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Ending legal aid for cultural reports at sentencing may only make court hearings longer and costlier

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The government's move to remove legal aid funding for what are commonly known as cultural reports at sentencing has been wrapped up in rhetoric about restoring "personal responsibility", reducing "discounts" or "reductions" on sentences, and saving money.

This may be popular, even populist, but it carries the risk of not achieving any of those purported goals. In fact, court hearings may become longer and more expensive.

To understand why, we need to look at the entire process of sentencing. It is governed by the Sentencing Act 2002, which requires judges to take into account many factors when considering a sentence.

Based on the facts of a case, judges must decide on the purpose of sentencing. For example, should it be for punishment, deterrence or rehabilitation?

Judges must also take into account various principles, including the seriousness of the offence, the defendant's level of culpability, and any circumstances that make a sentence particularly severe.

There are also various aggravating and mitigating factors, such as the motive for the offence, the level of planning, and whether the defendant has any intellectual restrictions.

What judges must take into account

Take a simple offence such as shoplifting. There is a difference between someone who shoplifts expensive items to sell them, and so is in the business of shoplifting, and someone who steals food for their family.

Even within the former group, there is a difference between someone who has been persuaded to be involved because they are suggestible, and someone who has no such impairment.

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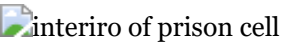
Judges also need to be aware of the likely effect of a sentence. Will a person be particularly vulnerable in prison, for instance? Will prison lead to a cycle of re-offending, maybe from gang recruitment? Is there any other action more likely to prevent re-offending?

In short, judges need a lot of information to help reach a proper sentence. This may have to come from experts, including reports from psychiatrists or psychologists when there is a mental health or impairment issue, as is often the case.

Similarly, reports about alcohol or drug use that cause a disproportionate amount of offending can be introduced from relevant specialists.



A cell in Auckland's Mt Eden Corrections Facility: vulnerability or likely re-offending are factors judges must take into account. Getty Images

Reasons for offending

Probation officers are one source of information under section 26 of the Sentencing Act. They may provide material relating to the cultural and social circumstances of an offender and make recommendations.

But probation officers have limits: they may not have much time and may not have the necessary expertise. This is where section 27 of the Sentencing Act comes in. It provides for an additional source of this information, which has been available for almost 40 years.

When parliament passed the Criminal Justice Act 1985, section 16 allowed a request for the court to hear from someone about a person's "ethnic or cultural background", how that might be relevant to the reason for offending, and how it might help avoid further offending. Any offender could use this provision.

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When the Sentencing Act 2002 was introduced, this provision was continued and expanded. The offender may now ask for someone to address their "personal, family, whanau, community, and cultural background".

More particularly, they can address how that might have been part of the offending, how it might be relevant to any sentence, and how support might help prevent further offending. Again, any offender can use this provision.

Its significance is underlined by the provision that the court can only refuse to hear the information if "special reasons" make it "unnecessary or inappropriate". And if no request is made, the judge may suggest it.

The right to a fair trial

To be clear, there is no proposal to remove this long-standing right to use section 27 reports. The only proposal is that legal aid will not fund them.

It is true that the cost to legal aid has risen significantly in recent years. But this is partly because it has been clarified that legal aid was the correct funding mechanism for cultural reports.

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The Ministry of Justice used to pay for them because they were considered a court report. But this was stopped and the reports became a disbursement for legal aid.

Also, senior judges have been clear these reports can contain useful information, meaning other judges have become more willing to consider them. The fundamental right to a fair trial includes a fair sentencing hearing, with the judge having all information that is useful.

Shifting costs elsewhere

Without legal aid funding for section 27 reports, then, what will happen? Obviously, those rich enough not to rely on legal aid will be able to use them.

On one level, therefore, there will be an additional barrier to equal justice for those who are poorer. Since Māori make up over 50% of the prison population, this inequity will also have an ethnic component.

But this obvious unfairness is something judges and lawyers will try to avoid.

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Defence lawyers have a professional responsibility to make sure all relevant information is put before the court. If this cannot come in the form of a report prepared by someone with the relevant expertise, the lawyer will have to look elsewhere.

So, we can expect lawyers to ask other experts, including drug counsellors or psychiatrists, to collate and include relevant information.

Lawyers may also request information from child welfare agency Oranga Tamariki, or from medical notes, to collate and put before a judge. Expect more oral evidence to be called – from social workers who might have had a role in the offender's background, for example.

In short, expect longer court hearings and more time put in by lawyers. This will potentially cost a lot more than any savings to legal aid from not funding section 27 reports.