The impact of the New Zealand Three Strikes Law on the assessment of fitness to stand trial by health assessors

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ABSTRACT

This thesis explores the impact of the New Zealand Sentencing and Parole Reform Act (2010), colloquially known as the 'Three Strikes Law' (TSL), on the assessment of fitness to stand trial (FST) by health assessors located at a Regional Forensic Psychiatry Service (RFPS) in New Zealand. The research included a retrospective file review producing descriptive quantitative statistics and semi-structured interviews with health assessors.

Health assessors are psychiatrists and psychologists who undertake the role of giving expert opinion in FST determinations in New Zealand. Research related to health assessors although scarce, has commenced in recent years (Sakdalan, 2012; Sakdalan & Egan, 2014; Wills, 2016); however, research is lacking on the impact of the TSL on these health professionals. The primary researcher is a health assessor who has an interest in determining the impact of the TSL on relevant FST assessments undertaken by health assessors.

The research is in two parts. Part 1 employs a retrospective cohort study which used data from 165 RFPS reports. These health assessor reports on FST were accessed from the period 30 June 2015 to 30 October 2015.

In Part 2, the views of health assessors on the significance they placed on the specific assessment of TSL, their methods of assessment, and the optimum assessment of this area were examined via semi-structured interviews. A qualitative thematic analysis of these interviews was undertaken.

The results indicated that health assessors were critical of the TSL, and experienced feelings of unease, umbrage, uncertainty and concern for vulnerable populations. The implications of these findings on the practice of health assessors are discussed.

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ATTESTATION OF AUTHORSHIP

"I hearby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no previously published or written material by another person (except where explicitly defined in the acknowledgements), nor any material which to a subtantial extent has been submitted for the award of any degree or diploma of a university or other institution of higher learning."

Signed 

Date 1 November 2019

CHAPTER 1. INTRODUCTION

1.1. A PRACTICE CHALLENGE

The impact of the Three Strikes Law (TSL) on the assessment of fitness to stand trial (FST) as a topic first captured the author's interest in late 2014. At that time the author was, and continues to be, a senior clinical psychologist employed as a health assessor at the Regional Forensic Psychiatry Service (RFPS).

The RFPS was established in response to the "The Psychiatric Report" produced in 1988 for the Honourable David Caygill, Minister of Health in New Zealand. The report inquired into the procedures and practices used in certain psychiatric hospitals in New Zealand and advocated for the development of the five regional services in New Zealand, amongst which was the RFPS (Mason, 1988). Thus, a new era in care was signalled (Mason, 1988). The Vision Statement for the RFPS is "Improving lives through responsive forensic services – Mauri Ora!" and the Mission Statement is "To achieve a world leading health service with people who have a mental illness and/or intellectual disability within the context of criminal offending. Our service excellence rests on the pillars of our knowledge, professionalism and values" (RFPS, 2017, p.2).

The RFPS provide an integrated forensic mental health service to the Northern Region's courts, prisons and general mental health services. The author's primary role, within this service, is to undertake s 38 Criminal Proceeding (Mentally Impaired Persons) Act 2003 (CP(MIP) Act 2003) court reports for the courts within this region. Courts request these reports to ascertain the defendant's competence, or 'fitness', to stand trial before the courts proceed with the trial process. The report requires a health assessor, who is a qualified mental health professional such as a psychiatrist or psychologist, to undertake a forensic evaluation.

The role of an assessor is challenging when undertaking FST reports, as the reports encompass a wide ranging assessment. Using discretion, the assessor has latitude regarding how she or he addresses various relevant areas including mental health, mental impairment, intellectual disability and ultimately FST. While the CP(MIP) Act 2003 details the factors that must be addressed, the Act does not detail exactly *how* the assessor is to undertake the assessment or the parameters of the assessments.

The enactment of the Sentencing and Parole Reform Act 2010, known colloquially as the TSL, potentially added a further dimension of required assessment for health assessors. As this research will discuss, the law around FST is complex, but is applied to enable an assessment of an offender's mental capacity to be tried on criminal charges. As Brookbanks (2018) stated:

> Essentially, it is concerned to answer the question whether there is a competent adversary to defend a criminal prosecution. For this reason the procedure is often referred to as 'fitness to plead', because the preliminary question is whether the offender is capable of entering a plea to a criminal charge. This necessarily presupposes that no plea has been taken and the question for the court is the defendant's capacity to do so. If the defendant is found incapable of entering a plea or adequately taking part in the court process or instructing counsel, the proceedings are adjourned pending the defendant's recovery of trial capacity. If this capacity is not restored, the defendant is then permanently diverted from the criminal justice system. Where the procedure is described as 'fitness to stand trial' it means precisely that – it is an assessment of whether the defendant has the mental capacity to participate in, and defend criminal proceedings, where a finding of guilt is a possible outcome. Again, a lack of capacity will typically issue in permanent diversion from the criminal justice system and proceedings stayed. (W. Brookbanks, personal communication, November 6, 2018)

Given that health assessors assess FST, Brookbanks' statement is important. With the entry of the TSL, questions have been raised during FST assessments as to whether a defendant has the mental capacity to understand the TSL and the consequences of the imposition of the TSL, as *part of* the FST assessment. This presents a new realm for the health assessor and the current research will seek to report on the impact of this law on the health assessor's role. In addition, questions have been raised as to the correctness of the positioning of these questions under FST law and FST health assessor assessments. Brookbanks (2018), in a personal communication, considered it was:

> Quite acceptable for the question to be raised as to whether a convicted offender has the mental capacity to understand the TSL law and the consequences of the imposition of a Three Strikes warning, although this is likely to arise very infrequently… The issue then is what is the proper procedure for the court to use in determining this question, since the legislation is silent on the matter (W. Brookbanks, personal communication, November 6, 2018)

There is no current legislation regarding the input of health assessors specifically addressing the TSL during FST assessments in New Zealand. However, case law has

provided some direction in this issue and will be addressed later in Chapter 2. The author sought to understand the impact of the TSL on health assessors undertaking FST reports and to bring clarity to the role of health assessors in this regard. This may reduce the ambiguity that some health assessors feel when grappling with the impacts of the TSL. The author's interest in the impact of the TSL was piqued by a case in which the author was one of two health assessors writing s 38 FST reports to assist the court to determine whether the person was fit to stand trial, and to specifically address the TSL.

1.2. THE CASE WHICH SPARKED MY INTEREST IN THREE STRIKES LAW

The case involved a defendant who appeared in court in 2014, whose charges were subject to the TSL. An Order was made by the Presiding Judge that assessment reports be prepared on the person for the purpose of assisting the court to determine whether the defendant was unfit to stand trial. Two health assessors, the author (a clinical psychologist) and a psychiatrist, both from the RFPS, completed these reports.

The defendant subsequently appeared at a District Court and the original health assessors were each asked to prepare an additional report to specifically address the issue of the TSL. This case raised several issues related to TSL for me:

- Was the TSL being taken into account in other cases?
- If so, how was this evaluation occurring?
- What was the impact on the health assessors of this additional requirement?
- Did this TSL appear to impact on the defendant?

To further understand the complexity and significance of this practice challenge, it is important to outline the evolution of FST and the development of TSL.

1.3. FITNESS TO STAND TRIAL IN THE UNITED KINGDOM

The following section outlines the development of FST legislation, with particular emphasis on the United Kingdom and later on Australia. This is important as, in many respects, New Zealand followed the legislation developed in these jurisdictions. In addition, the cumulative development of critical thinking on this topic is highlighted in the following historical sampling of relevant events.

The concept of 'fitness to stand trial' is also known as 'competency to stand trial' or 'fitness to plead' in various jurisdictions (Adjorlolo & Chan, 2017). Different jurisdictions around the world have legislation in regards to FST under laws governing criminal procedure (Pillay, 2016). This section will address the history of FST that influenced and shaped New Zealand FST legislation.

1.3.1. Historic beginnings to fitness to stand trial

The historic beginning of FST in English common law provides a fascinating trajectory in the development of the law surrounding fitness to plead. The concept of fitness to plead is one in which the defendant may be ruled unfit to defend himself or herself in criminal proceedings due to mental illness or some other form of disability (Brookbanks, 2011). The New Zealand law has its origins in English common law (Brookbanks & Mackay, 2010; White, Meares, & Batchelor, 2013) and some interesting highlights will be referred to.

Mackay (2018) observed "English law on unfitness to plead has developed over centuries in a piecemeal fashion…" (p. 11). The development of English law on FST covers an interesting range of contributing cases and factors. Given my interest in how FST arose and how it is assessed, relevant cases will be examined.

Some commentators reported that in the medieval courts, economic considerations or procedural formalities, rather than humanitarian factors, may have impacted on legal processes (Brookbanks, 2011). Brookbanks (2011) considered that it appeared that ethical considerations did not feature prominently at that stage, and fairness of trying people who could not meaningfully take part in their own defence was not considered.

In the 7th century the accused's ability to engage in the criminal proceedings reportedly required special attention within the law if the accused was thought mentally disordered (Walker, 1968). The intention behind these inquiries appeared to be financial. At that time, crimes required compensation; and in the case of the mentally disordered, the family was expected to pay. Walker (1968), looking back at the historical perspective at the time, reported that it was recognised that "If a man fall out of his senses or wits, and it comes to pass that he kill someone, let his kinsmen pay for the victim" (p. 15). Based on these early processes, it appears that the concern for the mental health of people before the court was based on financial compensation.

In later centuries, the fitness to plead concept arose to assist the courts who required a formal method of relating to mentally disordered defendants (Grubin, 1991). However, the historical concept of a defendant being competent or fit to stand trial appears to have been overshadowed for the courts by a focus on defendants wilfully refusing to plead (Brookbanks, 2011).

During the 13th century, a plea from a defendant appeared to be an important factor to enable the individual to consent to a trial by jury, as was the custom. Not pleading, for whatever reason, consequently raised problems for the trial process (Plucknett, 1976). In the case where the offence was a felony and the defendant stood mute, the court practice was to form a jury to decide if the person stood "mute of malice" or mute "ex visitation Dei" (by visitation of God) (Hale, 1736, p. 316).

At this point in the United Kingdom's history of FST, it seemed that the focus on what appeared to be feigning mental illness to avoid participating in the trial process arose. As can be seen, this received particular attention by the English courts in the 13th century.

1.3.2. The Standing Mute Act 1275 in England

In the 13th century in England, failing to, or being unable to, plead resulted in life threatening consequences. The "Standing Mute Act 1275", which enabled techniques like '*peine forte et dure'* (French for "hard and forceful punishment") was passed in England in 1275. This method of torture was formerly authorised by statute in the common law legal system in England, namely the Statute of Westminster. The court decided if the defendant was "mute of malice", or "by visitation of God" (Grubin, 1996, pp. 11-12) and the technique of 'peine forte et dure' could be enacted. Those who were considered 'mute of malice' and who refused to plead ("stood mute") were subjected to the torture of '*peine forte et dure*' in an attempt to force them to make a plea (Melton et al., 2007). The '*peine'* was imposed by imprisoning the defendants and attempting to starve them into submission, and by 1406 "pressing to death" was added to this technique (Durston, 2004, p. 516) (see Figure 1, p. 7).

This torture was meted out to a defendant who refused to plead (stood mute) and would, therefore, be subjected to having heavier and heavier stones placed upon his or her chest until a plea (guilty or not guilty) was entered, or the defendant died (Grubin, 1996; Rogers, Blackwood, Farnham, Pickup, & Watts, 2008). The courts at that time were

constrained when a defendant remained mute, because when a plea was not forthcoming and the defendant did not consent to a trial by jury, the trial could not take place (Grubin, 1996).

Furthermore, the courts faced another problem; if a defendant did not plead, his or her property was unable to be confiscated by the Crown (Brookbanks, 2011). The accused was not considered to be tried properly unless he or she pleaded to the charge(s); therefore, consenting to his or her trial (Hale, 1736). Thus, it has been argued that the pragmatic concept of economics again contributed to this doctrine more than concerns with justice (Brookbanks, 2011).

Such were the conditions in the 12th and 13th centuries in England that questions concerning fitness to plead focused on the defendants' willingness to plead to criminal charges rather than their ability to adequately participate within the trial (Brookbanks, 2011). As Brookbanks (2011) summarised "Historically, the claims of deaf mutes and defendants refusing to plead to charges have tended to overshadow the legitimate needs of mentally disordered defendants minded to challenge their trial competence status" (p. 14). The technique of attempting to extract a plea from a defendant considered 'mute of malice' with the use of '*peine forte et dure'* was abolished in 1772 (Rogers et al., 2008). As will be seen in the following section, by the 18th century, the regime did not resort to torture but was concerned with whether the person was fit to stand trial.

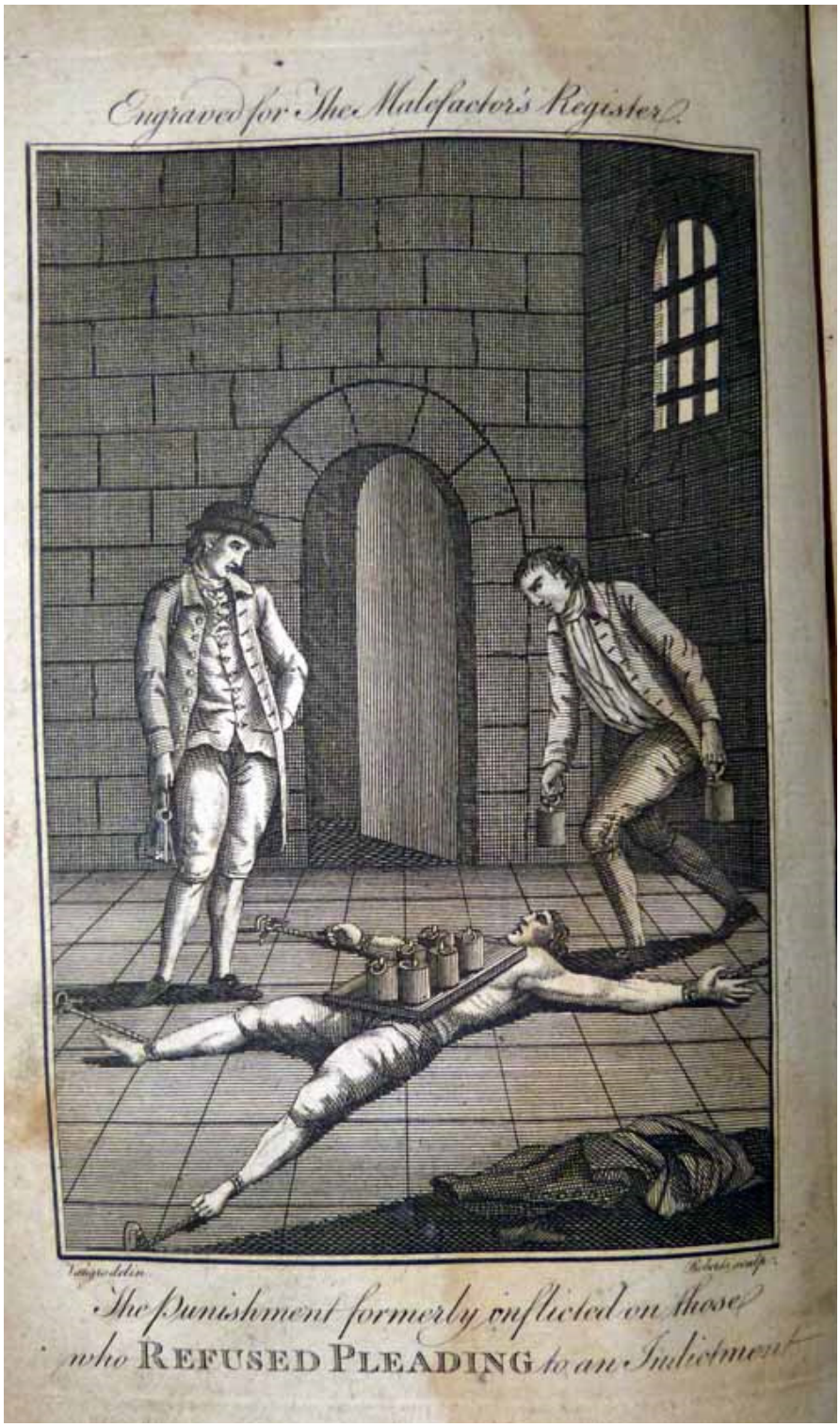

Figure 1. Peine forte et dure

Plate entitled 'The punishment formerly inflicted on those who refused pleading to an indictment' (The Malefactor's Register, 1700 to Lady-day 1779).

1.3.3. Mentally unwell defendants

In the early 18th century, a shift in thinking occurred regarding the link between FST and mental illness. It appears that the judiciary acknowledged that some defendants

were mentally ill and that this had legal implications. The concept that mentally unwell defendants should not be tried until their mental capacity was restored was introduced by Judge Lord Hale in his book *The History of Pleas of the Crown:*

> If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad he ought not by law to be arraigned during such his frenzy, but be remitted in prison until that incapacity be removed; the reason is because he cannot advisedly plead to the indictment. (Hale, 1736, p. 34)

This represented a more humane approach to the defendants. Walker (1968) reported that it was not until the mid-18th century that an insane defendant could potentially be found unfit to stand trial. Seven key cases that appear to illuminate the evolution in standards in the United Kingdom jurisdiction are detailed in the following 19th and 20th century cases. In the author's reading, it was noted that several commentators had selected a variety of cases which introduced and examined fitness to plead cases (Brookbanks, 2011; Rogers et al., 2008).

1.3.4. Relevant fitness to stand trial cases

Seven cases have been selected because they appear relevant to the work of health assessors in the present day in New Zealand. The progression signalled by these cases is extremely important as the findings have impacted on subsequent FST law. The first four cases, namely *R v Dyle* (1756) O.B.S.P., 271, *R v Dyson* (1831) 7 C & P 305, *R v Pritchard* (1836) Eng R 540, and *R v Davies* (1853) Car & Kir 328, show the development of judicial fitness considerations within the United Kingdom during the 18th and 19th centuries. The remaining three cases were decided in the United Kingdom during the 20th century. Two cases *R v Robertson* [1968] 1 WLR 1767 and *R v Berry* (1978) 66 Cr App R 156 helped to establish parameters concerning mental health and ability to plead; while *R v Janner* (7 December 2015), unreported, 'modernised' the earlier pivotal decision of *R v Pritchard* (1836).

1.3.4.1. R v Dyle (1756)

The case of Dyle in 1756 recognised elements of the concept of unfit to stand trial, *R v Dyle* (1756). Dyle was accused of murder. However, his lawyer could not take instructions from him, telling the court "I don't think he is capable of attending to or minding the evidence, or remembering it when he has heard it" (Walker, 1968, p. 15). Dyle was subsequently found "not of sound mind and memory" (Chiswick, 1990, p.

171), and was not tried (Shah, 2012, p. 179). This is significant given one of the fundamentals of the FST assessment in New Zealand law—CP(MIP) Act 2003—is the ability to instruct one's lawyer.

1.3.4.2. R v Dyson (1831)

Following the case of *R v Dyle* (1756), a significant issue was addressed during the following century in the case of Esther Dyson, a woman who was charged with the murder of her illegitimate child by decapitation. The defendant was deaf and unable to speak or use Sign Language. She was not able to understand her right to challenge jurors. The Judge, in this case, was Parke J (Brookbanks, 2011). After consulting Hale's (1736) *Pleas of the Crown*". Parke J instructed the jury that if it found Dyson lacked "intelligence enough to understand the matter of the proceedings against her due to defect of her faculties", then the jury "ought to find her not sane", *R v Dyson* (1831) 7 Car & P 307, 173 ER 136. The jury found the defendant 'mute by visitation of God and insane', and she was detained indefinitely under the Criminal Lunatics Act (1800) until his Majesty's pleasure was known (Shah, 2012).

This case was significant because it signalled the importance of the defendant being found 'not sane' if it was determined he or she did not have sufficient intelligence to 'understand the matter', which would appear to equate to being able to adequately participate in the court process.

1.3.4.3. R v Pritchard (1836)

The very important case of *R v Pritchard* (1836) followed five years later and led to the clarification of the legal test for fitness to stand trial. Brookbanks and Skipworth (2007) reported this case underpinned the legal test of fitness in most English and American common law jurisdictions. Brookbanks (1982) considered that the authority *of R v Pritchard* (1836) on the issue of fitness to plead had "…never been overruled or doubted" (p. 88).

Pritchard stood trial for the offence of bestiality. Deaf and mute, Pritchard did not initially plead and a jury was empanelled by Judge Baron Alderson to decide the nature of his muteness, whether "mute of malice or by the visitation of God". Despite being unable to hear or speak, he was found able to plead as he could read, write and gesture that he was not guilty. The jury found him able to plead, but was then asked to inquire if he was "now sane or not" (*R v Pritchard* (1836) 7 Car & P 303, 173 ER 135).

Pritchard was subsequently found unfit to plead as he could not meet all the criteria Judge Baron Alderson had specified in his formative test of FST:

> There are three points to be inquired into: First whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of the proceedings on the trial, so as to make a proper defence – to know that he might challenge any of you to whom he might object – and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation. (*R v Pritchard* (1836) 7 Car & P 303 at 304, 173 ER 135)

In the same manner as Dyson, *R v Dyson* (1831) Pritchard was also ultimately detained under the Criminal Lunatics Act 1800 (Victorian Law Commission, 2013). The judge's directions in *Pritchard* indicated that it was not sufficient for a defendant to have the capacity to plead; he or she was also required to have the cognitive ability to take part in his or her trial.

The five basic standards identified in *R v Pritchard* (1836) continue to be those criteria which must be satisfied in order for a defendant to be fit to plead in England and Wales. They are: the ability to plead to the indictment, the ability to understand the course of the proceedings, the ability to instruct a lawyer, the ability to challenge a juror and the ability to understand the evidence (Grubin, 1991; Mackay & Kearns, 2000). If a defendant is unable to meet any one of these criteria he or she may be found unfit to plead (Brookbanks & Mackay, 2010).

1.3.4.4. R v Davies (1853)

In the subsequent case of *R v Davies* (1853), an additional criteria to the *Pritchard* test was added; the defendant must be capable of instructing his or her counsel for the purpose of mounting a defence (Rogers et al., 2008). Davies was an elderly man charged with murder who did not respond when asked to plead. Davies' intellect was not questioned. However, the jury considered him to be 'mad' and he was subsequently judged unfit to plead (Shah, 2012).

It seems that *R v Davies* (1853) was one of the first cases to recognise that impairments arising from psychotic illness could affect a defendant's fitness to plead. According to Rogers et al. (2008), a very important feature of the *Pritchard* criteria was that it was expanded to include an additional criterion that a defendant must also have the ability to properly instruct his or her counsel for the purpose of mounting a defence. This

criterion continues today under New Zealand law, CP(MIP) Act 2003, and it is one that health assessors need to assess.

1.3.4.5. R v Robertson [1968]

By the mid-20th century, it became apparent that the *Pritchard* criteria had a number of limitations. One critique was that a defendant only had to have a rudimentary understanding of the trial process to be found fit (Rogers et al., 2008); an example of occurred in England in *R v Robertson* [1968].

A seaman who believed members of his crew were trying to poison him was prosecuted for the murder of a crewman. While he was initially found unfit, he appealed this ruling, which was allowed by the court. The defendant's insistence that he was fit to stand trial could be seen as against his best interests, given that he was standing trial for murder. However, the court determined that the "mere fact of being incapable of doing things in one's best interests is not sufficient for a finding of disability" (Rogers et al., 2008, p. 585). It was evident that a lack of self-interest, or what could be seen as a 'rational' point of view, was not sufficient for a finding of 'unfitness' in this case, and Robertson's criminal case was able to proceed.

This case indicated that the decision making of the defendant did not have to be in his or her 'best interests' for the court to find the defendant fit to plead. Brookbanks (2011) reported that both English and New Zealand courts in general "have not considered the implications of *irrationality* in the trial process, preferring simply to observe that the threshold for fitness is "low" (p.77). This finding suggests that health assessors within the New Zealand context do not necessarily need to find that the defendant has a 'rational' decision making capacity when assessing if they are fit to stand trial. This is despite the view of some commentators who suggest that a minimum requirement for competence to stand trial is rationality (Brookbanks, 2011).

1.3.4.6. R v Berry (1978)

In addition, the subsequent English case of *R v Berry* (1978) importantly outlined the development of a legal test, which influenced what is done in later FST assessment. The court held that a person can show a "high degree of abnormality" without being found unfit to stand trial (*R v Berry* (1978) 66 Cr App R 156 at 158) (Rogers et al., 2008, p. 585). In this case, the fact that the defendant had a mental disorder and choose not to act in his own best interests was not sufficient for the defendant to be found unfit

to plead. This case, taken together with the earlier case of *R v Robertson* [1968], indicated that English law at that time considered the right to a fair trial plus the public interest in holding people criminally accountable in appropriate circumstances was such a fundamental entitlement that only the most seriously disturbed defendants were found unfit to stand trial (Rogers et al., 2008).

