assist in painting a clearer picture of the issues identified. A critical limitation of this article is that it has drawn observations from a purely academic and analytical standpoint. It has not engaged in fieldwork research or empirical methodologies. Comprehensive research that consults with Pasifika women, on all sides of the justice system, is long overdue. This article advocates for a more targeted, intersectional analysis and theoretical framework that is appropriate for Pasifika women. Fieldwork research that interviews Pasifika women, including judges, offenders, victims, lawyers, court registrars, service staff and academics will rid the discussion of speculation on what Pasifika women might think and feel, and address the matter in a culturally appropriate and collaborative manner.

Second, legal decision-making risks reliance on pluralistic ignorance if it extricates Pasifika women from their wider socio-cultural context. Propounding the rhetoric of neutrality and colour-blindness is an inadequate response in an era where Pasifika peoples, especially young Pasifika women, are increasingly overrepresented in criminal offending. There is an increased need for lawyers and judges alike to be cognisant of Pasifika worldviews and how incorporating these value systems and socio-cultural contexts might improve the dispensation of individualised justice.

Finally, the obvious limitation in this research was its pan-Polynesian approach and grouping of "Pasifika women" as a singular gendered category. Further research targeting specific Pasifika ethnic identities could identify culturally specific issues, thereby eliciting culturally appropriate responses. This extends to understanding Pasifika women beyond the limited male/female binary, acknowledging the plurality of Pasifika gender identities existing in New Zealand, and the very specific legal issues Pasifika people face as a diasporic community.