1.3.4.7. R v Janner (7 December 2015), unreported

The important English case of *R v Janner* (7 December 2015) highlighted the need to update the fitness test as set out in *R v Pritchard* (1836) ('the *Pritchard* Criteria'). The Judge in this case, Openshaw J, set out a modernised version of these criteria. Whether the defendant is fit to plead or to be tried depends on whether he or she is able to:

1. Understand the charges;
2. Enter an informed plea to those charges;
3. Instruct those acting for him as to his answer to the charges;
4. Understand such advice as is given to him;
5. Properly exercise his right to challenge jurors for cause;
6. Follow and effectively participate in proceedings (with assistance if necessary);
7. Give evidence on his own behalf (again with assistance if necessary);
8. Make an informed choice as to whether he should do so and
9. Whether any other evidence should be called on his behalf. (*R v Janner*, 7 December 2015)

The original *Pritchard* criteria were modified to an extent in this decision. For example, the defendant may have assistance during his or her participation in the proceedings, including when he or she gives evidence. This is important, as the original *Pritchard* criteria may disadvantage defendants who are unable to adequately participate in court. These modifications are important as health assessors make recommendations at the conclusion of their FST reports regarding the practices or measures that would assist the defendant during the court process.

1.4. FITNESS TO STAND TRIAL IN AUSTRALIA AND OTHER JURISDICTIONS

1.4.1. Australia

While the United Kingdom laid the basis for understanding the New Zealand context of FST, Australian law has also influenced New Zealand law. In Australia, the legal test for fitness had also broadly reflected the *Pritchard* criteria from the United Kingdom. However, this test was expanded in the Australian case of *R v Presser* [1958] VR 45, which proved to be a highly influential case. In the 1980 decision of the Supreme Court of Victoria, the capacities listed in this case are provided below. The capacities were held to be the minimum standards needed to attain for fitness (*R v Ngatayi* (1980) 147 CLR 1).

The Australian criteria questions were whether the defendant is capable of:

a) Understanding what he or she has been charged with;
b) Pleading to the charge and exercising his or her right of challenge;
c) Understanding that the proceedings before the court would be an inquiry as to whether or not he or she did what he or she was charged with;
d) Following, in general terms, the course of the proceedings before the court;
e) Understanding the substantial effect of evidence given against him or her;
f) Making a defence to, or answering, the charge;
g) Deciding what defence he or she would rely on;
h) Giving instructions to his or her legal representative (if any) and
i) Making his or her version of the facts known to the court and to his or her legal representative, (if any). (*P v Police* [2007] 2 NZLR 528 at [43])

These additional criteria were considered pertinent to the assessment of FST in New Zealand in the case *P v Police* [2007]. The court in this case found that the list of Australian criteria derived from s 68(3) of the Mental Health (Treatment & Care) Act 1994 (ACT) as "more discriminating than the common law test for fitness to stand trial, and served to illuminate the criteria in s 4(1) of the CP(MIP) *P v Police* [2007] 2 NZLR 528 at [43]" (Brookbanks, 2011, p. 89).

These criteria continue to feature in FST assessment in New Zealand and will be referred to as the *Presser* criteria. New Zealand research by Sakdalan and Egan (2014) on FST reports suggested that the additional *Presser* areas of competency have been

mainly used only to structure and format the reports. They found "opinions on fitness were still largely based on the CP(MIP) 2003 criteria" (Sakdalan & Egan, p. 20). The *Presser* criteria are outlined and discussed further in Chapter 2 as they relate to health assessors.

1.4.2. Other jurisdictions

The detail of international reform is beyond the scope of this thesis; however, it is notable that many jurisdictions are grappling with the issue of how to assess for FST. For example, the United Kingdom Law Commission is contemplating changes to fitness to plead assessment (The Law Commission, 2019). In the United States, calls from scholars are also extant for change such as Collins (2019) who considered a new test for competence to stand trial based on "the defendant's capacity to participate effectively in his trial" (p. 157). In Canada, Ferguson (2018) has called for a comprehensive study concerning the definition of FST, in regards to issues around limited cognitive capacity and rational capacity.

However, in the United States, a "rational" degree of understanding is required to be found competent to stand trial following the seminal case of *Dusky v United States* 362 US 402, 406 (1960). This case indicted that, "(1) the defendant must have sufficient present ability to consult with defence counsel with a reasonable degree of rational understanding and (2) a rational as well as factual understanding of the proceedings against him or her" (Adjorlolo & Chan, 2017, p. 206). Assessors in this jurisdiction will, therefore, be required determine if the defendant has both a factual and a rational understanding of the proceedings.

Adjorlolo and Chan (2017) summed up that despite this requirement in the United States, "CST has the same or similar meaning and interpretation across different jurisdictions" (Adjorlolo & Chan, 2017, p. 207). Fitness to stand trial appears universally related to the defendant having an adequate level of capacity to allow a satisfactory level of participation in the court process (White et al., 2013). New Zealand's legislation is discussed below.

1.5. FITNESS TO STAND TRIAL IN NEW ZEALAND

As seen in the previous sections, FST is a legal concept that has been established to attempt to ensure procedural fairness and fair court outcomes (Heilbronner & Frumkin, 2003). In New Zealand, the concept of FST is concerned primarily with "procedural

fairness, the ability of an offender to defend himself or herself against accusers, and the process that evaluates an offender's competence to be tried" (Brookbanks & Skipworth, 2007, p. 157).

The underlying philosophy is that a person who is facing trial should be able to defend himself or herself, which reflects a fundamental concept of law (Brookbanks & Skipworth, 2007). Fitness to stand trial is considered at the very centre of the interface between criminal justice and the mental health systems (Nicholson & Johnson, 1991), and is one of the most fundamental protections afforded to defendants (Armstrong & Friedman, 2016).

Thus, health assessors are required to have an understanding of the relevant criminal justice and disability law, while considering the day to day mental health and mental impairment considerations of the individuals they are assessing for FST. This is a complex task given the 'cross over' of both legal issues and mental health (or mental impairment) considerations.

In the following paragraphs, the early background to recent legislation impacting on FST assessments is covered; while Chapter 2 focuses on the specifics of FST legislation as it impacts on health assessors.

1.5.1. Recent legislation in New Zealand impacting on fitness to stand trial assessments

An understanding of the 'required' FST assessment based on legislation is necessary prior to an analysis of the subsequent impact of the TSL on these assessments. A brief history of the relevant New Zealand law within the criminal justice system follows. This foundation is necessary given that the resultant legislation has had a significant impact on the provision of FST assessments by assessors.

1.5.1.1. The Mental Health (Compulsory Assessment and Treatment) Act 1992

The changing nature of mental health legislation in New Zealand has direct implications for health assessors. By way of background, in the 1980s in New Zealand, mentally impaired offenders had a comparatively high media profile due to a series of incidents involving mentally ill people (Brookbanks, 2014). When the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MH(CAT) Act 1992) was enacted,

it deliberately excluded people with an intellectual disability unless they also had a mental disorder (s 4E).

This marked a shift, whereby intellectual disability was viewed not as a mental illness, but as a distinctive disability. In practical terms, under the new MH(CAT) Act 1992 criteria, the court had limited options for people with intellectual disability. Subsequently, there was an impact upon the small group of people with an intellectual disability who offended in New Zealand; instead of being governed by the mental health system, they were governed by the criminal justice system, sometimes resulting in imprisonment (Duff & Sakdalan, 2007). For some members of this small group, neither the mental health nor the criminal justice system was optimum (Johnson & Tait, 2003).

In the 1990s, the public's response to people with intellectual disabilities began to change from a policy of 'hiding' many people with intellectual disabilities in large institutions to one of de-institutionalisation (Johnson & Tait, 2003). Against this background, New Zealand's criminal justice system recognised this gap in the provision of services for the intellectually disabled (Bell & Brookbanks, 2005). The subsequent legislation, the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (ID(CCR) Act 2003), was passed: "to better meet the care and rehabilitative needs of intellectual disabled offenders" (Smith, 2013, p. 6).

1.5.2. New legislation in New Zealand

A driving force for eventual changes to New Zealand legislation was the lack of consideration for individuals with an intellectual disability. This was an important thread running through the changes to the legislation over the past five decades, and proved to be of interest to health assessors, given they assess both for mental health and intellectual disability. Both the ID(CCR) Act 2003 and the CP(MIP) Act 2003 (described further below) provide health assessors with the legislative basis for determining both mental illness and intellectual disability as they relate to 'mental impairment' and ultimately FST.

The purpose of the CP(MIP) Act 2003 was to restate the law formerly set out in Part 7 of the Criminal Justice Act 1985 and to make a number of changes to that law. Section 3 of the CP(MIP) Act 2003 specifies that the purposes are to:

(a) provide the courts with appropriate options for the detention, assessment, and care of defendants and offenders with an intellectual disability;
(b) provide that a defendant may not be found unfit to stand trial for an offence unless the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence;
(c) provide for a number of related matters.

The new expression "unfit to stand trial" was incorporated under s 3(b) of the CP(MIP) Act 2003. Of interest, particularly to health assessors undertaking FST assessments, is that the number of defendants with intellectual disability exceed the number involving legal insanity in New Zealand (Brookbanks, 2014). Health assessors are required to be skilled at detecting mental impairment resulting from mental health and intellectual disability concerns.

Two of the major changes are that the CP(MIP) Act 2003 provides options for the detention, assessment and care of defendants and offenders with an intellectual disability. This move towards setting out special provisions for those with intellectual disability is important, both for reasons of fairness to those with an intellectual disability, and to provide guidance for professionals working with people subject to the CP(MIP) Act. This legislation particularly impacts on health assessors who are required to follow this legislation when undertaking their FST assessments. Following an amendment to the CP(MIP) Act 2003 (inserted 14 November 2018), s 8 A was inserted as follows.

8A Determining if defendant unfit to stand trial

(1) The court must receive the evidence of 2 health assessors as to whether the defendant is mentally impaired.

(2) If the court is satisfied on the evidence given under subsection (1) that the defendant is mentally impaired, the court must record a finding to that effect and—

(a) give each party an opportunity to be heard and to present evidence as to whether the defendant is unfit to stand trial; and

(b) find whether or not the defendant is unfit to stand trial; and

(c) record the finding made under paragraph (b).

(3) The standard of proof required for a finding under subsection (2) is the balance of probabilities.

(4) If the court records a finding under subsection (2) that the defendant is fit to stand trial, the court must continue the proceedings.

(5) If the court records a finding under subsection (2) that the defendant is unfit to stand trial, the court must inquire into the defendant's involvement in the offence under section 10, 11, or 12, as the case requires.

Section 8(a) of the CP(MIP) Act 2003 provided that the fitness inquiry preceded the involvement inquiry. As was stated by Brookbanks (2018), this change in procedure was needed to "avoid the risk of factually innocent offenders being found unfit to stand trial" (p. 137). (Brookbanks, 2018, p. 137). In terms of health assessors, this helps to provide certainty that the person they are assessing will have the opportunity to have the facts of the case heard and tested. This factor addresses whether the person did do "the act or omission which constitutes the basis of the offence charged" pursuant to s 9 CP(MIP) Act 2003.

1.5.2.1. Discussion of the CP(MIP) Act 2003 and the ID(CCR) Act 2003

The CP(MIP) Act 2003 and the ID(CCR) Act 2003 are closely connected and have "complex inter-locking provisions" (Brookbanks, 2005, p. 66). Both statutes were considered revolutionary as they sought to provide an alternate regime of care and rehabilitation for individuals dealt with under these Acts (Brookbanks, 2005; Duff & Sakdalan, 2007). Diesfeld (2013) précised:

> Eventually two interwoven Acts were created. The Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIPA) addresses the qualifying criterion for unfitness to plead (mental impairment) and includes people with intellectual disability. The IDCCA authorises compulsory care and rehabilitation for people with intellectual disability who have been charged with, or convicted of, an imprisonable offence. (p. 244).

However, various commentators noted that the ID(CCR) Act 2003 is 'compulsory care legislation'; as it was more focused on the need for public protection than the need for therapeutic intervention (Brookbanks, 2005; Diesfeld, 2013). Even so, the new legislation enabled the provision of care for certain individuals who may not have coped well within the mental health system. These provisions extended to the area of FST, which is discussed in detail from the health assessors' perspective in the following

chapter. Of importance, however, is that health assessors need to focus both on *mental impairment* as a result of mental health conditions and, due to intellectual disability, and any other condition which may be associated with mental impairment. Previous legislation was seen as inadequately providing for intellectually disabled offenders, who were found to be unfit to plead or to be tried.

1.5.3. Number of defendants found unfit to stand trial

The focus of this research involves FST in New Zealand. The number of defendants found unfit to stand trial is small; but numbers have slowly increased after 2004 (Ministry of Justice, 2018). The number of adults found unfit to stand trial in comparison to the total number of adults charged in New Zealand is small (Ministry of Justice, 2018). In her foreword to the book *Fitness to Plead,* Dame Brenda Hale also found that in the United Kingdom only a small number of people are found 'unfit to plead'; while many people who are convicted of crimes, "have a learning disability, report symptoms of psychosis or are elderly people" (Mackay & Brookbanks, 2018, pp. vii-ix). There may be an array of reasons for the increase in numbers of defendants being found unfit to stand trial in New Zealand since 2011. In particular, the enactment of the CP(MIP) Act 2003 and the ID(CCR) Act 2003 may have broadened the criteria for people to be found unfit to stand trial.

Table 1 (p. 20) shows the number of defendants found unfit to stand trial during the years 2004 to 2018. As can be observed, there has been a large increase in the number of defendants found unfit to stand trial during the last eight year period. The numbers of defendants found unfit rose from 59 in 2010 to 102 in 2011. This trend has continued during the intervening years. A number of factors may have contributed to this rise, including a growing awareness by health assessors of various conditions impacting on defendants under the term 'mental impairment', such as traumatic brain injury, foetal alcohol spectrum disorder and neurocognitive disorder. The advent of the TSL in 2010 may also have contributed to this increase in defendants found unfit.

Table 1: *Unfitness to Stand Trial in New Zealand 2004-2018* (Ministry of Justice, 2018).

Year	Defendants Found Unfit
2004	7
2005	33
2006	36
2007	54
2008	67
2009	57
2010	59
2011	102
2012	94
2013	101
2014	108
2015	125
2016	145
2017	194
2018	178

1.5.4. Summary of fitness to stand trial background

This section has summarised the history and complexity of the FST, drawing upon international and domestic developments. The history of FST in the United Kingdom presents an opportunity to understand the evolution in relevant jurisprudence. This overview focused on early influences on modern FST in the United Kingdom. Subsequently, courts provided a more contemporary interpretation of FST. As discussed, United Kingdom and Australian case law was influential in New Zealand case law. *Pritchard* informed New Zealand's CP(MIP) Act 2003 and *R v Presser* [1958] was influential to FST case law in New Zealand. The next stage of analysis focuses on the development of TSL in New Zealand. TSL presents another area of legislation which, again, has fascinating roots in history, with particular reference to California as a fore-runner to New Zealand law.

1.6. THREE STRIKES LAW

While the above discussion related to FST, the following analysis is more closely focused on TSL. In the author's view, four areas of knowledge contribute to health assessors' understanding of TSL. These areas are: the historical background to TSL, particularly as it relates to New Zealand; the political aspects of the TSL; the legislation; and case law relating to TSL. I am aware that these areas of knowledge appear, at first glance, unrelated or only obliquely related to the 'health assessment' work of the health assessor. However, these areas assist health assessors to understand the relevant terrain for their TSL assessments and the challenges they face.

To understand the early background to the New Zealand TSL, relevant international examples are discussed, with particular focus on the United States (California) and Australia (the Northern Territory). The focus then turns to the perceived negative effects of the TSL within these two jurisdictions and subsequent reforms. This is followed by a summary of the background factors contributing to the development of New Zealand TSL. Commentary from the literature concerning the potential negative outcomes of the TSL in New Zealand will be discussed.

The New Zealand Government enacted the current TSL legislation under the Sentencing and Parole Reform Act 2010, on 1 June 2010. The historical background to this Act is discussed below.

1.6.1. Early background with a focus on the United States

The United States has both federal and state legislation. An example of state legislation is Baumes Law 1926. First, New York State enacted an early habitual offender statute in 1797 and Baumes Law in 1926. The latter required life imprisonment for any offender convicted of a third felony (Oleson, 2015). The primary purpose of these laws was to "increase the severity of criminal sanctions by requiring that offenders convicted of certain crimes served fixed prison terms" (Stolzenberg & D'Alessio, 1997, p. 457), with habitual, or chronic offenders being the target of the law.

By 1949, statutes for 'habitual felons' were enacted in 43 of the 48 states (Tappan, 1949). However, these habitual offender laws eventually became obsolete as they were deemed "of little interest to judges, politicians or the general public" (Oleson, 2015, p.

278). Lack of interest changed, however, by the mid-1990s when habitual offender laws were described as "*Three Strikes Laws*" (Oleson, 2015, p. 278). These laws were seen as a means of combating rising crimes rates (Stolzenberg & D'Alessio, 1997), as prior research found a small percentage of offenders were responsible for a high proportion of violent offences (Wolfgang, Figlio, & Sellin, 1974).

1.6.2. Legislation in California

The first of the modern TSL was initiated in California in the early 1990s and was pivotal for the New Zealand TSL. California passed the legislation after two murder trials. The first, in 1992, involved the murder of Kimber Reynolds by a parolee during the attempted robbery of her hand bag. Her father, Mike Reynolds, worked with criminal justice officials to develop 'proposition 184'. This voter initiative automatically gave persons with two previous serious violent felonies life imprisonment with a minimum 25 years for their third offence (Oleson, 2015).

In 1993, 12 year old Polly Klass was kidnapped and murdered by a man with repeat violent convictions. Proposition 184 (the TSL) gained a great deal of media attention following this murder. Many commentators believed such a law could have saved her life (Oleson, 2015). Oleson (2015) described that consequently, on 8 November 1994, the proposition (placed on the California State Legislature ballot) passed with a clear 72% of the vote, bringing the new initiative into law (California Proposition 184, Three Strikes Sentencing Initiative, 1994). By the late 1990s, 24 states had a variation of TSL (Taibbi, 2013). Taibbi (2013) discussed that under the resultant law anyone who had committed two serious felonies would effectively be sentenced to jail for life upon being convicted of a third crime.

1.6.3. Support for California's Three Strikes Law

Judge James Ardaiz was instrumental in designing California's TSL (Ardaiz, 2000). He reported that he was approached by Kimber Reynolds's father so that "something positive would happen to ensure that others would not experience his grief" (Ardaiz, 2000, p. 1). Together with community leaders, Judge Ardaiz and Mr Kimber concluded that serious and violent crime needed to be reduced and subsequently developed the TSL. Justice Ardaiz explained that the rationale was that sentencing was the most effective method to reduce crime. His intention was to enforce a policy which would affect "career criminals" (Ardaiz, 2000, p. 1). An objective was the removal of

offenders from society which was seen as justified due to the continuing threat they posed to the community (Ardaiz, 2000). It was considered the TSL could identify these offenders and help to prevent additional offending which would significantly reduce serious violent crime (Marvell & Moody, 2001; Vitiello, 1997).

The first goal of the TSL was to deter repeat offenders by making the consequences of crime transparent with harsh punishment (Ardaiz, 2000). The second goal was the imprisonment of repeat offenders for long terms of imprisonment, thereby preventing them from committing additional crimes (Stolzenberg & D'Alessio, 1997).

Justice Ardaiz discussed the subsequently contentious point that this law did not just target those offenders whose behaviour was serious or violent; rather, those who "repeatedly demonstrate a disposition towards criminal behaviour" (Ardaiz, 2000, p. 8). While Justice Ardaiz said that individuals needed to have at least one preceding violent or serious felony conviction, he felt that the gravity of the third felony should not be the determinative factor in 'triggering' the TSL. The rationale was that these offenders showed their disposition to engage in serious or violent behaviour by continuing to engage in repeated criminal behaviour.

Critique of the law stated it was unfair, cruel, gave disproportionate sentencing and that strikes included non-violent property offences and drug offences. Justice Ardaiz responded that "…(O)ut of all the defendants actually charged under the Three Strikes Law, only those fitting the profile of the "habitual criminal" are sentenced to the fullest extent of the law. This is what was intended" (Ardaiz, 2000, p. 20).

1.6.4. Concern about California's Three Strikes Law

Many authors commented on apparent inequities in California's TSL law. It was claimed that its original inception was based on 'penal populism', in which the TSL movement 'exploited' the two particularly cruel murders that preceded it. These were both committed by repeat offenders and swayed the public towards supporting the harsh new policy (Sutton, 2013). Of particular concern, was that this law defined 'strikable' offences widely, with the list of 'violent and serious' felonies including nonviolent felonies such as selling drugs to minors, burglary and possession of weapons.

California was considered unique, because it enabled *any* felony to be called a third strike at the discretion of the prosecutor (Sutton, 2013). Tonry (1996) argued that

because of the inflexibility of such sentencing "such laws sometimes result in the imposition of penalties in individual cases that everyone involved believes to be unjustly severe" (p.160). An example frequently given in the literature was a defendant in California who was sentenced under TSL to 25 years to life for stealing a slice of pizza (Stolzenberg & D'Alessio, 1997). Taibbi (2013) also highlighted that thousands of inmates had sentences of life imprisonment in Californian for trivial crimes, such as stealing a pair of socks.

Another consistent objection to TSL was that it discriminated against minority peoples. Commentators expressed concern that this legislation may adversely impact ethnic minority groups (Jin & Hidalgo-Wohlleben, 2016). Hinds (2005) discussed how the TSL in California had been "disproportionately negative on African-Americans" (p. 240). California Department of Corrections data highlighted that African-Americans made up only seven percent of the population of California at that time, but comprised 37% of second strike convictions and 44% of third strike convictions (Dickey & Hollenhorst, 1998). Hinds believed African-Americans were disproportionately affected by TSL.

However, Hinds (2005) did not discuss the percentages of African-American's imprisoned under TSL compared to the 'total prison population' of African-American prisoners at that time. This did not allow a direct comparison of those sentenced under TSL as comparative or not with the total prison population for the ethnicity in question.

In a more recent analysis of the demographic characteristics of strike offenders in California, Jin and Hidalgo-Wohlleben (2016) addressed this data and provided some clarification. As a useful starting point, they noted that men and ethnic minorities were overrepresented in California's prisons, when compared with the general population. The data from Jin and Hidalgo-Wohlleben's study indicated that African-Americans were overrepresented in the third strike inmate group when compared to other inmate populations. They reported "in 2015, they represented 46% of the state's third strike inmates, but only 29% of all inmates" (Jin & Hidalgo-Wohlleben, p. 10). The conclusion from this research was that the TSL did disproportionately affect the African-American minority group, although there was no evidence that this over-representation extended to other ethnic groups (Jin & Hidalgo-Wohlleben). This research supported the assertion of Hinds (2005) that African-Americans were overrepresented under TSL legislation.

Additional arguments against California's TSL exist including the use of plea bargaining (Warner, 2007), a lack of serious effect on crime (Males, 2011; Tonry, 1996, 2016) and that established principles of proportionality and restraint in sentencing are undermined (Roberts, 2003, p. 484). As will be discussed later in this chapter, New Zealand scholars have similar concerns about New Zealand's TSL.

The California Proposition 184, Three Strikes Sentencing Initiative (1994) was challenged for 18 years. In 2012, Proposition 36 in California was introduced as a ballot initiative that radically reformed the TSL. The initiative did not seek to repeal the TSL, but to restrict it to its original intent: namely, the imprisonment of violent and dangerous criminals. Subsequently, defendants may only be sentenced to 25 years to life if their third crime was serious or violent, or they had qualifying crimes, such as very violent crimes or sex offenses among their prior convictions (Laird, 2013). Also, as Laird (2013) discussed, the law allowed inmates who were already serving life sentences for nonviolent, non-serious crimes to petition for resentencing.

1.6.5. Northern Territory, Australia, Three Strikes Law

Moving closer to New Zealand, the Northern Territory in Australia also introduced mandatory sentencing laws in 1997 (McCulloch, 2000), and the history of these laws provides a fascinating insight into the background implementation and effects of TSLs. Amendments to the Juvenile Justice Act 1983 (N.T.) and the Sentencing Act 1995 (N.T.) introduced mandatory penalties for 'property offenders'. The rationale for mandatory sentencing was that it would reduce crime by deterring and or incapacitating repeat offenders, and justice would be served in the eyes of the community (McCulloch, 2000; Office of Crime Prevention, 2003).

1.6.6. Concerns about the Northern Territory Three Strikes Law

By 2000, numerous commentators raised concerns about the Northern Territory TSL (Australian Women Lawyers Association, 1999; McCulloch, 2000). Commentators were particularly concerned about the inequities found against the indigenous population. For example, indigenous youth offenders were found to have "not always received the benefit of cautioning at the same rate as the general youth population" (Mackay, 1996, p. 6). This was despite the fact that the *Royal Commission into Aboriginal Deaths in Custody* recommended that police officers caution indigenous

suspects more often (*Royal Commission into Aboriginal deaths in custody, National Report-Vol.4*, 1987).

McCulloch (2000) discussed how the TSL "exacerbated the entrenched discrimination against Indigenous Australians" (p.33). This practice included removing indigenous children from their families by incarcerating many in detention centres, which were often great distances from their own communities (McCulloch, 2000). Of major concern was the statistic that the TSL raised the imprisonment rates of indigenous women by 223% in the first year (Australian Women Lawyers Association, 1999); a statistic which suggests that the TSL strongly disadvantaged women following its introduction.

The Australian Women's Lawyers Association (1999) and McCulloch (2000) summarised the issue and highlighted a number of inequitable cases with examples that illustrated the sentences were disproportionate to the nature of the crime. This included the tragic death in custody of a 15 year old boy at the Don Dale Correctional Centre in Darwin on 9 February 2000, after he had been detained under the TSL (McCulloch, 2000). He had been serving a 28 day mandatory sentence for stealing pencils and stationary valued at less than $100 (Warner, 2007). This case, in particular, contributed to the debate that followed about these laws and put pressure on the Government to override state and mandatory sentencing laws (McCulloch, 2000).

General criticism was also levelled at mandatory sentencing. There was a claim that it transgressed well established principles that sentences should be in proportion to the seriousness of the crime, that imprisonment should be a last-resort option and that the time of incarceration should be for the shortest period necessary (McCulloch, 2000). Challenges to this law occurred at both a legal and political level (Zdenkowski, 1999). The two statutes in the Northern Territory were subsequently repealed in October 2001 by the newly elected Labour Government.

1.6.7. Three Strikes Legislation implemented in other countries

A number of countries, in addition to various states in the United States and the Australian Northern Territory, implemented TSL sentences (Hughes, 2014). These included the United Kingdom (Jones & Newburn, 2006), South Africa (Terblanche & Macknezie, 2008) and Canada (Hughes, 2014). Thus, New Zealand was not alone in the imposition of a TSL regime and appears to be part of a global wave. The type of

offences that qualified varied from country to country, including drug trafficking and burglary (United Kingdom) and 'sexual, violent and arms offences' (Canada) (Hughes, 2014).

1.6.8. Background to the current three strikes law in New Zealand

In the early 20th century, New Zealand enacted habitual offender legislation, namely the Habitual Criminals Act 1906. It authorised the indefinite incarceration of three-time felons (Oleson, 2015). This law eventually fell out of favour in the 1950s (Newbold, 2007). More recently, policy about crime became increasingly politicised and populist in the United States and Britain (Garland, 2001; Klinger, 2009), which has consequently led to more punitive sentences and longer penalties (Klinger, 2009).

In 2007, New Zealand representatives of the Sensible Sentencing Trust (SST), which advocates on behalf of victims of sexual and violent crime, visited the United States to learn more about the TSL Act in California (Oleson, 2015). The SST reportedly drew inspiration from the California legislation (Brookbanks, 2012). The SST members considered that a three strikes approach would be an effective method to incapacitate serious and violent recidivists (Klinger, 2009). On their return, the ACT New Zealand Party adopted the three strikes approach as one of its key policies.

Following the 2008 general election, the National Party formed a coalition government with the Act New Zealand political party (Hughes, 2014). As part of its confidence and supply agreement, the National Party agreed to introduce TSL legislation (which was incorporated into other criminal justice changes to be introduced following a public referendum in 1999). This call for new legislation can be seen against the backdrop of a society where particularly heinous and violent crimes were being discussed in the media and the victims of crime were assuming a larger voice in the discourses about crime (Klinger, 2009). Unbeknown to health assessors at this time, these political changes were the backdrop for what would ultimately become legislation which would directly relate to health assessments.

1.6.9. The Sentencing and Parole Reform Bill 2009

On 18 February 2009, the Sentencing and Parole Reform Bill 2009 was introduced into Parliament by 58 votes to 43 (Oleson, 2015). The Bill sought to amend the Sentencing Act 2002 and the Parole Act 2002 by introducing a "three stage regime of increasing consequences for the worst repeat violent offenders" (Sentencing and Parole Reform

Bill 2009 (17-1) (explanatory note). The Bill provided a starting point of five years imprisonment to be levied before the subsequent strikes were re-triggered.

In addition, on the imposition of the third strike, a life sentence was to be imposed with a minimum non-parole period of 25 years, unless that would be 'manifestly unjust', in which case the court would impose lower non-parole period. The Hon Simon Power, Minister of Justice, suggested when proposing the Bill that the 'manifestly unjust' provision be included to provide for the 'extraordinary case' giving as examples an offender with an intellectual or mental impairment (Cabinet Business Committee, 2008). Given the population with mental impairment comprises many of the defendants that health assessors evaluate, it is important that assessors understand this background.

At that time, a Regulatory Impact Statement: Sentencing and Parole Reform Bill (18 February 2009) was prepared by the Ministry of Justice (2009) to evaluate the objectives and risks of this proposal. The main objectives were to increase public confidence and enhance public safety. Risks included the possibility of disproportionate sentences and the potential that the legislation would disproportionately affect Māori (Indigenous New Zealander; see Appendix J).

The Bill was sent to the Law and Order Committee for consideration and one of the recommendations was to replace the qualifying sentence (of five years imprisonment) with a conviction for a qualifying offence (Sentencing and Parole Reform Bill 2009 (17-2) (Select Committee Report pp. 2-3). The Court of Appeal in *R v Harrison* and *R v Turner* [2016] NZCA 381 at [71] noted "We are unable to discern any convincing justification for this in the legislative materials", indicating that they would have preferred the Bill remain with the qualifying sentence provision. They discussed, however, a New Zealand Police Departmental Report (New Zealand Police, 2010). It included the prediction that the qualifying sentence would exclude too many offenders, and excluding it would enable the regime to become effective more quickly. In addition, the Law and Order Committee in 2009 recommended that some additional offences be added to the list of "serious violent offences", bringing the total to 40 (*R v Harrison* and *R v Turner* [2016] NZCA 381 at [72]). These views appear to have contributed to the final form of Sentencing and Parole Reform Act in 2010.

1.6.10. The Sentencing and Parole Reform Act 2010

The amendments, discussed above, were adopted and the Sentencing and Parole Reform Act 2010 was passed on 25 May 2010 by 63 votes to 58 (Oleson, 2015). This Act gained assent on 31 May and commenced on 1 June 2010. It amended the Sentencing Act 2002 (inserted as 86A to 86I), and brought a TSL regime into New Zealand law. The Act sought to introduce a method of incapacitating the most serious violent and sexual repeat offenders. This sentencing regime was considered to protect the public, deter offenders and improve public confidence in the criminal justice system (Law and Order Committee, 2010).

New Zealand legislation established an incremental three-stage system of warnings, which increased the sentence length by limiting judges' discretion (Brookbanks & Ekins, 2010). In addition, the removal of the five year threshold, previously provided for in the 2009 version of the Act, widened the scope of the Act, which gave rise to unforeseen consequences (Hughes, 2014). These consequences included that the application of the law was related to selected offences, rather than the gravity of the particular offence characteristics as signalled by the 'five year imprisonment' criterion. Thus, the net was widened. This negative consequence arose in terms of *proportionality* of the crime and the penalty. That is, an offence that could be regarded, even by the general public, as at the relatively minor end of the scale, would receive the same strike regime as one at the very serious end of the scale.

In their judgment *R v Harrison and R v Turner* [2016] NZCA 381 [10 August 2016] at [87], the Appeal Court Judges stated "We consider the enlargement of the stage-1 qualifying catchment greatly increases the potential for injustice and damage to the policy's credibility". They applied this statement to the two cases they decided and noted that neither of the two offenders (Mr Harrison and Mr Turner) or the other three offenders, who faced a strike for murder, would have been subject to the current provisions under s 86E (when murder is a stage 2 or stage 3 offence) (*R v Harrison and R v Turner* [2016] NZCA 381 [10 August 2016] at [91]).

The Sentencing and Parole Reform Act (2010), colloquially known as the TSL, gained assent on 31 May 2010 and came into force the following day. This legislation amended the Sentencing Act 2002 (and Parole Act 2002). It "enacted a suite of reforms to provide additional consequences for repeated serious violent offending" (*R v Harrison* and *R v Turner* [2016] NZCA 381 at [1]).

Pursuant to s 3 of the Sentencing and Parole Reform Act 2010), the Act's purposes are:

(a) to deny parole to certain repeat offenders and to offenders guilty of the worst murders;

(b) to impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences.

The TSL gives a summary description of the **offence** of a stage-1 (first strike), stage-2 (second strike) and stage-3 (third strike) offence in s 86A Interpretation, as follows:

"stage-1 offence means an offence that— "(a) is a serious violent offence; and "(b) was committed by an offender at a time when the offender— "(i) did not have a record of first warning given under section 86B; and "(ii) was 18 years of age or over

"**stage-2 offence** means an offence that— "(a) is a serious violent offence; and "(b) was committed by an offender at a time when the offender had a record of first warning (in relation to 1 or more offences) but did not have a record of final warning

"**stage-3** offence means an offence that— "(a) is a serious violent offence; and "(b) was committed by an offender at a time when the offender had a record of final warning (in relation to 1 or more offences)" Section 86A , Sentencing and Parole Reform Act 2010".

The following sections of the Act (86 B, C and D) then detail what the court must do in relation to a stage-1, stage-2 and stage-3 offence. It is complex; hence, the author has summarised some of the features below to explain the stages of the TSL. The Sentencing and Parole Reform Act 2010 provides that a *first warning* "is issued when an offender aged 18 or over at the time of the offence, and who does not have any previous warnings, is convicted of a qualifying offence" (Section 86A Sentencing and Parole Reform Act 2010).

The first "strike" warning permanently stays on his or her record (unless the conviction is quashed by an appellate court). If the offender is convicted of another second qualifying offence (*a second strike*), the offender receives a *final warning*. If sentenced to imprisonment, the person will serve that sentence in full without the possibility of parole. The first and final warnings will stay on the offender's record. On conviction

of a third qualifying offence (*a third strike*) the court must impose the maximum penalty for the offence. The court must also order that the sentence be served without parole, unless the court considers that would be manifestly unjust.

The TSL is complex and special provisions apply if murder is a stage-2 or stage-3 offence. These provisions are set out in s 86E of the Parole Reform Sentencing Act (2010). Two important points are listed under s 2. The court must:

> (a) sentence the offender to imprisonment for life for that murder; and
>
> (b) order that the offender serve that sentence of imprisonment for life without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so. (s 2 86E, Sentencing and Parole Reform Act, 2010)

The complexity of the TSL is revealed in the understanding of the three strikes (or three stages), and in the phrase, 'manifestly unjust'. This term is not defined. However, the Court of Appeal judgement in *R v Harrison* and *R v Turner* [2016] NZCA 381[10 August 2016] made reference to the concept from the Harrison sentencing decision, *R v Harrison* [2014] NZHC 2705. In that prior decision, Mallon J reported, "The threshold of manifestly unjust was regarded as being "very high", although the Judge observed that Parliament had clearly accepted that in some instances life without parole "might be unfair" at [24].

There are 40 qualifying offences listed in s 86A of the Sentencing Act 2002 (see Appendix G). These qualifying offences are 24 violent and 16 sexual offences which carry a maximum penalty of seven years imprisonment or more. They range in seriousness from murder to discharging a firearm, and from sexual violation to indecent assault. It is noted that the definition of the relevant offences is based on the type of crime committed as opposed to the serious or aggravating features of any particular crime (Hughes, 2014).

1.6.11. Concerns about the three strikes law in New Zealand

While this legislation is not considered as draconian as the California law, upon which it is based (Oleson, 2015), it nevertheless raised significant concerns. Indeed, in 2011 when McDonald comprehensively evaluated the introduction of the TSL in New Zealand, she termed this law "one of, if not the most, controversial sentencing initiatives enacted in New Zealand's recent history" (McDonald, 2011, p. 6). These

sentencing implications predominately appear to involve negative impacts resulting from the TSL (Brookbanks, 2012).

The TSL may be counter to long-held, deeply embedded principles of justice. If TSL administers disproportionate sentences, it may be perceived as unjust. This was articulated by scholars regarding TSL in other jurisdictions, including Australia (Australian Women Lawyers Association, 1999; McCulloch, 2000) and the United States (Jin & Hidalgo-Wohlleben, 2016; Stolzenberg & D'Alessio, 1997). One fundamental sentencing principle is the notion of proportionality. That is, a penalty should not be out of proportion to the seriousness of the offence. Further, the principle of restraint is vital. Brookbanks (2012) asserted that the sentence of imprisonment should be used with restraint, as this sentence represents a severe deprivation of liberty. Despite these long established safeguards, TSL may remove judges' ability to craft appropriate sentences.

Commentators expressed concerns with these provisions, as they vastly reduce the judge's discretion at sentencing (Brookbanks & Ekins, 2010); regardless of the nature of the offence and the offender's culpability (Brookbanks, 2012). Brookbanks (2012) reported that, problematically, for homicide offences, there was no scope for mitigation, such as provocation, once a second or third strike was triggered. Further, as explained above and referenced in the discussion below, 'manifestly unjust' is not defined within the Act.

The TSL also raised concerns for individuals who may have mental impairment of some form, but *not* be found unfit to stand trial. These individuals may have more difficulty understanding and learning from their previous behaviour, thus making them more vulnerable in terms of TSL (Brookbanks, 2012).

1.6.12. Impact on Māori in New Zealand

Rumbles (2011) argued that the TSL legislation would disproportionately impact on Māori who were already over-represented in the criminal justice system. He observed that there was a systemic bias against Māori in the criminal justice system, making it more likely that Māori would be apprehended, arrested, charged, convicted and imprisoned. Therefore, any 'habitual offender-sentencing regime' "would disproportionately impact on Māori - and feed a cycle of Māori incarceration" (Rumbles, p. 108).

Oleson (2015) confirmed that minority groups were indeed overrepresented as 'strikers', with Māori (who represented 14.6% of the population) comprising 47.6% of the 'strikers'. Pasifika (who represented 9.2% of the population) comprised 15.2% of the 'strikers' (Oleson, 2015). Figure 2 (p. 33) sets out this disparity.

Importantly, in 2012, 51% of the prison population were Māori, 12% were Pasifika, 33% European, 3% Asian and 4% 'other' or unknown (Statistics New Zealand, 2012). Thus, the percentage of Māori and Pasifika 'strikers' appeared to closely follow the overall percentage of that particular ethnicity within the New Zealand prison population. It is recognised that ongoing work needs to occur to reduce the over-representation of minority groups such as Māori in both criminal justice and mental health statistics (Brookbanks, 2014).

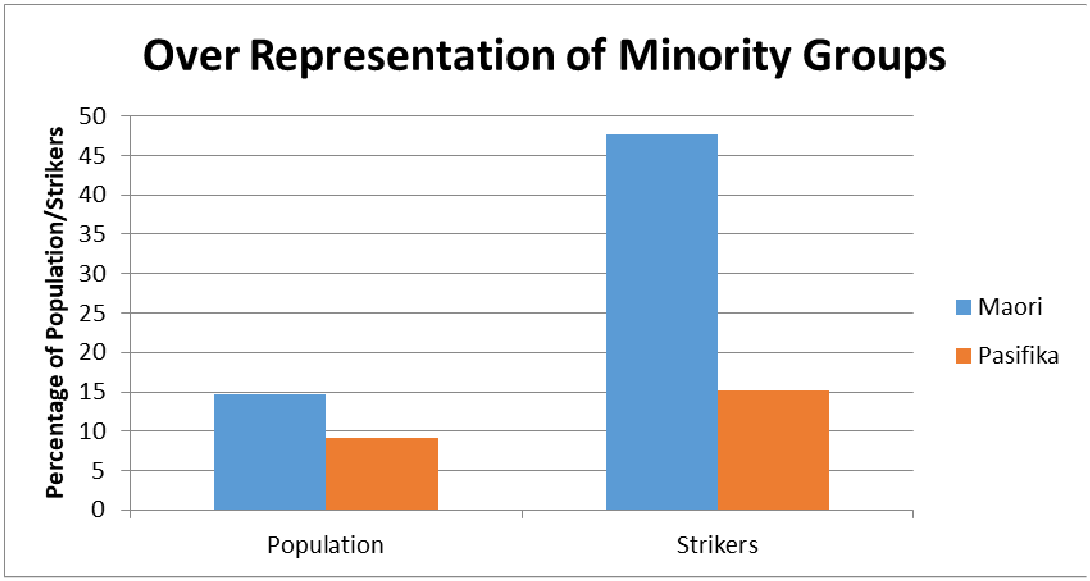

Figure 2. Over-representation of Māori and Pasifika strikers under the TSL (Oleson, 2015).

1.6.13. Number of strikes imposed to date in New Zealand

Table 2 (p. 34) reports that the number of stage-1, stage-2 and stage-3 offences (first, second and third strikes) issued in New Zealand from 2014 to 2018.

Table 2: *Number of Strikes 2010-2019, New Zealand Three Strikes Law Statistics* (New Zealand Ministry of Justice, 2019).

Year Strike	2014	2015	2016	2017	2018
1st	1274	1291	1426	1518	1536
2nd	33	52	56	84	101
3rd	0	0	1	1	5

There have been only seven stage-3 ('third' strike) convictions recorded as of 2018, since the introduction of the TSL in 2010. This suggests that most of the defendants subject to a 'final warning' strike have not progressed to the stage of a third strike. Of interest, is that of the seven people convicted under stage-3 (a third strike), only one person in 2018 has been sentenced to the maximum term of imprisonment. The following legal cases and commentary provide insight into why this situation has occurred.

1.6.14. Recent political developments in New Zealand

The recent political landscape concerning TSL, is now examined, as health assessors need to keep abreast of potential changes to the legislation that may affect their health assessments. In 2017 and 2018, politicians from a number of political parties in New Zealand entered the TSL debate. On 1 November 2017 Justice Minister Andrew Little, from the Labour Party, reportedly said the TSL is "silly, doesn't work and will be dismantled next year" (New Zealand Herald, 2017). According to Little, the offending rate was rising, as was the prison population. He concluded that putting people in prison for "longer and longer" was not working.

On 1 June 2018, reporter Phillip Matthews (2018) related "The imminent end of three strikes came even closer this week, when Little announced that a proposal will soon go to Cabinet to endorse a repeal". Reporter Matthews discussed how "Judges had been unwilling to play ball" concerning the TSL sentencing regime. At that time two offenders had been convicted of a third strike; however, in both instances they were granted the right to apply for parole after a third or half of their sentences were served,

as opposed to the TSL which mandated they serve their sentence in full without parole, unless manifestly unjust to do so (Matthews, 2018).

On 11 June 2018 Justice Minister Andrew Little was due to present his recommendation for repeal of TSL to Cabinet. At that time, he said that 'tough on crime' policies that resulted in offenders spending longer periods in jail had made New Zealand less safe (Fisher, 2018). This claim was also held by the Prime Minister's Chief Advisor Sir Peter Gluckman who supported the contention that prison inmates exposed to longer periods of time in prison posed a greater risk to society (Fisher, 2018). Later that day, New Zealand First made it clear that they would not support the TSL repeal as part of the intended justice reform (Walters & Moir, 2018). This effectively stalled the repeal of the TSL, although Justice Minister Andrew Little reportedly said that New Zealand First did not support a 'piecemeal' approach and instead wanted to see a complete reform platform (Walters & Moir, 2018). However, by the next day (12 June 2018), the Coalition government was seeking to present a more united approach to TSL; the Deputy Prime Minister and New Zealand First Leader, Winston Peters, reported to be backing Justice Minister Andrew Little (Bennett, 2018). Currently, TSL has not been repealed.

1.6.15. Summary

The assessment of FST is complex but essential for the rights of the individual and for society. The history of FST law, summarised above, illuminates that approaches to fitness to plead or stand trial have varied over time and jurisdictions. Indeed, commentators in this area continue to suggest refinements to current FST laws. The health assessor is required to make his or her assessment under the current FST law; however, the addition of TSL has produced another layer of complexity to this task. The health assessor consequently needs to acquaint himself or herself with complex law (TSL), which is not directly related to mental health or mental impairment. For context, the genesis of FST and political influences upon New Zealand's adoption of TSL have been summarised. Currently, health assessors are directed to both manage the complexity of assessing FST in tandem with TSL; however, to date, no specific research has been undertaken. The following section addresses this 'cross-over' area, before specific criminal court cases that appear relevant to the health assessor perspective both on FST and TSL, are discussed.

1.7. THE INTERSECTION OF FITNESS TO STAND TRIAL AND THREE STRIKES LAW

No specific research on the intersection of FST and the TSL has been identified to date. This research project focuses on this gap in considering the impact of the TSL on assessors writing FST reports. Of interest, in the research, is the view of Brookbanks (2011) who described the court's ability to assess fitness at the sentencing stage as "A legitimate and necessary function of the courts where an offender lacks the mental capacity to participate meaningfully in the sentencing process" (p.311). Given this view, it could be considered that the appraisal of the role of the TSL during an assessment of FST could be directed at the defendant's capacity to understand the sentencing process, including the consequences of potential sentencing in the future. This consideration will be discussed further in the discussion that follows the current research.

1.7.1. Decisional competence

Recent cases involving FST have highlighted an evolving realisation of the significance of 'decisional competence'. This area is important, as the capacities related to decisional competence have been shown to be particularly relevant to the determination of FST regardless of the more fundamental capacities of the defendant (Mackay, 2002). New Zealand courts have not routinely distinguished different competencies; rather, applied generic criteria to FST (Brookbanks & Skipworth, 2007). Sakdalan (2012) considered that this approach was changing, especially in regards to defendants with intellectual disability, who may superficially understand the concept of entering a plea but not the consequences of such.

Decisional competence is contextual, "Essentially, a distinction is drawn between the foundational notion of 'competence to assist counsel' and the contextualized notion of 'decisional competence'" (Brookbanks, 2018, p. 143). This distinction looks at competence both from a '*foundational notion*' such as by the defendant's ability to undertake cognitive tasks (i.e., understanding what a judge does) and to choose amongst differing courses of action, versus '*decisional competence*' which necessitates making decisions or 'contextualised' decision-making during the court processes. Bonnie (2018) recently described this contextualised decisional competence as "the defendant having the core capacity to make rational, self-interested decisions" (p.182). Recent

case law in New Zealand addressed the issue of decisional competence (P v Police [2007]).

1.7.2. P v Police [2007]

The 2007 ruling of Judge Baragwanath in *P v Police* [2007] acknowledged the difference between the foundational notion of 'competence to assist counsel' and the *contextualised notion* of 'decisional competence'. It set a legal precedent on the criteria in FST in New Zealand (Sakdalan, 2012). Thus, competence is measured both by the defendant's ability to demonstrate a foundational cognitive ability plus the capacity to show 'decisional competence' during the trial process. Judge Baragwanath also held that the expanded list of incapacities (identified by the court in *R v Presser* [1958] and recognised in Australia), was pertinent to the assessment of FST in New Zealand (Brookbanks & Mackay, 2010). These additional list of incapacities were considered more discriminating than those of the CP(MIP) Act 2003 and "beyond the text of the statutory test" (Brookbanks, 2018, p. 130). In this regard, health assessors can also refer to the *Presser* list of incapacities as well as considering the three capacities listed in the s 4 of the CP(MIP) Act 2003.

1.7.3. Distinction between fitness to plead and FST

Of interest in recent years is the decision in *R v Komene* [2013] NZHC 1347. The court examined a number of factors relating to FST assessment. These included if a finding of unfitness may be made when there are guilty pleas entered, and the distinction between fitness to plead and FST in relation to a defendant facing a TSL offence. This distinction is important to assessors when balancing the multi-faceted aspects of assessing a defendant in the TSL context.

In *R v Komene* [2013], Asher J. heard an application whether Mr Komene was unfit to stand trial [see paragraph 1], and found him fit to stand trial [2]. Asher J. firstly discussed the question of investigating FST after guilty pleas have been entered and prior to sentence. The Judge cited *Dalley v R* [2009] NZCA 404 at [19] in which the Court of Appeal appeared to have no concerns about a court considering FST after guilty pleas [13]. Asher J. supported this approach, and noted that he was quoting Brookbanks (2011) who claimed that assessing fitness at the sentencing stage was "a legitimate and necessary function of the courts where an offender lacks the mental capacity to participate meaningfully in the sentencing process" (p. 311). This suggested

that cases featuring TSL could be heard after guilty pleas had been entered and potentially be heard at the sentencing stage.

Asher J. secondly discussed the distinction between fitness to plead and FST. He set out the criteria required for a defendant to be held *fit to plead* and be sentenced in *R v Komene* [2013] NZHC 1347 at [18]:

> A defendant who wishes to plead guilty must be able to understand the implications of such a plea and the sentencing process... That defendant must understand sentencing options that will arise following the plea of guilty and what they mean in practical terms. Without that level of understanding, it would be unfair on a defendant for a Court to accept the plea and convict that defendant and impose a sentence. (*R v Komene* (2013) NZHC 1347 at [18])

As decided by Asher J., this ruling suggests that defendants must understand sentencing options, which would imply they would need to understand the TSL. In the case of TSL offences, it is my view that health assessors would need to consider the defendant's level of cognitive understanding concerning *ongoing potential* consequences should that person re-offend under TSL.

1.7.4. Fit to plead while not fit to stand trial

Judge Aitken also considered that a defendant could be considered fit to plead and sentenced, under certain conditions, while not additionally being able to conduct a defence in *R v Raukura* [2014]. Judge Aitken expressed her understanding that the requirements of fitness to plead as distinct from FST could be summarised as follows:

> To find a defendant fit to plead, the Court must be satisfied, on the balance of probabilities, that he understands the implications of a guilty plea and sentencing process. More specifically that the defendant;
>
> i. is aware of the nature of the charge and the facts supporting the charge;
>
> ii. understands what defence could run, if any;
>
> iii. understands the difference between a plea of guilty and a plea of not guilty; and
>
> iv. understands the sentencing options that follow a guilty plea and what they mean in practical terms. (*R v Raukura* [2014] at [24])

Of particular interest was point iv. Judge Aitken commented on the TSL and the health assessor's role in addressing this "However neither expert was asked to comment on the defendant's understanding of the significant consequence for him of a guilty plea and conviction, and that is the First Strike Warning and the implications of it" (*R v Raukura* [2014] at [42]).

The Judge reported:

> In my view where an offence carries a Strike Warning then a defendant must be able to understand the impact of that warning *at the time he instructs counsel to enter a plea of guilty.* In other words, an adequate understanding of the "sentencing options that follow a guilty plea and what they mean in practical terms" includes a basic understanding of the consequences of a Strike Warning (*R v Raukura* [2014] at [43]). (Italics added for emphasis)

This position appeared to instruct *lawyers* to include an assessment of the defendant's capacity to understand the TSL, albeit that the method of producing this was not specified. However, Judge Aitken provided additional clarification as to *what* the defendant should be capable of understanding; at the very least:

(i) That a plea of guilty will mean a conviction is entered; and

(ii) That the Judge will warn the defendant about what will happen if he commits another serious offence; and

(iii) That that warning will mean that if he does commit that a further serious violent offence, and is sent to prison, he will serve the full term [45].

According to Judge Aitken, it may not be necessary for the defendant to be specifically aware of the 40 offences to which the warning applies, but in her view they would need to "understand that the warning applies to some (not all) criminal offences and likely to all criminal offences involving serious violence" [46]. In addition, the Judge was clear that defendants would need to know that if they commit one of the 40 TSL offences in the future, and if they are sentenced to imprisonment, they will serve the entire sentence [47].

Judge Aitken also commented on the cognitive test results (produced by the assessor, in this case a psychologist) in terms of the cognitive abilities which would be relevant to the ability to: "understand the practical impact of sentencing" [48]. The Judge discussed some of the test results and specifically commented on the defendant's working memory index (as can be assessed by psychologists from the Wechsler Adult

Intelligence Scale- Fourth Edition). At [49] Judge Aitken summarised a finding from the assessor's report as follows "This is relevant as working memory is the ability of an individual to attend to verbally presented information, to process that information in his memory, and then to formulate a response".

As noted earlier, the health assessors in this case did not specifically assess the defendant in terms of his understanding of the TSL. Judge Aitken stated that the defendant would need to retain the following understandings, implying that the assessor would need to consider these points in the assessment:

> A sufficient understanding of the Warning would require the defendant to retain the following points:
>
> - Broadly what constitutes a 'serious violent offence'; and
> - That if, and only if, he commits another serious violent offence; and
> - If, and only if, he is sentence to prison: then he will serve the full term – something which he would not do if sentence to imprisonment on this charge, or in the future on any non-serious violent offence charge [51].

Further, the defendant needs to have both a level of retention and understanding about the TSL warning for it to act as a deterrent. According to Judge Aitken "As noted earlier, that must be the single purpose of the Strike Warning: to put a defendant on notice and thereby, it follows, to deter further offending" [52].

Reference is made to *Solicitor-General v Dougherty* [2012] 3 NZLR 585, in which no support was given for a change to the law in terms of requiring that a defendant was able to act in his or her best interests. Judge Aitken observed that:

> In my view a finding that, to be fit to plead, a defendant must have the ability to understand the implications of the strike warning, is not to conclude that the defendant is capable of making a decision in his best interests [55].

The Judge gave on-going credence to the *Solicitor-General v Dougherty* [2012]. Assessors need to continue to understand that decisional competence, even in relation to TSL, need not include that the defendant is capable of making decisions in his or her best interests.

1.7.5. Ramifications of third strike

The judiciary have continued to grapple with the TSL. In *R v Marks* [2017] NZHC 3048, Katz J summed up the case of a defendant who faced a charge of indecent assault after fleetingly grabbing a female's buttock in a public place before running off. If convicted of this charge, the defendant would have faced a third strike [1]. The defendant, Mr Marks, had initially pleaded guilty to the charge. However, his plea was vacated as evidence suggested that he may not have been fit to plead (or stand trial) at the time he pleaded guilty [2].

Katz J discussed that the court was asked to determine a preliminary issue, namely whether the added complexity of the TSL was a relevant consideration in FST. The judge cited an earlier decision (*Marks v R* [2017] NZHC 1991), in which the presiding Whata J. determined "when fitness to plead is at issue, the focus is much simpler – namely whether the defendant understands the nature and significance of the likely sentence or penalty" [31].

In Whata J's estimation for the purposes of fitness to plead, the defendant needed to be able to understand the advice of his counsel, rather than understanding the "detailed workings of the three strikes legislation" [32]. Whata J further clarified this matter in the following paragraph and concluded "Rather the issue is whether the defendant is capable of understanding the nature and severity of the sentence or penalty likely to be imposed" *Marks v R* [2017] NZHC 1991 at [33]. This provides guidance for health assessors, in so far as it implies the defendant does *not* need to know the comprehensive workings of the TSL; rather, understand the disposition they are likely to be given.

Katz J, in his oral judgment of *Marks v R* [2017], considered the evidence given from a number of assessors. He commented on the evidence of an assessor that in "usual circumstances" he would have found the defendant fit to plead. However, given the added complexity of a third strike offence (which the assessor noted may well require additional cognitive capacity), he concluded that Mr Marks was unlikely to be found fit to stand trial, due to his cognitive difficulties resulting from his intellectual disability (*R v Marks* [2017] at [30]). This is relevant to health assessors and suggests that at the third strike stage, additional cognitive capacities may be required by the defendant in light of the complexity of a third strike offence.

Another assessor also concluded that Mr Marks did not have a good appreciation of the seriousness of the charges, and Katz J quoted this assessor:

> With respect to the 3rd strike legislation, in my view this would raise the cognitive complexity of the task before Mr Marks to a level which is beyond his grasp, including the need to be cognisant of complicated terms such as "manifestly unjust" for example *R v Marks* [2017] NZHC 3048 at [33].

Summing up *R v Marks* [2017], it is apparent that this oral judgement provided assessors a number of relevant points to consider when embarking on a FST assessment concerning TSL. Firstly, a defendant under a third strike appears to have a higher threshold for fitness to plead or FST than a defendant not under TSL or under a warning or final warning. The added complexity associated with a third strike under TSL may require additional cognitive capacity. The defendant needs to be cognisant of difficult terms such as 'manifestly unjust'. In addition, if the defendant did not have an adequate capacity to understand the severe sentence under TSL, they may not be FST. A discussion of the important term 'manifestly unjust' follows with reference to applicable New Zealand cases.

1.7.6. Manifestly unjust

The term 'manifestly unjust' is undefined in the TSL. It is discussed here because it is apparent from cases such as *R v Marks* [2017] that defendants who are subject to a third strike need to have the cognitive ability to understand the potential effects of the TSL. To ascertain this, it would appear important; at the very least, that health assessors had an understanding of this complex term.

While this term applies to all third strike offences, it is particularly important in cases of murder where a whole-of-life sentence without parole applies to the "worst murders" (s 103(2A) Sentencing and Parole Reform Act 2010). However, the Court of Appeal noted that Parliament agreed in s 9 of the Bill of Rights Act (1990) that "disproportionately severe treatment or punishment" is prohibited. It is up to the courts to resolve this issue. However, when they cannot reconcile the TSL and the Bill of Rights Act (1990), the court must "give effect to the legislation but may say that it has done so under s 4 of the Bill of Rights Act" [78].

The term 'manifestly unjust' was discussed in *R v Harrison* and *R v Turner* [2016] NZCA 381 at [58] by the Court of Appeal. The Court of Appeal discussed factors

which were relevant in determining if a case was 'manifestly unjust'. It held that the determination of manifest unjustness included an assessment of the circumstances of both the offence and the offender [108]. Importantly, the court held that a relevant factor was "whether an offender has any, or limited, ability to understand the relevance and importance of a first or final warning" [108(e)(i)]. This is potentially an extremely important area for a health assessor to cover when addressing TSL under FST.

1.7.7. Cases where strike outcome was found manifestly unjust

Select cases illuminate the issue of 'manifestly unjust' that arise in the interpretation of TSL in New Zealand. While this area appears to be within the realm of the Judge to determine, health assessors have been asked if a sentence is manifestly unjust. Therefore, 'manifestly unjust' will be explained.

A recent example where manifestly unjust was discussed was the case *R v Campbell* [2016] NZHC 2817. The defendant was facing his third strike for one charge of indecent assault. This charge could be described as being at the lower level of the indecent assault range of offences. The defendant was an incarcerated prisoner who "grabbed (the Corrections Officer's) right buttock and squeezed it quite hard, and held on for about 1 to 2 seconds" (*R v Campbell*, [2016] at [5]).

Toogood J. highlighted important factors in this case. The defendant had been convicted of a stage-3 offence (other than murder). Also, Toogood J. had no option but to sentence the defendant to the maximum term of imprisonment prescribed for the offence in s 86D(2) of the Sentencing and Parole Reform Act 2010, namely seven years imprisonment. Toogood J. reported "It may seem very surprising that this consequence could be required by law for an offence of this kind, but that is the law and I have no option but to enforce it" (*R v Campbell*, [2016] at [13]).

The law required that the offender be sentenced to the entire sentence without parole, unless this would be manifestly unjust given the circumstances of the offence and the defendant's circumstances (Sentencing Act, s 86D (3)). However, Toogood J. then discussed the factors he weighed in determining whether this sentence without parole would be unjust. These included a detailed discussion of rehabilitation and re-integration. Toogood J. sentenced the defendant to seven years' imprisonment but chose to be lenient in terms of parole, as he did not order that the defendant serve this sentence *without* parole.

The case was reported in the media and one commentator reported that, Justice Toogood had deployed "every drop of discretion available" when faced with "an absurdly rigid obligation to issue a prison sentence for a relatively minor offence" (Geddis, 2016, p.1). Thus, manifestly unjust offers an opportunity to select a relatively lenient sentence, and gives the health assessor important information as to what background factors contribute to a finding of manifestly unjust.

In the recent case of *R v Nuku* [2018] NZHC 2510 [26 September 2018] the High Court Judge, Downs J. sentenced Mr Nuku on two charges of wounding with intent to injure, which were both third-strike offences. He stated "this means I must impose the maximum penalty of seven years' imprisonment. And, I must order you to serve the sentence without parole, unless that would be manifestly unjust" [1]. After discussing a number of factors the Judge was satisfied "parole ineligibility for the duration of the mandatory sentence of seven years' imprisonment would not be manifestly unjust" [20]. Importantly, he addressed proportionality "The three-strikes regime effects a disproportionate sentence; not a grossly disproportionate one" [21].

The case was important for health assessors. When discussing Mr Nuku's personal circumstances, the Judge referred to the health assessors' reports on Mr Nuku's childhood—exposure to violence, neglect, school and the possibility of an attention disorder [24]. It was apparent that these areas were also important for the health assessor to cover. Downs J concluded the circumstances of Mr Nuku's background were not remarkable, albeit that it was "depressingly familiar" [24]. Mr Nuku was consequently sentenced to preventive detention on each charge, and to serve a minimum of at least seven years' imprisonment [40]. As Downs J stated "Your minimum period will be what it would have been under the three-strikes regime. I have already explained that this is not manifestly unjust" [39].

These cases discussed show where the judge was lenient, based on 'manifestly unjust'; and one in which the judge held that the strict application of TSL would not be 'manifestly unjust'. These judgements are informative regarding what qualifies. Health assessors need to be aware of the threshold and poised to respond if questioned about 'manifestly unjust'. Later, analysis will return to manifestly unjust and participants' views on being asked to comment on this area.

1.7.8. Summary of cases

These cases provide a legal framework for health assessors to understand some of the concepts related to the TSL. Health assessors need to build their knowledge of the TSL from the legislation and from case law.

Areas which were alluded to in the above cases are of likely interest to health assessors' during their assessments, as they include areas central to the defendant's mental health and intellectual or other mental impairment. In addition, the defendant's social background, exposure to violence and neglect, schooling and attempts (or not) at rehabilitation were relevant. Comment on previous convictions, the current charge and the defendant's remorse were of interest. Further, the defendant's ability to understand the first and final strike is of great importance.

Chapter 2 describes the role of the health assessor within the New Zealand criminal justice setting. This role is important, given the overarching aim of the study is to examine the views of health assessors concerning the impact of the TSL on their FST assessments. This role will be looked at from the perspective of a health assessor writing FST reports on defendants facing TSL. The chapter provides an overview of the role and processes health assessors undertake in assessing for FTS in general.

CHAPTER 2. HEALTH ASSESSORS

The research question the author is addressing is the *impact* on *health assessors* of the TSL during the FST assessment process. The aim is to shed light on this gap in the literature. The previous chapter introduced the two contributing areas of FST and TSL; this chapter presents the results of a literature review concerning the role of the health assessor, particularly as he or she relates to FST assessments intersecting with TSL. As such, this chapter introduces the role of the health assessor undertaking FST assessments within the New Zealand criminal court setting.

The focus of this chapter is to enable the reader to gain an appreciation of what a health assessor does, and where he or she sits within the relevant ethical, legal and professional systems. Material on the health assessors' role was located, which helped to clarify how the topic should be approached. The approach mirrored the early work of Grisso (1996), in which he considered that clinical assessments for the courts were influenced by developments in four areas "laws; research; professional standards; and service delivery systems" (p. 380).

The literature review in this chapter is organised into five main sections:

1. Professional standards and values concerning the role of assessors.
2. A review of the legal background to forensic health assessments in regards to FST.
3. New Zealand research on FST and health assessors.
4. Assessment methods.
5. Legal cases which inform health assessors related to FST/TSL.

To inform the above areas, a systematic search strategy was implemented. The search involved the electronic databases Web of Science, Medline, PsycINFO and *Hein Online*. The EBSCO database was also accessed with the most relevant databases selected (Australia/New Zealand Reference Centre, eBook Collection, Humanities International Index, Medline, Open Dissertations and SocINDEX) and CINAHL Complete). The time period initially selected was from 2010 (when the New Zealand TSL was enacted) to the end of June 2018; however, searches were later carried out in 2019. The review used a subject and text-word search strategy with 'health assessor', 'fitness to plead', 'competency to stand trial' and 'Three Strikes Law' as the main

search terms. ‘Three Strikes Law’ and the broader phrase ‘three strikes’ were both included, as well as the phrase ‘three strikes legislation’. Further, the wider keyword ‘assessors’ was used.

On the basic search platform (‘Library Search’) only individual words are searched and phrases cannot be linked. For example, ‘health assessors’ pulls up articles on ‘health’. As such, this search engine was too broad to be useful (over 87 thousand articles found). However, the advanced search option enables keywords and phrases to be linked. Therefore, ‘health assessor’, ‘Three Strikes Law’ and ‘fitness to stand’ were searched. No articles were found linking these three topics in any search platform. ‘Health assessors’ and ‘Fitness to stand trial’ proved useful resulting in 18 articles. ‘Health assessors’ and ‘competency’ was then searched, nine articles were of interest. ‘Health assessors’ and ‘three strikes’ produced no relevant articles. Additional searches included ‘health assessor’ and ‘competency’ (n=0), ‘psychiatrist’ and ‘fitness to stand trial’ (n=4), and ‘psychologist’ and ‘fitness to stand trial’ (n=7).

The Web of Science (WoS) was searched across the WoS Core Collection, Current Contents, the Data Citation Index, Derwent Innovations Index, Medline and the SciELO Citation Index. ‘Three strikes’ had 208 hits; however, when ‘fitness to stand trial’ was added this reduced to zero. There were zero results also for ‘three strikes’ and ‘health assessor’ and for the term ‘health assessor’ linked to ‘fitness to stand trial’.

Finally, an advanced search in the custom range was carried out using Google Scholar. The broad terms: ‘three strikes’, ‘fitness’ and ‘health assessor’ were searched resulting in 11 hits. However, none were relevant.

Reference searching based on key articles and hand-searches of relevant journals, such as *Psychiatry, Psychology and the Law*, were also carried out. Given the overall lack of literature directly relating to FST, TSL and health assessors, it was apparent that there was a gap in the literature concerning the nexus of TSL, FST and health assessors, which the author hopes to address.

2.1. PROFESSIONAL STANDARDS AND VALUES CONCERNING THE ROLE OF ASSESSORS

The National Association for Healthcare Quality (NAHQ) in the United States (https://nahq.org/about/code-of-ethics) discusses ‘professional standards’ for the health

care professions. The site sets out that health care professionals are likely guided by a code (or codes) of ethics and standards of practice that relate to their particular industry, certification and employer relationship. These codes are not necessarily always complementary, and the health care professional will be required to exercise his or her judgment about specific ethical questions. In New Zealand, obligation for health assessors is provided by the Treaty of Waitangi (Te Tiriti o Waitangi), the United Nations Convention on the Rights of Persons with Disabilities (CRPD), and Codes of Ethics related to psychologists and psychiatrists. Additional laws apply such as the Health Practitioners Competence Assurance Act 2003 (HPCAA) and the Health and Disability Commissioner Act 1994 (HDCA).

The importance of several of these guidance documents was exemplified during a recent conference on unfitness to stand trial in New Zealand at Auckland University of Technology in November 2017. The conference was entitled *Perils and portents of unfitness to stand trial: International and comparative perspectives*. One presenter discussed a Māori court report writer's perspective of FST, which was relevant in terms of important cultural considerations (Elder, 2017). Another scholar, McSherry (2017), detailed the significance of the CRPD when discussing the theme of disability, disadvantage and unfitness to plead. The latter gave guidance to health assessors on the importance of upholding the rights of defendants with disabilities.

2.1.1. The Treaty of Waitangi principles

In New Zealand, the Government embraces the Treaty of Waitangi principles, namely the principles of partnership, participation and protection. These underpin the relationship between the Government and Māori (Ministry of Health: Manatu Hauora, 2014). As such, health assessors need to be cognisant of these principles when undertaking FST assessments. At the RFPS, Māori and Pacific Island cultural guidance and support is provided by senior cultural advisors who are affiliated to these cultural groups including a Kaumatua (Māori tribal elder) and a Matai (Samoan chief) (RFPS, 2017).

Two statutes relevant to FST acknowledge the principles of the Treaty of Waitangi. Both the CP(MIP) Act 2003 and the ID(CCR) Act 2003 make provision for the views of whanau to be obtained during assessments. Pursuant to section 23 of the ID(CCR) Act 2003 health assessors should "try to obtain views of whanau, hapu and iwi". (Whanau

are the extended family group, hapu are a collection of whanau groupings descended from one ancestor, and iwi are extended kinship groups. (See Appendix J).

Section 39 2 (d) of the CP(MIP) Act 2003 provides that every health assessor assessing under s 38 (1) "should consult, wherever practicable, the subject's family or whanau". In essence, this means that during assessments, assessors routinely seek defendants' permission to contact their whanau/family to listen to their views.

2.1.2. Cultural issues in the assessment of fitness to stand trial in New Zealand

Health assessments typically involve clinical, neuropsychological and/ or psychometric testing and the latter two are primarily the domain of psychologists. Assessors need to be particularly sensitive to the cultural dimension of neuropsychological assessments. Defendants are from diverse cultures and assessment should take account of this to produce reliable and valid assessments of neurocognitive function (Wong, Strickland, Fletcher-Janzen, Ardila, & Reynolds, 2000).

Assessors have a number of important values and codes that contribute to the assessment of the defendant. As providers of psychological and psychiatric services, health assessors need to be cognisant of cultural factors, as pointed out in seminal New Zealand research (Ogden & McFarlane-Nathan, 1997). This study acknowledged that neuropsychologists were beginning to recognise the importance of "cultural factors when assessing indigenous peoples" (Ogden & McFarlane-Nathan, 1997, p. 2). Ogden and McFarlane-Nathan (1997) addressed cultural bias with respect to young Māori men who had suffered head injuries, in a study of 24 non-head injured Māori men who were tested with various neuropsychological tests. The results showed the respondents fell within the average range on some tests, scored lower than average on tests which required formal education and higher than average on visuospatial tests (Ogden & McFarlane-Nathan). The researchers concluded that further study be undertaken to develop tests and assessment processes valid for Māori. Ogden and McFarlane-Nathan suggested in the meantime that clinical psychologists who assess Māori should ideally consult or collaborate with Māori concerning the assessment, setting and interpretation of test results. More recently, researchers in New Zealand have termed the coin "*cultural competence*" to describe the value and importance of practitioners "attending to culture in evaluation practice in a way that acknowledges and honours different perspectives and ways of being, in order to undertake ethical and effective evaluation"

(Torrie, Dalgety, Peace, Roorda, & Bailey, 2015, p. 51). Research from the United States suggests the most common model of cultural competence has three parts: cultural awareness, cultural knowledge and cultural competence (Dunaway, Morrow, & Porter, 2012).

Theoretical and practical issues in regards to the neuropsychological assessment of culturally dissimilar individuals have been addressed by researchers from the United States. However, the conclusions drawn suggested that there were limited resources available for neuropsychologists at that time who were interested in understanding the influence of cultural variables (Wong et al., 2000). In the United Kingdom, relevant research on transcultural mental health services has been championed at the Sainsbury Centre for Mental Health and the Tizard Centre at the University of Kent. These organisations contributed to a wide-ranging document, *Breaking the circles of fear*, which reviewed the relationship between African and Caribbean communities and mental health services in London (Keating, Robertson, McCulloch, & Francis, 2002).

Amongst a number of recommendations for improved cultural practice, these centres advocated for mental health services to show that they are "humane; respond to individuals as such regardless of race or culture; are free from prejudice and stereotypes; use reliable and accurate methods to assess mental health need; and have a range of credible and beneficial interventions" (Keating et al., 2002, p. 75). Hence, it continues to be important for health assessors to seek culturally appropriate methods of assessing mental health status, including during FST assessments.

In New Zealand, more recently at the conference on unfitness to stand trial at Auckland University of Technology in November 2017, Dr Hinemoa Elder, a consultant psychiatrist, suggested that the consideration of a Māori worldview must be taken into account as part of a fitness assessment (Elder, 2017). As Durie (2001) noted, when assessing Māori defendants, it is important to recognise that Māori may see themselves as part of Māori society, or as part of general society or, indeed, as alienated from both (Durie, 2001). Dr Elder discussed research that Māori are seen to continue to perform below Pakeha (Caucasian New Zealand) peers in neuropsychological testing (Ogden & McFarlane-Nathan, 1997; Starkey & Halliday, 2011). Researchers raised that a cultural bias in neuropsychological protocols contributes to this result (Ogden, Cooper, & Dudley, 2003; Ogden & McFarlane-Nathan, 1997).

Research found that individuals may not be optimally motivated during the evaluation, which can lead to an under-estimation of their true capacities (Wong et al., 2000). Subsequent research found that Māori cultural identity is not included in aspects of neuropsychological assessment (Dudley, 2014). These findings demonstrate the need for assessors to stay abreast of research developments, especially as it applies to the assessment of defendants across cultures.

In response to the research, Dr Elder recommended that the Māori worldview should be integrated into a fitness assessment, and that research on Kaupapa Māori fitness be undertaken (Elder, 2017). Additionally, Elder advocated that a court for Māori be established, similar to Te Kōti Rangatahi (The Māori Youth Court, see Appendix J). In this court, respect, collective participation and decision making is expected and actively encouraged (Elder, 2017).

Lunt (2017) also focused on preserving the dignity of the mentally unwell in New Zealand and considered the 'Te Whare Tapa Wha Model' to be useful. In her estimation, the goals of the justice system should be to "repair and restore" defendants' physical, spiritual, mental and family health (Lunt, p.50).

These research initiatives indicate that it is imperative for health assessors to understand defendants' cultural reference points during the assessment process and to continue to promote the mental health of the defendant.

2.1.3. The Convention on the Rights of Persons with Disabilities 2006

The CRPD is central to understanding the legal framework for people who are subject to FST assessments in New Zealand. This convention was adopted on 13 December 2006 at the United Nations Headquarters in New York, and entered into force on 3 May 2008. New Zealand is one of the signatories to this convention (Hickey & Gledhill, 2011), and played "a leading international role in finalising the CRPD" (Diesfeld, 2013). It was adopted to change attitudes from viewing people with disability as 'objects' who require charity and social protections, towards viewing people with disabilities as 'subjects' with rights, who are capable of making decisions for their own lives and being active members of society. All categories of rights apply to persons with disabilities (United Nations Enable-Convention on the Rights of Persons with Disabilities, http://www.un.org/diabilities/default.asp?id=150, retrieved 10 November 2015). Article 12 requires equal recognition before the law and states that "…States

Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law". In addition, States Parties must take appropriate measures to provide access and support for individuals with disabilities to ensure they can exercise their legal capacity.

The need to take into account the CRPD was recognised by the Law Commission (2019) in England and Wales. Fortson (2018) stated that "the Courts cannot disregard the UN Convention on the Rights of Persons with Disabilities" (p.47). Fortson did not detail examples related to this advice. However, he discussed a decision of the European Court of Human Rights (ECtHR) in which effective participation in the context of the ECtHR presupposes "…that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed" (*SC v UK* (2005) 40 EHRR 10 (App No 60958/00) [29]). This consideration of the ECtHR could conceivably be applied to the New Zealand context of the defendant facing a TSL sentence and penalty.

Equal access to justice within the court system is an important consideration in modern legal systems. Human rights law requires that all individuals have equal access to justice, including persons with disabilities (McSherry 2014, 2017). McSherry (2017) asserted that access to justice is a cornerstone of modern legal systems, and human rights laws require equal access to justice for all.

Equal access to justice is a live issue for many people who are subject to the criminal justice system and have disabilities. For example, in Australia findings of unfitness may lead to the indefinite detention of un-convicted persons in facilities based on community protection (McSherry et al., 2017). People in these cases may be detained for longer when found unfit than they would have been if sentenced to imprisonment under the criminal legislation (McSherry et al., 2017).

Further, Australia was found in breach of CRPD in *Noble v Australia* (2016) CRPD C/16/D/7/2012: 53. This case was particularly relevant to FST in New Zealand because it involved a man detained after being found unfit to stand trial:

> The decision was a response to a communication brought by an Indigenous man, Marlon Noble, who had been found unfit to stand trial, had not had the opportunity to plead not guilty, and had been detained in prison for over a decade. (Freckelton & Keyzer, 2017, p. 770)

Arising from this critique was the finding that procedural fairness *and* assistance to people with disabilities was required "to persons whose disabilities may preclude their meaningful participation in the criminal justice system" (Freckelton & Keyzer, 2017, p. 770). People with disabilities may require additional support to enjoy full realisation of their rights. This is relevant to FST and TSL given the complex nature of the latter and the need for defendants' to be able to understand the implications of this Act, while going through the justice system. Respondents in this study voiced their views on who should ideally provide the initial educative role in this regard as discussed during the thematic analysis.

Within the New Zealand setting, health assessors need to be aware that findings of unfitness to stand trial by the court can lead to containment of the defendant under the CP(MIP) Act 2003 and ID(CCR) Act 2003 for lengthy periods which may exceed the expected length of a custodial sentence for the original charge, particularly when the original order is extended.

Smith (2013) made two observations concerning the CRPD and the ID(CCR) Act 2003 in New Zealand (discussed in depth in 2.2). First, she observed "If rehabilitative goals are not met based on the dominance of 'criminality' for example then the potential for long term compulsion becomes a possibility" (Smith, 2013, p. 7). Second, she asserted that once an individual was placed under the ID(CCR) Act 2003, it was important that the rehabilitation and care provided by this Act was in compliance with the CRPD. While health assessors are involved earlier in the criminal justice process, when they assess the fitness of defendants, Smith's assertions provide consideration for reference both to the human rights of defendants and, more specifically, to the on-going importance of treatment and rehabilitation.

In her work on procedural justice, Lunt (2017) was interested in preserving the dignity of the mentally unwell in New Zealand, which supports the aims of the CRPD. Lunt concluded that many people charged in court with co-occurring mental health disorders had the widest array of socio-economic disadvantage and the most serious criminal histories. To accommodate these complex needs, Lunt advocated for a solution-focused Mental Health Court. A recommendation was also made to consolidate court calendars of defendants with mental health issues (Lunt). The latter is already occurring in the Porirua District Court where a designated day is allocated to mental health and intellectual disability matters. Advantages for the individuals concerned include that

these courts are designed to treat the participants with respect, and communicate effectively and appropriately to the level of the individual (Lunt, 2017).

Against this background, health assessors are required to make fair assessments regardless of dispositional outcomes. Health assessors are required to follow ethical principles and codes of conduct, and adhere to the appropriate legislation during their FST assessments. The question of additional mandates, such as commenting on the TSL during FST assessments, is not currently discussed in the literature.

2.1.4. The Health Practitioners Competence Assurance Act 2003

This act is one that helps to underpin all areas of practice for registered psychologists and psychiatrists. It provides the legal framework for the regulation of all registered practitioners in New Zealand. The principal purpose is "to protect the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions" (Section 3, HPCAA, 2003). Osborne (2011) noted, in relation to psychologists, that they can generally ensure compliance of this Act by acting in an ethical and professional manner.

In New Zealand, health assessors are also providers under the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 (CHDSCR) and have to abide by the 10 duties in the code. Right 4 "The right to have good care and support that fits your needs" is particularly relevant to health assessors. It is comprised of five subsections, namely:

> (1) Every consumer has the right to have services provided with reasonable care and skill.
> (2) Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.
> (3) Every consumer has the right to have services provided in a manner consistent with his or her needs.
> (4) Every consumer has the right to have services provided in a manner that minimises the potential harm to, and optimises the quality of life of, that consumer.
> (5) Every consumer has the right to co-operation among providers to ensure quality and continuity of services (s 4, subsections 1-5). (CHDSCR)

As can be observed, the assessment of complex FST matters clearly requires care to be taken for all of these subsections of Right 4. The TSL introduces another layer of complexity, especially concerning subsection (2); given the early lack of direction for health assessors as to what their legal and professional requirements were concerning the TSL and the resulting ethical considerations in this area when assessing for FST.

2.1.5. Codes of Ethics

To set the scene concerning s 38 fitness report writing, some of the particular elements of an assessment will be commented on during this chapter. One such consideration is codes of ethics. Ethics are important to health assessors. Assessors' specialist reports provide 'expert evidence' or 'expert opinion' within the relevant criminal proceedings, including in the District Court, High Court or Court of Appeal in New Zealand (Blackwell, 2011). Both psychologists and psychiatrists are subject to the High Court Rules (2016), including the Code of Conduct for Expert Witnesses (CCEW) and their respective professional codes of ethics.

The main purpose of the CCEW is to "remind the expert that, above all, the role of an expert witness is to assist the court or tribunal" (Blackwell, 2011, p. 21). Hence, when a health assessor is completing a fitness assessment, he or she must abide by the seven CCEW specifications. Two are particularly relevant. Specification (c) requires that the assessor "state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise". Specification (d) requires that the assessors must "state the facts and assumptions on which the opinion of the expert witness are based" (Schedule 4, High Court Rules, 2016, p. 1). These and the remaining specifications for presenting evidence to the court provide both a basis under which health assessors can give their opinions and a scope for their range of opinions.

'Expert evidence' includes evidence of fact (such as the results of cognitive testing) and expert opinion (derived from the assessor's particular area of expertise). Importantly, health assessors operate as the exception to the general rule that in legal settings witnesses must restrict their evidence to facts directly observed and must not suggest opinions on those facts (Fisher & Wild, 2004). Blackwell (2011) considered that a psychologist must be both conversant with the literature and have clinical experience in an area to be generally considered an expert in an area. Given that health assessors are experts in health rather than law, discussion as an expert witness of the finer points of

the TSL, and the defendant's understanding of such could be seen as beyond the scope of the health assessor.

The *Code of ethics for psychologists working in Aotearoa/New Zealand* (New Zealand Psychologists Board) (2012) has four major principles: respect for the dignity of persons and peoples; responsible caring; integrity in relationships; and social justice and responsibility to society. The following is particularly relevant to health assessors undertaking FST/TSL assessments: Principle 2.4 "Vulnerability: Value Statement: Psychologists especially provide responsible care to individuals and groups who may be disadvantaged and/or oppressed" (Code of Ethics Review Group, 2012, p. 17). The practice implications are detailed as: 2.4.1. "Psychologists recognise the vulnerability of some individuals, groups, or communities and take appropriate action in relation to this". This is an important principle for psychologists who are health assessors to keep in mind, given the assessment work they are undertaking concerning TSL knowledge and understanding by defendants who are sometimes from vulnerable groups.

Psychiatrists have corresponding codes (Royal Australian and New Zealand College of Psychiatrists, 2018). After perusing these standards, it appears that principle number 1 embodies the relevant values for psychiatrist health assessors—"Psychiatrists shall respect the humanity, dignity and autonomy of all parties" (Royal Australian and New Zealand College of Psychiatrists, 2018, p. 6). This principle reminds health assessors who are psychiatrists that it is incumbent on them to respect the dignity and humanity of their clients.

2.1.6. Summary of standards and values

The practices of health assessors, whether psychologists or psychiatrists, are guided by a number of important professional standards, values and codes including the Treaty of Waitangi, the CRPD, the HPCAA, the Code of Health and Disability Services Consumers' Rights Regulations 1996 and Codes of Ethics related to psychologists and psychiatrists. In New Zealand, the influence of the Treaty of Waitangi is paramount as the founding document between the Government and Māori. The three principles of partnership, participation and protection are relevant to health assessors' daily practices. Health assessors need to be cognisant and sensitive to cultural values of the defendants they are assessing to ensure defendants' access to justice.

The CRPD is particularly important to health assessors given they work with people who are being assessed for disabilities during the FST assessment process. As New Zealand is a signatory to the United Nations CRPD, health assessors, as agents of the court, have obligations to those they assess with disabilities. Being aware of the right for people with disabilities to have equal access to all aspects of life, including exercising their legal capacity, is an important tenet for health assessors' FST and TSL evaluations.

2.2. THE LEGAL BACKGROUND TO HEALTH ASSESSMENTS OF FITNESS TO STAND TRIAL

The relevant legislation concerning FST has been discussed in Chapter 1. Here, additional sections of this legislation specifically relating to health assessors producing s 38 FST reports are briefly discussed.

The author is a health assessor at the RFPS, whose primary role is assessing defendants' FST under s 38 of the CP(MIP) Act 2003 for the courts. The court requires s 38 assessment reports under specific circumstances:

> When a person is in custody at any stage of a proceeding against the person, whether before or during the hearing or trial, or while awaiting sentence or the determination of an appeal, a court may, on the application of the prosecution or the defence or on its own initiative, order that a health assessor prepare an assessment report on the person for the purpose of assisting the court to determine 1 or more of the following matters:
>
> a) Whether the person is unfit to stand trial
> b) Whether the person is insane within the meaning of section 23 of the Crimes Act 1961
> c) The type and length of sentence that might be imposed on the person
> d) The nature of a requirement that the court may impose on the person as part of, or as a condition of, a sentence or order. (Section 38 (1) CP(MIP) Act 2003)

Courts request the reports to ascertain the defendant's competence or 'fitness' to stand trial before the courts proceed with the criminal trial process. The purpose of the remand under s 38 CP(MIP) Act 2003 is to ensure that the:

> Defendants' health is assessed by qualified health assessors and to have a report on their position returned to the Court to help it determine whether the person is

> unfit or insane, or help it determine the type, length or character of any sentence to impose. (Skegg & Paterson, 2015, p. 490)

Health assessors undertake forensic evaluations and address the following areas, dependent on the case. First, they may give an opinion concerning the presence (or absence) of intellectual disability within the meaning of the ID(CCR) Act 2003. Second, they assess for the presence (or absence) of mental disorder as defined in s 2 and s 4 of the MH(CAT) Act 1992. Third, they form an opinion as to the FST of the defendant based on these factors. These relevant areas are covered below.

2.2.1. The presence (or absence) of intellectual disability

Under the ID(CCR) Act 2003, the health assessor is typically a psychologist due to the need to undertake psychometric testing. She or he undertakes psychometric testing to determine whether the person has a 'mental impairment', in this case due to intellectual disability, as defined under s 7 of the ID(CCR) Act 2003. This section sets out the defendant would need to meet three criteria:

1. Significantly sub-average general intelligence. A score of 70 or less (with a confidence level of 95% or greater, using standard psychometric tests).
2. The impairment became apparent during the developmental period (prior to 18 years).
3. The person has significant deficits in at least two areas of adaptive functioning; namely communication, self-care, home living, social skills, use of community services, self-direction, health and safety, reading writing and arithmetic and leisure and work.

Also, s 8(1)(a)-(d) provides that a person *does not* have an intellectual disability simply because the person has a mental disorder, personality disorder, acquired brain disorder or does not feel shame or remorse about the harm that person causes to others. Within the FST assessment, psychologists detail whether the defendant's mental impairments include a significantly sub-average general intelligence based on the results of psychometric testing.

2.2.2. Mental disorder defined

Assessment of mental disorder under the MH(CAT) Act 1992 is typically undertaken by a psychiatrist, given the primary consideration is a mental health assessment, although

psychologists also undertake this role. That person reports on whether the defendant presents with evidence of a mental disorder. Mental disorder is defined under s 2:

> An abnormal state of mind (whether of a continuous or an intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it–
>
> a) Poses a serious danger to the health or safety of that person or of others, or
>
> b) Seriously diminishes the capacity of that person to take care of himself or herself.

In addition, in pursuant to s 4, a person is not subject to the Act by reason of "(a) that person's political, religious, or cultural beliefs; or (b) that person's sexual preferences; or (c) that person's criminal or delinquent behaviour; or (d) substance abuse; or (e) intellectual disability".

If the defendant is found to have a mental disorder under the MH(CAT) Act 1992, the defendant would be found to have a mental impairment for purposes of the CP(MIP) Act 2003. The health assessor then assesses whether the defendant's mental impairment is such as to render him or her unfit under the three criteria listed under s 4 and s 8A (Amendment to the Criminal Procedure Legislation (November 2018) applying to the CP(MIP) Act 2003. The fitness reports then offer the assessors' reasoning for their opinions, for the judges' consideration of fitness.

2.2.3. Legal definition of 'unfit to stand trial' in New Zealand

With the advent of the CP(MIP) Act 2003, New Zealand incorporated the phrase "unfit to stand trial", under s 4 (Definition of "unfit to stand trial") and s 14 (Determining if the defendant unfit to stand trial). Pursuant to s 4, unfit to stand trial, in relation to a defendant:

> (a) Means a defendant who is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so; and
>
> (b) Includes a defendant who, due to mental impairment is unable–
>
> (i) To plead:

(ii) To adequately understand the nature or purpose or possible consequences of the proceedings:

(iii) To communicate adequately with counsel for the purpose of conducting a defence.

Section 14 of the CP(MIP) Act 2003 was repealed on 14 November 2018 by s 131 of the Courts Matters Act 2018 (2018 No 50), and there was an insertion of a new section (s 8A), relating to the assessment of FST namely:

8(A) Determining if defendant unfit to stand trial

(1) The court must receive the evidence of two health assessors as to whether the defendant is mentally impaired.
(2) If the court is satisfied on the evidence given under subsection (1) that the defendant is mentally impaired, the court must record a finding to that effect and–
    a. Give each party an opportunity to be heard and to present evidence as to whether the defendant is unfit to stand trial; and
    b. Find whether or not the defendant is unfit to stand trial; and
    c. Record the finding made in paragraph (b).
(3) The standard of proof required for finding under subsection (2) is the balance of probabilities.
(4) If the court records a finding under subsection (2) that the defendant is fit to stand trial, the court must continue the proceedings.
(5) If the court records a finding under subsection (2) that the defendant is unfit to stand trial, the court must inquire into the defendant's involvement in the offence under sections 10, 11 or 12 as the case requires (p. 1). (See Appendix H: FST process)

Brookbanks (2018) observed that fitness requirements are a "performance based standard", which test a defendant's ability to adequately function in these domains (p.129). In addition, these criteria for determining FST have been applied at all stages of the criminal proceedings, including before a plea is entered, after a guilty plea has been entered and during the course of the trial (Brookbanks, 2018). Based on these criteria, the assessor forms an opinion on whether the person is fit.

Further, the *Presser* criteria (as detailed in 1.4.1.) are generally included in FST reports undertaken by the RFPS. This addition has followed Baragwanath J's decision set out in *P v Police* [2007] that additional capacities other than those set out in s 4(a) CP(MIP) Act 2003 could be used to consider the defendant's FST. This decision details the factors that can be evaluated when making a fitness assessment (Brookbanks, 2018).

2.2.4. 'Mental impairment' undefined in New Zealand law

It is understood that the definition of "mental impairment" has been deliberately undefined in New Zealand legislation. Mental impairment can apply to both mental disorder and intellectual disability. Brookbanks (2011) discussed that the lack of definition extends the scope of this term so that it does not unintentionally miss out an area of impairment which causes cognitive impairment. "They elected to adopt the generic expression "mental impairment", which is left undefined with the intention to capture both mental disorder and intellectual disability" (Brookbanks, 2011, p. 87). The concept is more inclusive and can include brain damage and other neurological conditions that impact on cognitive functioning (Brookbanks, 2011). The concept, therefore, includes: mental illness; "mental disorder" under the MHCATA 1992; and cognitive impairment, including "intellectual disability", under the ID(CCR) Act 2003 (Brookbanks, 2014).

Kos J gave a broad definition of the term in *R v Hemopo* [2014] NZHC 1423:

> "Mentally impaired" is undefined in the Act… It is possible it includes, therefore, other mental impairments, such as those caused by degenerative neurological condition, substance abuse or acquired brain injury, involving short term memory and frontal lobe deficits, low intelligence or impaired cognition, any of which lead to difficulty in organising or processing information and responding [9].

Kos J held that the subsequent focus needed to consider the *extent* of the impairment of mental function to determine whether "it may seriously affect the defendant's ability to comprehend charges, consider options and consequences, plead or mount a defence" (*R v Hemopo* [2014] NZHC 1423 at [9]). Hence, assessors need to evaluate a range of complex factors to form their opinions regarding whether a person has an impairment and, if so, its impact upon their FST.

Brookbanks (2011) highlighted that New Zealand law does not specifically authorise an assessment of FST based on a physical condition, although on rare occasions the courts

may "consider whether evidence of physical impairment renders a defendant unfit to stand trial" (p. 144), such as in *R v Duval* [1995] 3 NZLR 202 (HC), where the court was required to determine if the pain arising from a disability was disabling. In these types of cases, a health assessor could give an opinion as to "assist the court in determining whether, on account of any of these impairments, the defendant is mentally impaired to such as degree as to be incapable of undergoing his or her trial" (Brookbanks, 2011, p. 144). However, given the New Zealand focus on 'mental impairment', the primary focus has been on mental disorder and cognitive impairment (Brookbanks, 2011).

The 'typical' fitness report, in the author's clinical opinion, would comment on each of the primary areas, namely mental health and cognitive impairment. In the case of 'cognitive impairment' in addition to intellectual disability, a wide spectrum of conditions affecting cognition can also be discussed including neurological disorders or traumatic brain injury. As discussed, the physical health of a defendant may, on rare occasions, be linked to a defendant being found unfit to stand trial. Freckelton (2017), discussed such a case in Australia, in which Huntington's Disease was implicated in a defendant being found unfit to stand trial.

The assessor is then required to discuss if these conditions are of such a *degree* that the defendant would be considered unfit to stand trial. The assessor summarises his or her opinion and evidence.

2.2.5. Summary of the impact of legislation on health assessments in New Zealand

The enactment of the CP(MIP) Act 2003 and the ID(CCR) Act 2003 changed the way health assessors assess a defendant's fitness to stand trial (Sakdalan, 2012). Health assessors consequently evaluated defendants in terms of 'mental impairment' including assessing if they could (or could not) conduct a defence or instruct a counsel to do so, and were unable due to mental impairment to reach the three competencies set out in s 4 of the CP(MIP) Act 2003.

As described above, the three competencies are: to plead, to adequately understand the proceedings, and to adequately communicate with their counsel (s 4). At the same time, the undefined term "mental impairment" provides a great deal of latitude for consideration of impairments that may compromise FST. Health assessors typically

assess both for mental impairment based on intellectual disability and mental health conditions. Psychologists tend to undertake psychometric assessment in regards to intellectual disability and psychiatrists evaluate for mental health conditions. As discussed above, the *Presser* criteria were routinely included in many FST reports from the RFPS. Given the new law and additional *Presser* criteria it is apparent that health assessors have relatively wide scope to discuss mental impairment leading to a lack of FST. The next section discusses research undertaken in New Zealand relevant to health assessors.

2.3. RESEARCH RELATED TO HEALTH ASSESSORS

2.3.1. New Zealand research on fitness to stand trial

FST is considered in the literature to be complex. Part of the complexity appears to be the intersection of mental health and legal issues. While there is minimal research on health assessors and FST in New Zealand, a recent study has added to the knowledge of factors associated with FST in New Zealand (Sakdalan & Egan, 2014).

In their study, Sakdalan and Egan (2014) obtained data from FST reports on 200 defendants who appeared in the New Zealand courts between 2005 and 2011. The authors found "generic sociodemographic, offence-related and clinical factors were not significantly associated with fitness to stand" (Sakdalan & Egan, p. 658). Previous findings of intellectual disability, assessment of FST and resultant findings of unfitness to stand trial were, however, significant (Sakdalan, 2012; Sakdalan & Egan, 2014).

Cognitive and neuropsychological functioning in the New Zealand sample was determined by assessing full scale intelligence quotient (IQ) obtained using the Wechsler Adult Intelligence Scale (WAIS) on 81 defendants identified as having an intellectual disability (Sakdalan & Egan, 2014). The researchers found that full scale IQ scores that were low were "significantly correlated with the finding of unfitness to stand trial" (Sakdalan & Egan, 2014, p. 663). Sakdalan and Egan (2014) also found that Verbal and Performance Index IQs were associated with findings by the court of unfitness to stand trial.

These researchers further reported that court liaison nurses' concerns about the ability of defendants to communicate and comprehend appeared to be reliable indicators of unfitness, leading to the conclusion that initial screening may be useful. The courts

generally agreed with, and respected, the health assessors' opinions on FST (Sakdalan, 2012).

2.3.2. Research on youth fitness to stand trial in New Zealand

Two recent New Zealand studies on FST addressed the characteristics of youth being assessed under court ordered competence assessments in the Youth Court (Armstrong & Friedman, 2016; Tan, Friedman, Armstrong, Fitzgerald, & Neumann, 2018). These assessments are governed by the same FST legislation as adults; however, people under the age of 18 years are excluded from TSL. These studies found that, as in the adult population, only a small proportion of people appearing before the Youth Court were referred for FST trial evaluations (Armstrong & Friedman, 2016; Tan et al., 2018). Assessments regarding FST were then conducted via the Regional Youth Forensic Services (RYFS).

Armstrong and Friedman's pilot study (2016) focused on one year (February 2012 to February 2013), when a total of 366 individuals between the ages of 12 and 17 years were referred to the RYFS with formal requests for fitness assessments in one third of cases (n=119). This sample was 88% male (n=105). These FST court reports were completed pursuant to s 333 of the Children, Young Persons and Their Families Act 1989 (now cited as the Oranga Tamariki Act 1989, or the Children's and Young People's Well-being Act 1989), having been amended by section 6(1) of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 (2017 No 31).

Twelve percent of these youth were perceived to be unfit to stand trial by either a psychologist or a psychiatrist. The most common diagnoses were "mental retardation (intellectual disability) 64% (9), followed by 'no diagnosis' 21% (3)" and "one each had a diagnosis of mixed receptive/expressive language disorder and schizophreniform disorder" (Armstrong & Friedman, 2016, p. 542).

Adding to this research was the retrospective longer term review between the years 2010 and 2015 of 149 FST reports on 79 youth undertaken by the RYFS (Tan et al., 2018). These researchers sought to understand the impact of immaturity on FST assessments and a high level of agreement was anticipated between the assessors and the court findings. Given, however, that immaturity is not a distinct legal determinant of incompetence, it was anticipated by Tan et al. (2018) that most youth found unfit

would have an intellectual disability. This proved to be the case in the findings of the assessors, as 58% of the youth evaluated were considered mentally impaired, with intellectual disability being the most common diagnosis, and 29% (23 youth) opined unfit (Tan et al., 2018). However, in a surprising result, Tan et al. reported only 9% (7 youth) were subsequently found unfit to stand trial. This rate of agreement between the assessors and court decisions overall was 75% agreement only, with the researchers speculating that "New-Zealand-based evaluators may have a higher competency threshold than New Zealand's Youth Court, reflecting tensions where clinical decision-making processes are applied to legal criteria" (Tan et al, p.129). One possible implication of such is that the presence of a Mental Health Court, such as advocated by (Lunt, 2017), could potentially promote a higher level of agreement between assessors and the courts via a closer working relationship.

Of interest, youth in New Zealand referred for assessment for FST were predominantly male (89%); with an over-representation of Māori (69%) and Pacific Island (25%) youth (Tan et al., 2018). This longer term study found similar rates of gender to the earlier pilot study by Armstrong and Friedman (2016) with 88% of the sample male; however, it was apparent that an increased rate of over-representation of Māori had emerged. In this earlier study, 51% of the defendants were Māori, followed by 28% Pasifika, 19% New Zealand European and 2% 'Other'.

The views of assessors in New Zealand who assess adult defendants remain an area which has received little research attention. An earlier study, in 2010, explored the role of forensic psychiatrists as expert witnesses in criminal trials in which the insanity defence was raised (Thom, 2010). Of relevance, Thom (2010) noted that the aim of the expert's testimony was to 'assist' the courts in their decision making rather than determining the correct verdict of the case for them. While a s 38 FST trial report has a different focus (i.e., fitness rather than insanity), the purpose of the report is similar, namely to assist the Court in its decision making.

2.3.3. Recent research on health assessors and fitness to stand trial

While no specific research on the intersection of FST and the TSL has been identified to date, recent New Zealand research has highlighted themes arising for health assessors within the general realm of assessing FST in adults in New Zealand (Wills, 2016). This research is relevant to the current study, given that it addressed important themes concerning health assessors in New Zealand.

This study analysed the opinions of health assessors regarding the FST legal criteria and process in New Zealand (Wills, 2016). The researcher obtained health assessors' opinions by means of interviews and thematic analysis. She conducted face-to-face interviews with 10 health assessors—six psychologists and four psychiatrists—within the Auckland region. While TSL was not raised within the resulting themes, the four themes provided background data in regards to health assessors and FST.

2.3.3.1. Flexibility

The first theme was that health assessors preferred a 'flexible approach' when assessing fitness in terms of the statutory criteria, and additional leeway when considering the more detailed *Presser* criteria. The health assessors also reported the threshold for fitness needed to be flexible to encompass such issues as the defendants' plea and the complexity/seriousness of the charges they were facing. In addition, the respondents reported that the court process ideally needed flexibility to accommodate defendants who were on the cusp of fitness, such as having borderline cognitive ability.

2.3.3.2. Unfairness

The second theme related to the consideration by health assessors that some defendants experienced an unfair outcome following the FST process. This was in respect to the consideration of a 'right' to a fair trial with some of the health assessors considering that it was best to err towards fitness, so the defendant could exercise this fundamental right. This theme led to the conclusion that assessors may need to balance the legal function of the fitness assessment with their clinical judgement of a finding of unfitness not being in the client's best interest.

2.3.3.3. Competing positions

The third theme identified that health assessors' experienced a professional tension between the mental health and legal fields. A 'dual' role was identified between the health assessors having legal obligations to the court, while having clinical and ethical responsibilities to the defendants. Interestingly, a dichotomy was signalled between the 'black and white' answers the legal practitioners and judges preferred versus what could be described as the 'shades of grey' that clinicians provided.

A further variance of position was discussed between those of psychologists, who viewed themselves as more evidence based, particularly with the use of psychometric

tests; and psychiatrists, who focused on their clinical assessments and judgement. Despite the perceived variance of the two groups, the respondents considered variation in perspective between the psychologists and psychiatrists engendered two different and valuable outlooks on FST determination.

2.3.3.4. Lack of agreed process

The fourth theme raised was the issue of the absence of a legal process regarding many aspects of the FST process. As a result, the health assessors considered that this could result in variable practices and inconsistencies. Furthermore, some health assessors observed that uncertainty negatively impacted on defendants; for example, having limited information or unclear timelines.

2.3.4. Summary

The four major New Zealand studies discussed above show factors associated with FST assessments in the youth and adult courts, while highlighting the complexity facing the health assessors involved in this process (Armstrong & Friedman, 2016; Sakdalan & Egan, 2014; Tan et al, 2018; Wills, 2016). However, the influence of the TSL during FST has not been addressed to date in New Zealand studies of FST.

Firstly, Sakdalan and Egan's (2014) research enabled an 'over-view' of significant factors which contributed to FST findings in New Zealand. Unsurprisingly, they found that if a defendant had a historic finding of FST or a previous diagnosis of intellectual disability, there was a statistical relationship with a current unfitness to stand trial opinion.

Of importance to health assessors, the Wechsler Adult Intelligence Scale was reported as the assessment tool used to assess cognitive/neuropsychological functioning for the study sample of 81 defendants diagnosed as having an intellectual disability (Sakdalan & Egan, 2014). Other FST assessment tools were not reportedly used by health assessors in the study; suggesting that clinical judgement combined with psychometric tools such as the WAIS were the major FST assessment methods utilised in New Zealand. Alternatively, Armstrong and Friedman (2016) found that for 20% of their youth FST assessments, defendants were considered unfit to stand trial as a result of both developmental immaturity and cognitive limitations, which did not meet formal intellectual disability standards but impacted on their trial-related abilities. Again,

clinical judgement and psychometric cognitive assessment tools were utilised to arise at this conclusion.

White et al. (2015), in their Australian research, also reported that the WAIS was "an important assessment tool" (p. 884), although in contrast to New Zealand, over 50% of psychologists endorsed the use of an abbreviated intelligence test, such as the Wechsler Abbreviated Scale of Intelligence (WASI). It is hypothesised that New Zealand psychologists do not take this approach of using abbreviated cognitive tests due to the necessity for formal IQ testing as part of the CP(MIP) Act 2003 when diagnosing for intellectual disability. Half of the psychologists also reported using the Mini Mental Status Examination (MMSE) in FST assessments on occasion. Current New Zealand research into FST does not identify the use of the MMSE, albeit that this screening tool is widely used in the area of age-related impairment in New Zealand (Strauss, Leathem, Humphries, & Podd, 2012).

Wills' (2016) study was much closer in intent to the current study. She analysed the views of 10 health assessors on FST legal criteria and process in New Zealand, albeit that TSL was not the focus. Wills' findings of the importance of flexibility for health assessors within this process signalled the importance of health assessors not being limited to a particular diagnosis in the determination of mental impairment. This could be seen as enabling consideration of 'wider' factors such as the TSL.

However, Wills' (2016) 'unfairness' theme indicated that it was important to health assessors that defendants were ethically and fairly treated in the court process. The theme of 'competing positions' added to this narrative as it strongly signalled the dichotomy between mental health considerations and the legal issues. Finally, the theme of 'lack of agreed process' within assessments related to variable practices which could raise uncertainty both for the health assessors and the defendants. This theme again relates strongly to the current research in terms of giving insight into the impact of uncertainty on health assessors. Wills suggested that the various professions that contribute to FST determinations work collaboratively "in order to formulate a way to negotiate the opposing ideas of flexibility and consistency, and to ensure fair and well-defined processes take place in the determination of FST" (p.2). It is apparent that this recommendation would extend to the impact of TSL on the assessment process.

Having addressed recent research concerning health assessors undertaking FST assessments, this chapter turns to the assessment process and methods used by health assessors when undertaking the complex process of FST assessments.

2.4. ASSESSMENT METHODS

2.4.1. Fitness to stand trial assessments by health assessors

As indicated in the literature, these assessments form part of the process where an offender's competence to be tried is considered and ultimately determined by a Judge (Brookbanks & Skipworth, 2007). While competency to stand trial is consequently a *legal* decision and *not* a *clinical* decision, the final decision often "relied heavily on clinical opinion" (Cox & Zapf, 2004, p. 110). Indeed, in the United States, court determinations of competency typically agree above 90% with clinical opinions of mental health professionals (Cox & Zapf, 2004). Zapf, Hubbard, Cooper, Wheeles and Ronan (2004) reported that in Alabama, United States the court accepted all recommendations, bar one, put forward by mental health professionals on defendants undertaking competency evaluations. Zapf et al. questioned if the judges in these cases preferred that mental health evaluators determined competency rather than leave it to the courts.

Sakdalan (2012) found that the situation was similar within New Zealand, with Judges noted to generally take notice of health assessors' FST recommendations. However, more recent research undertaken in the Youth Court found the agreement rate between assessors and the court was only at 75% (Tan et al., 2018), with the researchers hypothesising that assessors may have had a higher threshold level for FST in the Youth Courts.

As discussed above, when assessing for FST or competency to stand trial, health assessors in various jurisdictions typically use clinical opinion, psychometric and neuropsychological testing and or fitness or competence assessment tools. Various countries favour particular methods or combinations of these methods. In England and Wales "the gold standard test is currently a consensus of psychiatric opinion" (Rogers et al., 2008, p. 587). However, Rogers et al. (2008) acknowledged that when there is a question of intellectual or cognitive impairment, clinical psychologists are then likely to give evidence.

This is important in the New Zealand context where typically psychologists assess for intellectual disability and furthermore a lower full scale IQ is significantly correlated with unfitness to stand trial (Sakdalan & Egan, 2014). New Zealand psychologists use psychometric and neuropsychological tests to evaluate intellectual disability and cognitive functioning when these areas need particular consideration in a FST report.

2.4.2. Use of psychological tools and competency assessment tools

In the United States, Cox and Zapf (2004) undertook a survey of forensic mental health professionals to find out what specific tools or measures they used in their competency to stand trial assessments, and found that 51% of the assessors considered standard psychological measures essential, while the remaining 49% considered them optional. Therefore, it can be observed that even in the United States health assessors are evenly divided on the need for the use of standard psychological tools.

Lally (2003) surveyed registered *psychologists* in forensic psychology in the United States and found that 83% of respondents reported using psychological tests when conducting adult competence assessments. The tests recommended were the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA) and the WAIS–Third Edition (WAIS-III). The increased use of psychological tests may be due to the respondents being forensic psychologists rather than forensic psychiatrists. The survey appears relevant within the New Zealand FST assessment process, in so far as the WAIS is widely used by psychologists (Sakdalan & Egan, 2014).

While this research survey did not find that a standard practice for competency evaluation (FST) was in place in the United States, at that time, assessment tools developed for *competency to stand trial* are considered to have increased the reliability of competency assessments (Cox & Zapf, 2004). A variety of competence tools or measures were developed to assist in the evaluation of competence to stand trial in the United States, and a comprehensive table of the 19 instruments of interest can be found in Rogers et al. (2008, pp. 588-590). These researchers assessed the strengths and weaknesses of the primary tests used to assist with evaluating competence.

While a large number of structured assessment instruments for FST/competency were developed in the United States, they are not commonly used in other parts of the world (Pirelli, Gottdiener, & Zapf, 2011). One test, the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA), has been modified to be suitable for legal

criteria in England and Wales with the resulting test being called the MacArthur Competence Assessment Tool-Fitness to Plead (MacCAT-FP) (Akinkunmi, 2002). This test features an interview with criterion based scoring.

However, the literature reports that although this test has been specifically modified to suit United Kingdom conditions, structured instruments are not routinely used in this domain (Rogers et al., 2008). Health assessors in Australia also do not generally use specific tests for unfitness to stand trial, with researchers reporting this is due to the lack of availability of instruments with Australian norms (Van der Wijngaart, Hawkins, & Golus, 2015). Rogers et al. (2008) considered, despite this lack of use, that standardised fitness tools could assist assessors to gain consistency when applying the *Pritchard* criteria.

Specific tests of FST or competence are not generally utilised in New Zealand (Brookbanks & Skipworth, 2007). However, a related tool, the MacArthur Competence Assessment Tool-Treatment (MacCAT-T) has been employed in New Zealand in the associated role of determining the capacity of detained patients to consent to treatment in forensic mental health care (Skipworth, 2011). This suggests that health assessors in New Zealand could potentially be open to the use of a FST assessment tool in the future.

2.4.3. Cognitive/neuropsychological assessment and assessment tools

The relevance of neuropsychological and cognitive ability tests to FST has been repeatedly found in the literature (Klein, 2011; Nester, Daggett, Haycock, & Price, 1999; Parker, 2009). Parker (2009) found that low verbal IQ was associated with incompetence to stand trial; while Nestor et al. (1999) discovered that defendants found FST had significantly higher scores for attention, memory (particularly verbal memory) and overall psychometric intelligence. Klein's (2011) study supported these earlier findings and emphasised the significant role of neuropsychological considerations, including auditory-verbal episodic memory.

In a recent Australian study, the importance of both cognitive and neurological functioning, in accordance with the criteria of *R v Presser* [1958], was considered. Researchers examined 153 unfit and 91 fit defendants in New South Wales over a period of five years in a retrospective fashion (White, Batchelor, Meares, Pulman, & Howard, 2016). The findings extended the preliminary results of White, Batchelor,

Pulman and Howard (2012) and reinforced the influential role of *cognitive assessment* when addressing FST. In this case, the predominant test was cognitive, using the WAIS-IV or earlier versions. Within this cognitive test, significant differences were found between defendants considered fit or unfit on tests of nonverbal cognitive abilities (Perceptual Organisation Index) and verbal learning and recall (Verbal Memory Index) (While et al., 2016, White et al., 2012).

In New Zealand, the most utilised test continues to be the WAIS (Sakdalan & Egan, 2014). This is primarily incorporated in the FST assessments of psychologist health assessors, as Sakdalan and Egan (2014) found that "99% of defendants" referred to psychologist health assessors were referred due to intellectual disability/cognitive impairment (p. 667). Sakdalan and Egan also echoed the findings of past researchers who found that higher Full Scale IQ, Verbal IQ and Performance IQ were significantly correlated with FST (Klein, 2011; Nester et al., 1999; Parker, 2009).

2.4.4. Health assessor clinical assessment process

As indicated above, the clinical assessment process forms either the entire assessment or a major part of the health assessor FST assessment in New Zealand. Skipworth (2017) explained the clinical assessment process when assessing a defendant's FST:

1. Assess clinical condition or mental impairment.
2. Ascertain what are the demands of the task (how high is the bar set)
3. Apply the clinical findings to the specific demands
4. Consider the contextual matters to optimise performance
5. Assist the Court to determine the ultimate issue.

Health assessors usually ask the defendant a number of questions to establish if he or she understands the charges, the plea options and the court proceedings, and can adequately communicate with his or her lawyer to assist in determining an opinion regarding FST (Davidson, Kovacevic, Cave, Hart, & Dark, 2015). In addition, health assessors can choose to use relevant psychometric tools (psychologists) or structured competence assessment tools (psychologists or psychiatrists) (Davidson et al., 2015).

Fogel, Schiffman, Mumley, Tillbrook, and Grisso (2013) reviewed and evaluated publications during 2001-2010 relevant to the assessment of competence to stand trial in

the United States. The review focused specifically on articles that provided "new concepts or data supported by research or case analyses" (Fogel et al., p. 165). Of particular interest was the discussion on 'contextual variables', which has gained attention in New Zealand. Brookbanks (2018) discussed that the contextualised concept of 'decisional competence' is distinct from the foundational concept of 'competence to assist counsel'. An example of a contextual variable can be seen in the following sentence: "The idea is that a defendant who is *provisionally* competent to assist counsel, may lack competence to make specific decisions likely to be encountered as the trial unfolds" (Brookbanks, 2018, p. 143).

Some authors believed dissimilar cases should offer different thresholds because of contextual variables. Fogel et al. (2013) discussed two opposing views; firstly, that dissimilar cases can require different thresholds, as advocated by Brakel (2003) and Buchanan (2006). In this first view, the level of capacity required depends on case-specific variables (Brakel, 2003; Buchanan, 2006). In terms of the TSL this could equate to a third strike having a higher threshold for fitness than a first strike due to the higher sanctions associated with a third strike. Secondly, Fogel et al. (2013) discussed Coles' (2004) contrasting position, which did *not* support the presence of distinct neurologically based abilities that corresponded to different aspects of the fitness court process.

This debate is interesting for health assessors in light of recent New Zealand judgments. For example, *R v Komene* [2013] NZHC 1844 addressed *fitness to plead.* It held that in some cases a lower threshold for the standard of fitness would suffice, when there were relatively simple contextual factors. Skipworth's (2017) view on the clinical assessment process for FST in New Zealand also appeared to support the contention that particular FST cases can have different case specific variables.

Given that FST evaluation tools are not routinely used in New Zealand, it is apparent that clinical judgment is the primary method of assessing FST; albeit that neuropsychological and cognitive tests also feature in *psychologists'* FST assessments. Internationally it appears that health assessors continue to primarily use clinical judgement during their assessments of FST: "In the final analysis, the assessment of decisional competence remains heavily a matter of clinical judgement" (Beauchamp & Childress, 2009, p. 115). Relevant clinical factors include the presence of psychotic disorder which is noted in the literature to be correlated with competency to stand trial

(Cooper & Zapf, 2003; Kennedy, 2008). Cooper and Zapf's (2003) United States study, which assessed 468 defendants, found that a diagnosis of psychotic disorder was associated with findings of being found unfit to stand trial (incompetency). However, given that this is a different jurisdiction and at a different time it cannot be assumed the same findings will be accurate for New Zealand at the time of the present study.

Sakdalan and Egan's (2014) News Zealand study of FST found the opposite result concerning psychosis and unfitness to stand trial. They discovered that defendants with psychosis and mental illness were *more likely* to be found fit in New Zealand than in the international context. Explanations for this new finding suggested the relevance of Skipworth's (2017) set of clinical guidelines (listed above), given a number of clinical factors may have contributed to this result. The defendant's mental illness may not have been severe enough to be incapacitating and, therefore, not have met the threshold for unfitness to stand trial, or the psychiatrist health assessors (who generally assess mentally disordered defendants) may have a higher 'bar' (than overseas jurisdictions) for declaring unfitness to stand trial.

Medical and clinical factors such as head injury and alcohol and drug use disorder are also considered relevant to FST. The presence of drug and alcohol disorder has been associated with defendants less likely to be found FST in the United States (Cooper & Zapf, 2003). However, in a recent New Zealand study on FST, Sakdalan and Egan (2014) found the opposite result, namely that there was a significant correlation between drug and alcohol misuse and FST (Sakdalan & Egan, 2014). This apparently contradictory result was explained by Sakdalan and Egan: "However this observation is confounded; co-morbid conditions (i.e. cognitive impairment, mental illness) associated with alcohol and drug disorder probably explain the associated findings" (p. 660).

2.4.5. Summary

The research indicated that health assessors have multiple methods to assess a defendant's FST, including competency assessment tools, neuropsychological and cognitive assessment instruments and clinical judgement. In New Zealand, health assessors currently favour clinical judgement as the primary method of assessment, while psychologists may also use neuropsychological and cognitive assessment methods for FST (Sakdalan & Egan, 2014). However, no current research exists as to what potential methods health assessors may utilise, or consider relevant, for the assessment of TSL factors in relation to FST. This study will investigate the views of the health

assessors in relation to utilised methods of assessment for defendants facing TSL charges. No instruments or tools have been devised to assess the TSL dimension of FST to date.

2.5. LEGAL CASES WHICH INFORM ASSESSORS

An important method of health assessors gaining knowledge about changes to FST assessment expectations also arises via case law. The seminal New Zealand case of *P v New Zealand Police* [2007] provides guidance on additional capacities, placed under the term 'decisional competence', and serves to show FST. These capacities add to those originally discussed in *R v Presser* [1958]. In turn, *Solicitor-General v Dougherty* [2012], delivers commentary on the application of 'decisional competence', setting out that it need not include a defendant making decisions in his or her best interests.

2.5.1. P v New Zealand Police [2007]

The enactment of the CP(MIP) Act 2003 and ID(CCR) Act 2003 resulted in changes in the way health assessors evaluate a defendant's FST. As indicated in s 1.71, the judgement by Judge Baragwanath (P v New Zealand Police [2007] 2 NZLR 528) acknowledged the difference between "the foundational notion of 'competence to assist counsel' and the contextualised notion of 'decisional competence'" (Brookbanks, 2018, p. 143). Thus, competence was measured both by the defendant's ability to demonstrate a foundational cognitive ability plus the capacity to show 'decisional competence' during the trial process.

2.5.2. R v Presser [1958]

Judge Baragwanath also held that the expanded list of incapacities (identified by the court in *R v Presser*, [1958] and recognised in Australia), was pertinent to the assessment of FST in New Zealand (Brookbanks & Mackay, 2010). This consideration is important to health assessors, as the capacities related to decisional competence have been shown in studies to be particularly relevant in the determination of FST regardless of the more fundamental capacities of the defendant (Mackay, 2002). While New Zealand courts have not routinely distinguished different competencies, but rather applied a generic criteria to FST (Brookbanks & Skipworth, 2007), this tendency is changing. As Sakdalan (2012) discussed "This issue becomes more pertinent particularly for defendants with intellectual disability who may superficially understand the concept of entering a plea but may not be able to fully appreciate the implications of

entering such a plea" (p. 14). It is apparent that one of the implications of entering a plea could be the defendant's understanding (or not) of the TSL. Given the above reasoning, it appears that a defendant with an intellectual disability, or indeed another mental impairment, may not adequately appreciate the sentencing consequences of the TSL in regards to his or her future actions.

2.5.3. Solicitor-General v Dougherty [2012]

Despite the acceptance of the 'contextual notion' of decisional competence, the New Zealand courts have determined that 'decisional competence' with a '*best interests component*' is not part of a fitness assessment in New Zealand (Brookbanks, 2013). Brookbanks discussed the interesting and relevant case of the *Solicitor-General v Dougherty* [2012] NZCA 405, Court of Appeal, New Zealand. The defendant had been convicted on several charges related to Goods and Services Tax (GST) fraud. He had a delusion that he was being victimized by the Inland Revenue Department. The trial Judge had found that due to this delusion, the defendant could not give adequate instructions to his lawyers and he was found unfit to stand trial (Brookbanks, 2013). However, at the Court of Appeal, the case was re-formulated as to whether decisional competence was part of a fitness assessment and decided it was not. The Court of Appeal's decision included, "We are satisfied there is no discernible statutory intention to move away from the settled principle that fitness to plead does not include an inquiry into whether the accused will act in his or her best interests" [40]. Brookbanks (2013) concluded his discussion of this case with a call for: "the notion of decisional competence receives the endorsement it deserves as a tool for identifying and operationalising capacitated decision-making in this important intersection between law and practice" (Brookbanks, 2013, p. 8).

Summing up from the cases *P v New Zealand Police* (2006) and *Solicitor-General v Dougherty* [2012], it seems that only the *narrower application* of 'decisional competence' as it appears in the former case is currently applicable in FST evaluations in New Zealand. In this regard, an assessor would *not* have to be satisfied that the defendant could make decisions which were in his or her best interests.

2.5.4. Applying 'fit to plead' to a three strikes law charge

Health assessors have a challenging role to remain knowledgeable about the intricate and unfolding cases which serve to inform via case law as to what is significant in cases

in which FST intersects with TSL. For example the *Britz v R* [2012] NZCA 606 (HC) case was significant and applied subsequently by Judge Aitken in *R v Raukura* [2014]. Importantly, Judge Aitken noted that neither expert (health assessor) in this case was asked to comment on the significant consequence to the defendant of a guilty plea and conviction, namely that it was a first strike warning (*R v Raukura* [2014] at [42]). The Judge held that where an offence qualifies for a strike warning, "the defendant must understand the impact of that warning *at the time he instructs counsel to enter a plea of guilty*". The defendant needed an adequate understanding of the "*sentencing options that follow a guilty plea and what they mean in practical terms*; this includes a basic understanding of the consequences of a Strike Warning" (*R v Raukura* [2014] at [43]; italics added for emphasis).

This judgement appeared to give guidance as to the need for lawyers to include an assessment of the defendant's capacity to understand the TSL. The question then arose whether health assessors have a duty to raise and answer this question during their assessments. Judge Aitken provided additional clarification as to what the defendant should be capable of understanding at a minimum:

i. that a plea of guilty will mean a conviction is entered; and
ii. that the Judge will warn the defendant about what will happen if he commits another serious offence; and
iii. that that warning will mean that if he does commit that a further serious violent offence, and is sent to prison, he will serve the full term [45].

Judge Aitken also held that it may not be necessary for the defendant to be specifically aware of the 40 offences to which the warning applies, but in her view the defendant would need to "understand that the warning applies to some (not all) criminal offences and likely to all criminal offences involving serious violence" [46]. In addition, the Judge was clear that the defendant would need to know that should he commit one of the 40 TSL offences in the future and be sentenced to imprisonment, he would serve the entire sentence [47]. Judge Aitken's decision gave excellent guidance to health assessors seeking to consider if a defendant understands the TSL to an adequate degree.

Importantly for health assessors who are clinical psychologists, Judge Aitken also commented on the cognitive test results (produced by the health assessor, in this case a psychologist) in terms of the cognitive abilities, which would be relevant to the ability to "understand the practical impact of sentencing" [48]. In this regard, the Judge

provided direct guidance to health assessors. The Judge discussed some of the test results and specifically commented on the defendant's *working memory index* (as can be assessed by psychologists and is within the WAIS-IV. As such, the defendant needed to have both a level of retention and understanding about the TSL warning for it to act as a deterrent. Judge Aitken reported "As noted earlier, that must be the single purpose of the Strike Warning: to put a defendant on notice and thereby, it follows, to deter further offending" [52]. This commentary provides guidance for health assessors as to psychometric tests and domains which are likely to be of interest to health assessors, in particular clinical psychologists.

The decision referred to *Solicitor-General v Dougherty* [2012] 3 NZLR 585, which did *not* support a change to the construct of decisional competence; in the sense that it required a defendant to make a decision in their best interest. Assessors need to continue to understand that decisional competence, even in relation to TSL, need not include that the defendant is capable of making decisions in his or her best interests. This is a very 'fine-tuned' distinction, but it is important that the health assessor understands that a 'rational' application of this knowledge (in the person's best interests) is not required for the person to be found fit. Seemingly illogical decisions do not necessarily equate with unfitness.

2.5.5. Third strike presents additional complexity

Health assessors can additionally learn from case law concerning the growing complexity of increasing strikes. As discussed previously, in *R v Marks* [2017], Katz J summed up the case and one important point of relevance to health assessors was that it was the advice of *the defence counsel*, rather than the intricate details of the TSL, that the defendant needs to understand. However, the defendant is still required to be capable of understanding *the sentence* that is likely to be imposed.

This finding raised the interesting point that a defendant, when facing a TSL third strike, required additional cognitive capacity than may be usually required to be found fit to stand trial. If the defendant did not have the capacity to understand the complexity of a third strike, then he or she could be judged unfit to stand trial, provided they were found to have a mental impairment. This case is important to health assessors as it suggests that when assessing a defendant facing a third strike, health assessors may need to 'set the bar' higher for findings of FST, due to the need for defendant's to understand the complexities of a third strike.

Another health assessor also concluded that Mr Marks did *not* have a good appreciation of the seriousness of the charges, and Katz J quoted this assessor:

> With respect to the 3rd strike legislation, in my view this would raise the cognitive complexity of the task before Mr Marks to a level which is beyond his grasp, including the need to be cognisant of complicated terms such as "manifestly unjust" for example *R v Marks* [2017] NZHC 3048 at [33].

Summing up *R v Marks* [2017], it is apparent that this oral judgement provided assessors with a number of relevant points to consider when embarking on a FST assessment concerning TSL. Firstly, a defendant under a third strike appears to have a higher threshold for fitness to plead or FST than a defendant not under TSL or under a warning or final warning. The added complexity associated with a third strike under TSL may require additional cognitive capacity. The defendant needs to be cognisant of difficult terms such as 'manifestly unjust'. In addition, if the defendant did not have an adequate capacity to understand the severe sentence under TSL, he or she may not be fit to stand trial. A discussion of the important term 'manifestly unjust' follows with reference to applicable New Zealand cases.

2.5.6. Summary of cases

The cases discussed above; *P v New Zealand Police* [2007], *R v Presser* [1958], *Solicitor-General v Dougherty* [2012], *R v Raukura* [2014] and *R v Marks* [2017] provide a legal framework for health assessors to understand some of the concepts related to the TSL and the court's expectations of their assessments. As health assessors continue to build their knowledge of the TSL in relation to FST, being aware of relevant cases which involve the 'cross-over' of these areas can assist in this endeavour.

The first three cases discussed provided valuable background and rulings concerning the use of additional areas of competence when deciding FST. The latter of these three cases demonstrated that, notwithstanding the additional *Presser* competencies, defendants in New Zealand were not required to present a 'best interests' or rational point of view to be considered fit to stand trial. In the recent decisions above, the courts produced detailed descriptions of relevant background issues relating to the TSL, with particular reference to the 'manifestly unjust' term. When assessing a defendant's knowledge of the TSL, the health assessor *may be*, on occasion, required to give his or her opinion on the question of 'manifestly unjust'. Case-law can provide insight into what this concept can potentially mean within the TSL application. Health assessors

being potentially required to give their opinion of this area may be viewed by some as leaving decision-making to clinicians rather than the courts. Zapf et al. (2004) raised this consideration during their research in the United States in regards to competency assessments (FST); albeit that they were not directly linked to TSL.

2.5.7. Concluding remarks

This chapter demonstrated the complex nature of the role of the health assessor within the New Zealand legal setting. The literature indicated that there is a gap in understanding of the interrelationship between FST and TSL for health assessors. The current research seeks to add to the understanding of this complex area in terms of the impact on health assessors undertaking FST assessments involving TSL in New Zealand. The following chapter explains how the mixed methods research was conducted.

CHAPTER 3. METHOD

3.1. INTRODUCTION

The aim of this research was to investigate the impact of the TSL on the assessment of FST by health assessors. This study had two parts. The first was a retrospective file review that produced descriptive quantitative statistics and a thematic analysis of the health assessors' comments in the reports. The second was a semi-structured interview with health assessors. This chapter describes the methodology used in both parts including the research paradigm, participants, procedure for data collection and data preparation through to analysis.

Part 1 involved a retrospective analysis of s 38 Reports, including FST reports, undertaken during the period 30 June 2015 to 30 October 2015. Further analysis was made of FST reports which included TSL offences. These assessments were undertaken at the RFPS and involved both gathering descriptive statistics and a thematic analysis of the reports. In Part 2, health assessors were interviewed regarding the impact of the TSL on their assessments of FST, and a thematic analysis was applied to their interviews.

The RFPS is a forensic mental health service located within a District Health Board in New Zealand. This service provides a cohesive mental health service to the areas courts and prisons. This forensic mental health hospital has a number of inpatient units, including an intellectual disability unit. Referrals for FST reports are made by District and High Courts within the region. The court liaison team undertakes referral of these defendants for assessment concerning mental impairment, when the fitness of the defendant to stand trial is queried. These assessments are undertaken by the health assessors who may be either psychiatrists or psychologists. In general terms, a psychiatrist is:

> A qualified medical doctor who has obtained additional qualifications to become a specialist in the diagnosis, treatment and prevention of mental illness and emotional problems. They can prescribe medication. (Mental Health Foundation of New Zealand, 2018).

A psychologist is a health professional who:

> Assesses the current emotional and lifestyle problems of clients, their social and family histories, and examines how feelings, actions, beliefs and culture interact to shape the person's experience and difficulties. Clinical psychologists give psychometric and neuropsychological tests to identify problems and to measure clients' skills and abilities. They develop and implement individual client plans. They cannot prescribe medication. (Mental Health Foundation of New Zealand, 2018).

The courts ascertain the defendant's competence or FST before proceeding with the criminal trial process. Ascertaining the defendant's competence requires a health assessor to undertake a forensic evaluation. The definition of a health assessor is given under section 4(1) of the CP(MIP) Act 2003:

> (a) a practising psychiatrist who is registered as a medical practitioner; or
>
> (b) a psychologist; or
>
> (c) a specialist assessor under the Intellectual Disability (Compulsory Care and Rehabilitation Act) 2003.

Section 4 of the CP(MIP) Act 2003 further clarifies that a medical practitioner, means a health practitioner "who is, or is deemed to be, registered with the Medical Council of New Zealand continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of medicine". A psychologist is further defined in s 4 of the CP(MIP) Act as a health practitioner "who is, or is deemed to be, registered with the Psychologists Board continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of psychology".

The court requests health assessors' reports when they are required under s 38 of the CP(MIP) Act 2003.

3.1.1. Research question

The aim of this study was to understand the impact of the Sentencing and Parole Reform Act 2010 (the TSL) on health assessors undertaking FST assessments on defendants subject to the Act.

3.1.2. Methodology paradigm

The research question was addressed using a mixed methods approach that enabled interpretation of the research data gathered in both the retrospective file review and the semi-structured interviews. This paradigm was chosen as there was no other research in the area. Further, an exploratory mixed methods study can benefit from bringing together both qualitative and quantitative descriptive approaches, which provides 'triangulation' of the data, as each method provides different kinds of evidence that help to improve the 'trustworthiness' of the findings (Wright-St Clair & McPherson, 2014). Triangulation, therefore, helps to give the researcher confidence in the conclusions made (Giddings, 2007).

Carroll and Rothe (2010) offered a social theory-based conceptual framework for integrating qualitative and quantitative research within the area of health research. They observed that the integration of qualitative and quantitative research (mixed methods) was becoming more pronounced. Different levels of meaning that can be ascribed to qualitative and quantitative findings help to gain a 'conceptually sound' holistic knowledge of an area of research phenomena. Carroll and Rothes' perspective was that these methods formed a continuum of meaning through complementarity. Within this paradigm, the relationship between the 'inside' (subjective or qualitative) and 'outside' (objective or quantitative) observation is made in the sense that one is a 'looking in' perspective and one is a 'looking out' mode. Data can be quantitative or qualitative. Generally, quantitative data refers to facts or symbols, while qualitative data refers to non-numerical information and seeks to understand verbal interactions through methods such as interviews (Carroll & Rothe).

Of interest, is that both quantitative and qualitative data have been commonly used as tools in socio-legal research (Siems, 2011). Siems (2011) discussed opposing views on the subject of how to research areas of the law with some scholars arguing that quantitative approaches are central to scientific progress, while others considered that "the law is about things that are not quantifiable" (Larenz & Canaris, 1995, p. 19). The author concluded that the mixed methods approach enabled data to be considered from each perspective and provide valuable information in this area of research.

Turning to the current research, it is apparent that little is known about the topic being investigated and that the study covers new ground. The author therefore explored how often the area of TSL was considered within the general FST assessment reports on a

TSL charge; this is the quantitative data. In addition the author investigated the circumstances in which TSL was considered by health assessors and how this should best be done, based upon the complexity revealed within the literature review. The rationale for this approach is outlined in more detail below.

3.1.3. Part 1: Retrospective file review

Quantitative methodology was employed in Part 1 of the study to enable an objective, value-free appraisal of the number of health assessors evaluating the defendant's understanding of the TSL within relevant FST assessments. By gathering quantitative research data, the intent was to gain a realistic understanding of what had been occurring in past reports in this regard. According to White and Millar (2014) this is a method of determining, "whether there are differences or similarities between things or groups" (p. 40). Information is gained by via the collection of empirical data, which can be counted to gain objective knowledge (White & Millar). The goals of the file review included gaining information on the number of FST reports during the period 30 June to 30 October 2015 that qualified under the TSL, and to look at demographic data in this regard. Next, the analysis determined the percentage of psychiatrists and the percentage of psychologists that undertook assessment of defendants potentially subject to TSL. In addition, the author attempted to identify whether the assessment was conducted pursuant to CP(MIP), the *Presser* criteria or criteria termed 'Other' criteria related more specifically to the TSL.

The statutory test for unfit to stand trial is defined in s 4 of the CP(MIP) Act 2003. The *Presser* criteria, however, were referred to in the case of *P v Police* [2007]. According to Baragwanath J, the incapacities listed by the court in *R v Presser* [1958] were relevant to the assessment of FST in New Zealand (Brookbanks & Mackay, 2010). The 'other' category was recorded when the assessment undertaken was also/instead placed in the report elsewhere to these two categories. Finally, the author employed a qualitative procedure, namely thematic analysis, within the reports identified as examining TSL within FST, and analysed how the health assessors assessed the defendants' knowledge of the TSL, as documented in the actual reports.

3.1.4. Part 2: Semi-structured interviews with health assessors

Qualitative analysis collected health assessors' views on the impact of the TSL and how they integrate this into their assessment process. This approach is portrayed as

'interpretivism', in which the researcher attempts to explain and understand respondents' views (Thanh & Thanh, 2015). Interpretivist researchers explore "the world of human experience" (Cohen & Manion, 1994, p. 24). In terms of the qualitative data from the health assessors, the author sought to understand the current knowledge of health assessors concerning the TSL, and how they see this law impacting on FST assessments. In this sense, the author was attempting to understand reality through the health assessors' views (Thanh & Thanh, 2015). The author was also interested if the health assessors chose to assess (or not assess) TSL within their FST assessment. If they did refer to TSL, information was sought on how they did so. These lines of inquiry led to exploration of whether health assessors would change their approach to assessment based on the particular strike the defendant was facing and, if so, in what way. Finally, qualitative information was sought to understand views on the ideal method of assessing defendants' understanding of the TSL. In conclusion, qualitative analysis presented an opportunity to gain the views of health assessors and, importantly, to put these views into a context in terms of collective themes which could be identified concerning the various impacts of TSL on the health assessors.

3.2. METHODS

3.2.1. Part 1: Retrospective file review - description of the research paradigm

Part 1 gathered base-line information to establish if health assessors at the RFPS had been commenting on the TSL as part of their assessment during FST reports. Information was gathered primarily using a quantitative design, which utilised descriptive statistics to comment on archived reports at the RFPS. One of the few studies on FST in New Zealand employed a descriptive, archival study design to investigate the differences between defendants who were assessed as either mentally disordered or intellectually disabled, and facing FST assessments in New Zealand (Sakdalan, 2012). In Sakdalan's (2012) study, data were obtained from health assessors' reports from 2005 to 2011. A similar research model was used in Part 1 of the current research.

For this thesis, offence-related data and generic socio-demographic data in the health assessors' reports were examined to provide background regarding the health assessors' references to the TSL. In addition, the sample of reports in which health assessors referred to the TSL was considered qualitatively to enable a view of the 'subjective'

element within these reports, namely the contents of the assessments relating to TSL. Part 1, therefore, utilised a mixed method research design to explore a gap in current knowledge. This framework enabled qualitative and quantitative data to be collected from the sample of reports for later analysis (See Appendix E: Data collection form for retrospective file review).

3.2.1.1. Target sample

The description of reports in this study involved defendants who were referred to the Court Liaison Team of a RFPS by the New Zealand courts for FST assessments. In this RFPS region there are eight District Courts and two High Courts. Reports on the defendants were completed pursuant to an order by the court for an assessment of FST, under s 38 of the CP(MIP) Act 2003. These reports were contained in the defendants' forensic files, located at the RFPS. In total, 165 defendants' reports were examined from the four month period and 103 specifically referred to FST.

No individuals were identified during data collection and analysis. The cohort was defendants assessed for FST, with a sub-group of defendants assessed for FST under the TSL.

3.2.1.2. Exclusion criteria

Reports containing reference to the TSL written by the author were excluded from data analysis to avoid potential conflicts of interest.

The legislation restricts the application of the TSL to defendants aged 18 years and older at the time of the offence. Therefore, only the reports of defendants who were aged 18 years and older at the time they committed a TSL offence were analysed for TSL.

In addition, the reports of defendants who offended prior to 1st June 2010 were not examined for TSL, as these offences were ineligible as they preceded the Sentencing and Parole Reform Act 2010. Hence several reports were not included in the pool of reports for TSL analysis.

3.2.1.3. Data collection

This study reviewed RFPS health assessment reports on defendants who were referred to the Court Liaison Team for FST assessments during the period 30 June 2015 to 30

October 2015. One hundred and sixty five reports were reviewed to provide baseline information concerning the number of various s 38 reports, including 103 FST reports, 49 pre-sentencing reports, nine disposition reports and four insanity reports. Socio-demographic factors including age, gender and ethnicity were recorded from all FST reports to obtain information on defendants' backgrounds. Broad age categories were used to increase anonymity. Additional quantitative data were collected from the three-strike reports: offence(s), the health assessors' professions (psychiatry or psychology), the presence of comments on the TSL and the placement of comments within the report. In addition, any comments made with reference to the TSL were extracted from the report and qualitatively analysed using a thematic analysis.

The Forensic Administrator's records enabled the identification of health assessor reports that were completed during this period. These reports were located at the Records Office at the RFPS and were retrieved by a Mental Health Act Administrator.

A research assistant was employed to locate the reports from the relevant files. The research assistant signed a confidentiality agreement and this is appended in (Appendix F). The research assistant then recorded data from the relevant reports onto the database collection form and a code number was created for defendants to preserve their anonymity. As far as possible, socio-demographic data were 'grouped' such as by the use of age ranges and ethnicity according to the New Zealand Statistics method to assist in anonymising the data. While the author was aware that Māori can be broken down to iwi (extended kinship groups), information regarding the defendants' iwi was not solicited, to increase anonymity. The database collection form is appended in (Appendix E).

3.2.1.4. Retrospective file review: Items

During the retrospective file review, de-identified quantitative demographic data and qualitative data on the retrospective cohort of defendants were collected using a specifically designed form (See Appendix E, Database collection form). The general demographic data collected included gender, age band and ethnicity. The age bands chosen were those that have recently been developed in the literature as non-arbitrary metrics (Hanson, Lloyd, Helmus, & Thornton, 2012). Helmus, Thornton, Hanson and Babchishin (2012) reported on the age ranges developed for adults convicted of sexual offences as the reference category, as developed for the Static-2002 R, namely 18-34.9, 35 to 39.9, 40 to 59.9 and over 60. The ethnicity categories used in this study were

those used within the New Zealand Statistics Department: Māori, Pasifika, European, Asian and Other. The data collection sheets collected a minimum of socio-demographic information to protect the anonymity of the defendants.

For defendants who had a TSL offence, *offence related factors* were recorded on defendants who satisfied the requirements for imposition of the TSL, namely they were over 18 at the time of the offence and the offence was committed following the implementation of the TSL on 1 June 2010 (Sentencing and Parole Reform Act 2010). In addition, the number of the current strike, namely first, second or third, was recorded. The Sentencing and Parole Reform Act 2010 sets out in full the definitions of what are colloquially known as the first, second or third strike (See s 1.6.10).

Additional offence related factors were recorded if the TSL was mentioned in the report. This additional data recorded whether the health assessor was a psychiatrist or a psychologist. It also recorded the health assessor's opinion of (likely) fit or unfit. Also, the *type of criteria* under which the TSL was discussed, if this was the case, was recorded as 'CP(MIP) Act 2003 criteria', the '*Presser* criteria' or 'other' (See Appendix E). Finally the reports were analysed in terms of the 'text' in the reports about TSL and the assessment of TSL. This content was recorded to enable me to undertake a thematic analysis on the contents of these passages.

3.2.1.5. Retrospective file review: Analysis

Sociodemographic data and offence relate data were collected quantitatively; and descriptive statistics, such as frequencies and ranges, were performed. Qualitative analysis was undertaken on the written data referring to the TSL contained within the health assessors' reports. Thematic analysis was employed to reveal the main themes (Braun & Clarke, 2006; Sandelowski, 2000, 2010). Thematic analysis is a means of identifying and analysing patterns or themes located within the data, and enables the interpretation of aspects of the research topic (Boyatzis, 1998). As Braun and Clarke (2006) noted "thematic analysis is not 'wed' to any pre-existing theoretical framework, and can be a 'realist' method, which reports experiences and meanings of the participants" (p.81). Thematic analysis is described in more detail under the sub-heading 'Analysis' in the following section.

3.2.2. Part 2: Semi-structured interviews with health assessors

Part 2 of the study involved qualitative data gathered from interviews with 15 health assessors, comprising psychiatrists and psychologists employed at the RFPS during the period April to June 2017.

3.2.2.1. Semi-structured interviews: Description of research paradigm

Part 2 of the research utilised a qualitative design (McNaughton, 2014). This design model was also used by a New Zealand researcher in her thesis which explored the role of forensic psychiatrists as expert witnesses in criminal trials using the insanity defence in New Zealand (Thom, 2010). Thom (2010) used an interview design with open-ended questions in a semi-structured format. This allowed respondents maximum flexibility when responding, while allowing the interviewer to engage in wide-ranging discussions (Aberbach & Rockman, 2002).

The current study used a similar design to understand the participants' perspectives regarding the effect of the TSL on FST assessments, as it impacted on the health assessors. It was intended that the semi-structured, in-depth interviews with the health assessors would enable valuable information to be gathered about the health assessors' interactions with the TSL, and the resultant impact this had on the individual health assessor.

3.2.2.2. Semi-structured interviews: Participants

In Part 2, the participants were health assessors (both psychiatrists and psychologists) employed by a RFPS, under the local District Health Board in New Zealand. The RFPS has a large complement of health assessors who undertake FST assessments (under s 38 of the CP(MIP) Act 2003) comprising 16 psychiatrists and 11 psychologists at the time of this study. The pool of potential participants was, therefore, 27 health assessors.

The literature reported that a realistic target for interviews within doctoral studies is between 12 and 20 participants to enable due care to both appreciate each participant and work intensively with the data from each interview (Smythe, 2011). A target of 15 participants was considered both realistic and representative as it targeted over 50% of the health assessors employed by the RFPS at that time. This study utilised established sampling procedures (White, Batchelor, Pulman, & Howard, 2015). Under this sampling procedure, health assessors were accepted when they volunteered until the

target number of 15 interviews was obtained. Of the 15 participants, six were psychiatrists and nine were psychologists.

The participants' contributions were acknowledged in two ways. First, they were offered a koha (a gift to acknowledge and reciprocate something that has been given to an individual or group, see Appendix J), approved as part of the research design (See Appendix A). This koha (a voucher) was not advertised prior to the interview. Second, the results will be disseminated by the RFPS Research Committee to all staff, but will ensure the participants remain anonymous.

3.2.2.3. Exclusion criteria

Health assessors who wrote FST reports, but were not employed by the RFPS during the period of the study, were excluded from the study.

3.2.2.4. Data collection

Participation was voluntary and via invitation from a third party, namely the business support administrator at RFPS to participate in the research. An invitation was placed at the health assessors' monthly Report Writing Forum and sent via email by the business support administrator (See Appendix C.) Any potential health assessors who expressed an interest in taking part in this study were given a Participant Information Sheet, which provided relevant information about the study (See Appendix D).

The Participant Information Sheet included the project title, an invitation to participate and a description of the purpose of the research. In addition, an explanation of the participants' selection procedure and how they could agree to take part was detailed. Health assessors were then informed of the interview procedure and how their privacy would be safeguarded. They were also informed that they had the opportunity to consider the invitation and could withdraw from the study at any time. If participants chose to withdraw from the study, they would be offered the choice of either having their data removed or allowing it to continue to be used. However, once findings had been produced, removal of the data would not be possible, given the data were fully aggregated and anonymised.

The participants were informed that they would receive general feedback on the results of the research via the Research Committee at the Mason Clinic at the completion of the

study. The participants were able to check a box on the consent form if they wanted a summary to be sent to them by email.

The information sheet had the email contact of the author, as the researcher, and the project supervisor. Potential participants contacted the author either in person, by phone or via email. An interview time was agreed and the consent form completed at the start of the interview. Fifteen participants provided informed consent for the interviews (See Appendix D, Participant Information Sheet). The consent forms were signed at the start of the interviews in a private room on the premises of RFPS (See Appendix D). No participants chose to withdraw from the study.

3.2.2.5. Procedure/interview schedule

During the semi-structured interviews, the emphasis was on the collection of qualitative data from health assessors at the Mason Clinic who had direct experience writing FST assessments. The author considered the merit and appropriate fit of both semi-structured interviews versus focus groups as the means of collecting the required data to align with the research objectives (McNaughton, 2014). Interviews and focus groups are the most common methods of data collection used in qualitative health care research (Gill, Stewart, Treasure, & Chadwick, 2008; Jeanfreau & Jack Jr, 2010). A semi-structured interview is one of three types of interview: structured, semi-structured and unstructured. Semi-structured interviews were considered the best fit as they enable several key areas to be explored, while allowing ideas that arise to be pursued in greater depth (Britten, 1999). This enabled the author to explore and understand the health assessors' decision making processes in this complex area. During the interviews, no definition was given for the word 'impact' and it was up to the individual health assessors to determine how broadly they applied this term to their circumstances.

Emphasis was placed on 'narrative enquiry' in which the respondents were encouraged to relate their thoughts and experiences in terms of the open-ended questions asked (Denzin & Lincoln, 2011). This process enabled an account of the important phenomenon contextually relevant to the respondent and provided valuable data for analysis.

Australian researchers used semi-structured interviews for interviewing criminal lawyers and forensic mental health experts regarding the usefulness of neuropsychological assessments in FST decisions (White et al., 2015). The author

faced practical considerations in the sense that health assessors are busy and their work takes them to different locations, for example courts and prisons. It was important to reach the target participants by setting individual times for semi-structured interviews that suited the participants.

Questions were informed by the literature review and sought to address the gap in existing research. The interview schedule probed the health assessors' knowledge and practices regarding TSL consideration in their assessments, and the impacts (See Appendix E). All interviews were conducted in person, were digitally recorded, and transcribed. Interviews were undertaken across April, May and June 2017.

3.2.3. Analysis

Qualitative thematic analysis was used to examine the interview transcripts and reveal the main themes (Terry, Hayfield, Clarke, & Braun, 2017). The 15 respondents involved in the study were numbered from 1 to 15 based purely on their date order of interview. The occupation and assigned number of the respondent was listed following any direct quotes during the analysis of the themes. This meant the participants were anonymous but could be identified as a psychologist or a psychiatrist.

Qualitative thematic analysis "maps the terrain of thematic analysis (TA), a method for capturing patterns ("themes") across qualitative datasets" (Braun, Clarke, Hayfield, & Gareth, 2018). As Braun et al. (2018) discussed, qualitative thematic analysis can be employed with different interpretive frameworks and, as such, can answer a variety of different research questions. Braun et al. proposed a six phase process of thematic analysis which is a reflexive and recursive process. However, these researchers suggested that to achieve a functional, practical approach the earlier work of Braun and Clark (2006) could be followed (Braun et al., 2018). Consequently this analysis followed the step by step guidelines of Braun and Clarke.

The six phases include the following processes:

1. *Transcribe the verbal data.* This process involves a thorough and verbatim account of all the verbal data (Braun & Clarke, 2006; Poland, 2002).

2. *Generate preliminary codes.* In this step, initial codes identify areas or features of the data from the transcripts which appear interesting to the researcher (Braun & Clarke, 2006). In addition, these codes refer to: "the most basic segment, or

element, or the raw data or information that can be assessed in a meaningful way regarding the phenomenon" (Boyatzis, 1998, p. 63). While this data is being organised into meaningful items (Tuckett, 2005), the units of analysis are narrower than the themes (Braun & Clarke, 2006).

3. *Search for themes amongst the data.* In this theme the researcher sorts and collates the codes into potential themes (Braun & Clarke, 2006). As Braun and Clarke (2006) observed, the researcher is basically determining how the codes can contribute to different themes.

4. *Review of themes as some may merge together.* This stage is a refinement of the themes identified in stage 3. In level one, the coded data excerpts are re-read and considered if they "appear to form a coherent pattern" (Braun & Clarke, 2006, p. 20). Consideration is given to factors such as if the themes are 'stand-alone' in terms of having enough data to support the theme or, alternatively, can they be merged into one theme (Braun & Clarke, 2006). Braun and Clarke indicate that in level two of this step, the validity of the identified themes is considered in terms of the theme's ability to signify the meanings of the collected data.

5. *Define and name the themes.* This step enables the researcher to find the essence of the theme, and gain a view of the overall data in terms of what is captured by the individual themes (Braun & Clarke, 2006).

6. *Analyse the themes and produce the report.* The themes are meant to tell a story and provide interesting and clear examples of the issue, while: "convincing the reader of the merit and validity of your analysis" (Braun & Clarke, 2006, p. 93)

3.2.4. Consultation with Māori and Pasifika

Consultation with Māori regarding this research was imperative. The Māori Health Committee of the Health Research Council of New Zealand (HRC) has produced guidelines "to assist researchers" in this regard (HRC, 2010, p. 1). The HRC (2010) emphasised that all health research undertaken in New Zealand is important to Māori.

The current research did not directly target any cultural group, but involved participants engaged in New Zealand's criminal court processes. As such, a wide variety of cultures were represented in this research, including both Māori and Pasifika peoples. In terms

of culture, neither iwi nor specific Pasifika cultures were reported to assist in keeping confidentiality.

The above mentioned guidelines inform researchers about the processes involved when initiating consultation with Māori in a culturally appropriate way. The intent of the guidelines was to assist as much as possible to ensure that research contributes to both "improving Māori health and enhancing mana Māori" (HRC, 2010, p. 2). The HRC emphasised that Māori as Treaty partners, are a "priority population" requiring suitable health intervention. Thus, Māori involvement in health research is vital. Previous HRC research confirmed "Māori feature disproportionately negatively in most well-being statistics that have been gathered nationally" (HRC, 2010, p. 3).

This study design acknowledged the Treaty of Waitangi's three guiding principles—partnership, participation and protection. The research intended to encourage a mutual respect and benefit between the researcher and the staff at RFPS and for past, current and future defendants. The author offered to share her knowledge of FST and the TSL through a feedback seminar for all staff members so that they, and the people they serve, could get the benefits of the findings (see Appendix B; Consultation with Māori and Pasifika).

The researcher obtained approval from the District Health Board to carry out this study. Approval involved consulting three times with Lifeng Zhou, Senior Epidemiologist at the District Health Board, New Zealand Health Foundation for Asian and Ethnic Communities (Awhina Research and Knowledge Centre).

In parallel, the researcher conferred with both Māori and Pasifika cultural consultants and employees of the Māori Therapeutic Unit (Tane Whakapiripiri) at RFPS. These consultations included helpful discussions with Trudie Field (Registered Nurse) and Nick Wiki (Unit Manager) who provided valuable insights as to the particular needs in relation to the Unit. The researcher had the benefit of on-going liaison and consultation with Te Mamaeroa Cowie (Māori Senior Cultural Advisor) from the RFPS. Dr Helen Wihongi (Māori Advisor – Research, District Health Board) also provided encouragement. Tafesilafai Lavasii (Pasifika Senior Cultural Advisor) at the RFPS participated in a beneficial background discussion, which helped to affirm the process. The insightful contributions of AUT's Matauranga Māori Committee on 6 July 2016 further informed and enriched the study (See Appendix B).

Following these early consultations, the author successfully presented the proposal to the RFPS Research Committee (under the Chair of Dr Susan Hatters-Friedman) on 16 June 2016. The Chair then referred the researcher to the Awhina Research and Knowledge Centre. The proposal was approved by that Centre, the Mason Clinic Research Committee, the Regional Manager and the Clinical Director (See Appendix A).

3.2.5. Ethics

The study was approved by AUT's Ethics Committee (15 December 2016, AUTEC Reference number 16/427; see Appendix A). The author obtained a locality agreement approval from the RFPS with a sign off from the Clinical Director and the Manager, and Awhina Health (District Health Board, see Appendix A). The author used the database collection form to collect information required in Part 1 of the study. Part 1 did not involve any direct contact with health assessors or defendants. In addition, the author ensured that data were de-identified, anonymised and remained confidential. The research assistant and the transcriptionists all signed confidentiality forms.

The design of the study respected *defendant* confidentiality. The data were derived from archived reports that were de-identified and anonymised. The author was aware that socio-demographic data could potentially be linked with a particular offence to identify a particular individual, and consequently extremely reduced the amount of demographic data collected. In addition, the specific age of the defendants was not indicated; rather, four age-bands were utilised. The reports were de-identified and the data in them will be presented in an aggregated anonymised form.

The semi-structured interview data was gathered from the health assessors practicing with the RFPS during the study period. In terms of experience of writing FST reports in New Zealand, the majority of participants (11) had at least five years' experience and four had less than five years' experience.

The indicative questions are listed on the 'Interview Questions' form (See Appendix E). Specific identifying participant data was not collected to help ensure anonymity. Themes identified in this study were presented under the general heading of 'health assessor'. The transcriptions of the interview were kept in a password protected computer and the consent forms were initially kept in a locked cabinet at the RFPS premises while they were collected, and then held in a locked cabinet at room AR337 at

AUT North Shore. They will be destroyed six years after the doctorate is awarded. Anonymised material collected from the interviews will be used in the thesis, academic publications and presentations.

CHAPTER 4. FINDINGS OF THE RETROSPECTIVE FILE REVIEW

In this chapter, the findings from the data obtained from the FST reports undertaken during the period 30 June to 30 October 2015 are presented using descriptive statistics (rounded for clarity when presented as percentages). In addition, a thematic analysis of TSL references in fitness reports is reported. The analysis followed the guidelines of Braun and Clarke (2006) as set out in Chapter 3. The data were examined for codes and two themes emerged.

4.1. RETROSPECTIVE FILE REVIEW: DESCRIPTIVE STATISTICS

Auditing of the data set for accuracy of input involved checking that all data points were entered. When missing data were identified, the files were re-examined for the missing information.

The retrospective file review analysed s 38 reports during the period 30 June to 30 October 2015. These reports were collated into categories; fitness, pre-sentence, insanity and disposition. The focus of the research was on fitness reports; therefore, these were targeted for analysis. Descriptive statistics were employed on the resulting sample of 103 fitness reports during the targeted period. This involved an analysis of socio-demographic statistics of the defendants referred to in each fitness report. In addition, the research collated the number of fitness reports which involved three strikes offences, the health assessors' professions and the important question of how many assessors chose to comment on the TSL when the defendant was facing a three strike charge. The particular TSL offence was identified under the three strikes 40 gazetted offences. The data also examined where the assessors documented their comments on the TSL within their assessment.

4.1.1. Overall report type

A total of 165 reports were analysed. Table 3 and Figure 3 (p. 98) present the break-down of report type. Of the total number of reports over the time frame, 103 reports were identified as 'fitness' reports.

Table 3: *Overall Report Type*

Report Type	N	Percent
Disposition	9	6%
Fitness	103	62%
Insanity	4	2%
Pre-sentencing	49	30%
Total	165	

Figure 3 shows the overall report type within the sample collected during the four month period from 30 June to 30 October 2015.

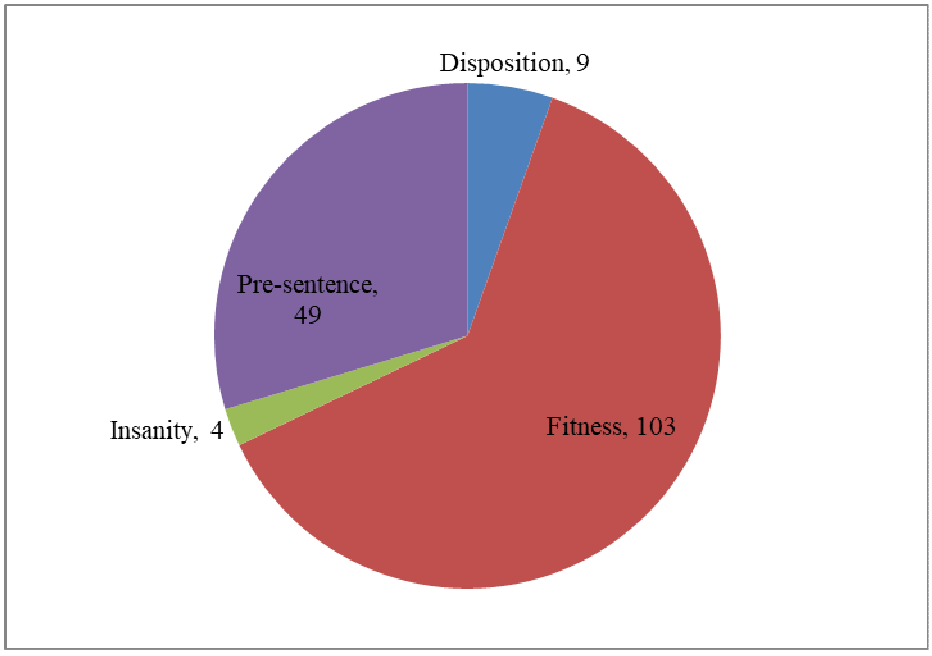

Figure 3. Type of report

In Figure 3, the clear majority of reports analysed over the four month period were fitness reports at 62%, followed by pre-sentence reports at 30% and a small number of disposition and insanity reports.

The 103 fitness reports related to 71 specific defendants who had a varying number of fitness assessment reports written on them during this period. It is noted that additional reports may have been written before and after this period on these defendants; however, only the reports appearing in the sample period were examined. While most

defendants (45) had one fitness report written during this period, 21 had two reports, and a small number had a larger number of reports completed (four defendants with three reports and one defendant with four reports respectively). Figure 4 shows the number of fitness reports compiled per defendant during the time period (30 June to 30 October 2015).

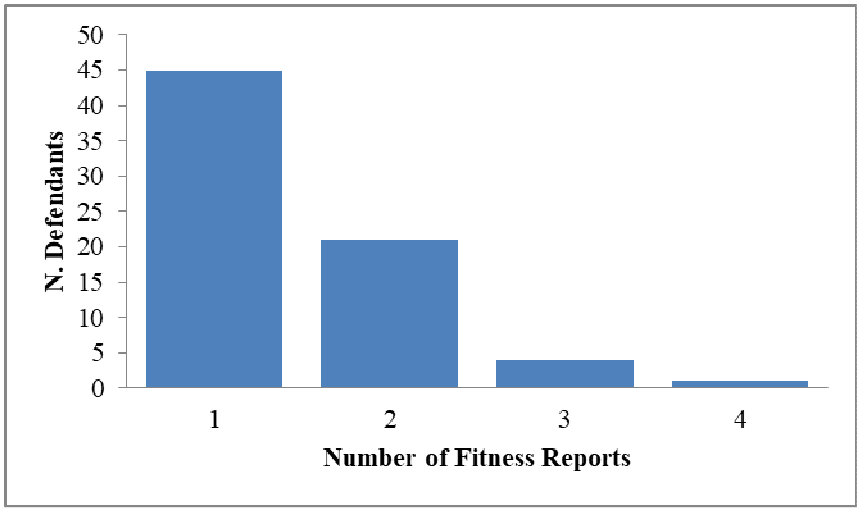

Figure 4. Number of reports per defendant

The fitness reports were analysed using descriptive statistics. These statistics described the general demographic factors of the defendants referred to in *all* of the fitness reports, regardless of the type of offence.

4.1.2. Fitness reports

Table 4 (p. 100) sets out both the gender and the age of the 71 defendants in the sample. The majority of defendants referred to in these reports were male (89%), with the remaining 11% female. To maintain confidentiality, the age of the defendants was assigned to one of four categories; namely under 35 years, 35 to under 40 years, 40 to under 60 years and over 60. The age bands chosen were those that had recently been developed in the literature as non-arbitrary metrics (Hanson et al., 2012). The largest group of defendants (60%) were within the younger category (under 35 years), while the second largest group (24%) was in the 40 to under 60 category. The third most populated category (13%) was defendants aged over 35 to under 40 years. As expected, the over 60 years category had the smallest number of defendants (3%). Table 4 also differentiates the age categories between male and female. The most populated category was the under 35 category, for both males and females.

Table 4: *Age within Gender for Defendants with Fitness Reports*

	Gender		
Age class	Male	Female	Total
<35	36	7	43 (60%)
>=35,<40	9	0	09 (13%)
>=40, <60	16	1	17 (24%)
>=60	2	0	02 (03%)
Totals	63 (89%)	8 (11%)	71 (100%)

Regarding ethnicity, the categories employed in this study were matched to those used by New Zealand Statistics. Hence, ethnicity was presented under the following categories; Māori, Pasifika, European, Asian and Other. Table 5 (p. 101) indicates the ethnicity breakdown of the defendants (referred to in the fitness assessment reports). Māori, 30%; Pasifika, 28%; and European, 31% were the major ethnicities with Asian defendants having a small representation at 6%, and the general 'Other' category 1%. Based on the identification of the ethnicities by the health assessors, four defendants were classed under two ethnic categories; namely Pasifika/Māori, Pasifika/European, Māori/European and Māori/Other.

Figure 5 (p. 101) illustrates the ethnic breakdown of the defendants. The figure indicates the three major ethnic groups prevalent in the fitness reports, namely Māori, Pasifika and European.

Table 5: *Ethnicity and Gender for Defendants in Fitness Reports*

Ethnicity	Gender		Total	Percent of total
	Male	Female		
Māori	16	5	21	30%
Māori /European	1	0	1	1%
Māori /Other	1	0	1	1%
Pasifika	17	2	19	28%
Pasifika/Māori	1	0	1	1%
Pasifika/European	1	0	1	1%
European	21	1	22	31%
Asian	4	0	4	6%
Other	1	0	1	1%
Total	63	8	71	100%

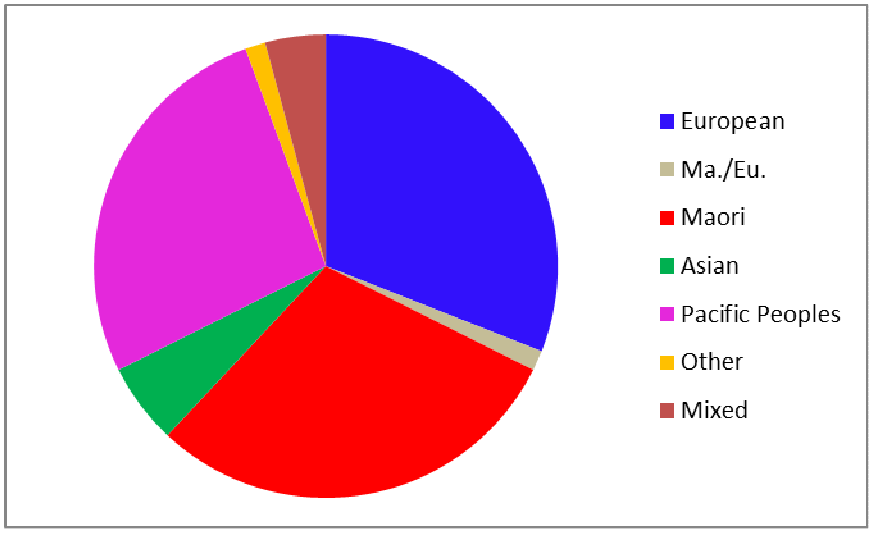

Figure 5. Ethnic breakdown of defendants in fitness reports

4.1.3. Summary of content above

A total of 165 reports were accessed from the retrospective file review relating to 71 defendants identified during the four month period of 30 June to 30 October 2015. The predominant report type was FST reports (n=103), and only these reports were included in further analysis.

4.1.4. Analysis of defendants under three strikes law

Of the 71 defendants identified during the research period as having fitness reports, 28% were found to have offences listed under TSL legislation (see Table 6).

Table 6: *Three Strike Gazetted Offences by Defendants*

Three-strike offence	N	Percent
Yes	20	28%
No	51	72%
Total	71	

While a total of 20 defendants were found to have TSL related offences, Table 7 indicated that five defendants did not qualify under TSL legislation, with two being under 18 years of age at the time of alleged offending, and three due to their alleged offences having been committed prior to the enactment of TSL on 1 June 2010.

Table 7: *Valid and Invalid Categories of Three Strike Offences by Defendants*

Three-strike validity	N	Percent
Invalid <18 years	2	10%
Invalid pre 2010	3	15%
Valid	15	75%
Total	20	100%

The remaining 15 'valid' TSL defendants were overwhelmingly male with only one female TSL defendant. Table 8 sets out the age range of the defendants with the majority being under 35.

Table 8: *Age Range of Defendants with Valid Three Strikes Offence(s)*

Age	N
<35	8
>=35,<40	1
>=40, <60	5
>=60	1
Total	15

Table 9 sets out the ethnicity of the defendants referred to in the valid TSL reports with the majority of either Māori or European ethnicity. The remaining reports featured primarily Pasifika or people of Asian descent.

Table 9: *Ethnicity of Defendants with Valid Three Strikes Offence(s)*

Ethnicity	N
Māori	5
Pasifika	2
European	5
Asian	2
Other	1
Total	15

Table 10 sets out the various offences under the TSL with which the 15 defendants have been charged. Some defendants had more than one offence and more than one example of a particular type of offence. These offence types were collected to identify which defendants were facing TSL offences within the FST reports studied. These offences are not specifically related to individual defendants to protect defendants' privacy.

Table 10: *Offence Type*

Offence type
Sexual violation; Attempted sexual violation
Indecent assault
Sexual violation; Sexual connection
Sexual violation; Sexual connection with a child
Indecent act on child
Indecent assault male 12- 16 years; Other kidnapping
Indecent assault; Abduction for sexual connection
Murder
Wounding with intent grievous bodily harm (GBH)
Aggravated robbery
Use firearm against a law enforcement officer

Concerning the type of TSL offence, Figure 6 illustrates the TSL offences—violence, sexual and sexual and violence—in regards to the 15 defendants. While the numbers are small, seven defendants had sexual offences, six had violence offences and two had offences from both categories.

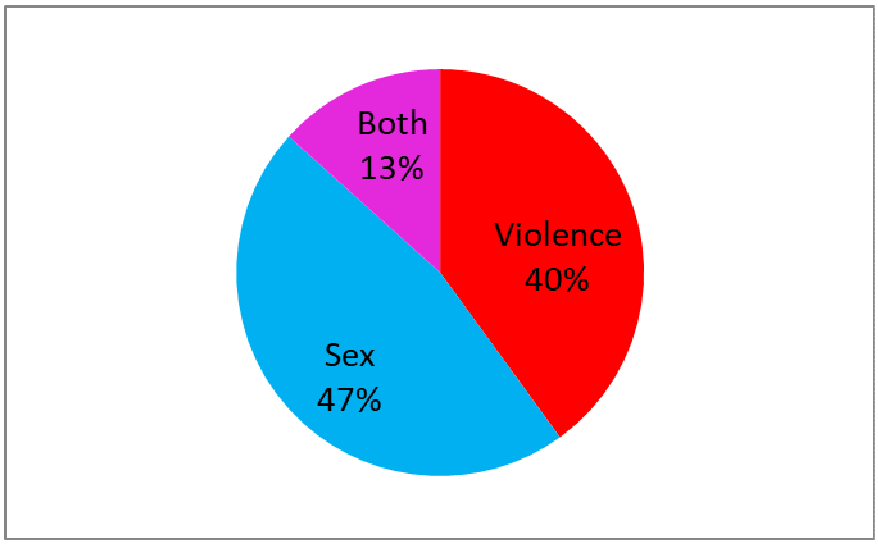

Figure 6. Offence category related to defendants n=15

The offence categories were relatively evenly divided in regards to the defendants' TSL sexual and violent offences, with only two defendants (13%) featuring both sexual and violent offences.

4.1.5. Reports featuring three strikes law offences

As previously stated, there were 103 fitness reports. The following results focus on the reports which were identified as referring to the 'three strikes offences', namely the 40 qualifying sexual and violent offences, which have a penalty of seven years or more (as listed in the Sentencing and Parole Reform Act, 2010). Of the 103 reports, 32 featured TSL offences, while the other 71 reports did not. These TSL offences were immediately defined as 'valid' or 'invalid', based on the associated two factors which preclude three strikes charges being under the TSL; namely that the defendant was under 18 years at the time of the charge, or the charges related to the time period prior to the enactment of the New Zealand Sentencing and Parole Reform Act, 2010, that is prior to 1 June 2010.

Subsequently, almost a third of these TSL offences were classed as *invalid;* with 6% of these alleged offences relating to defendants under the age of 18 years and 25% relating

to alleged offending pre 1 June 2010; therefore, not qualifying under TSL. These results are presented in Table 11.

Table 11: *Valid and Invalid Categories of Three Strike Offences by Reports*

Three-strike Validity	N	Percent
Invalid <18 years	2	6%
Invalid pre 2010	8	25%
Valid	22	69%
Total	32	100%

The number of valid reports for further analysis was reduced to 22.

Given that most of the defendants assessed for FST were in the younger age bands it is apparent that TSL stands to impact more severely on younger offenders. In addition, this sample of adult defendants referred for FST reports found an over-representation of Māori and Pasifika, with Māori representing 30%, Pasifika 28% and European 31%. Asian defendants had only a small representation at 6% and 'Other' ethnicities comprised the final 1%. In regards to these simple statistics for age, gender and ethnicity, the current study demographics very much mirrored those proportions of adults within the courts and the Department of Corrections in New Zealand.

4.2. THREE STRIKES OFFENCES (VALID REPORTS)

4.2.1. Characteristics of three strikes offences reports

The following section focuses on the FST reports containing valid TSL offences. As in the general FST reports, the number of reports on each defendant varied. Overall 15 defendants had a total of 22 reports prepared by health assessors, which were accessed during the targeted period. These reports were examined to determine how many assessors commented on TSL within the assessments. In addition, the reports were analysed to determine under which (if any) legislation the assessors had commented on TSL within the particular reports. Figure 7 (p. 106) presents the number of reports per defendant, with the majority of defendants having only one report written during the reported time period.

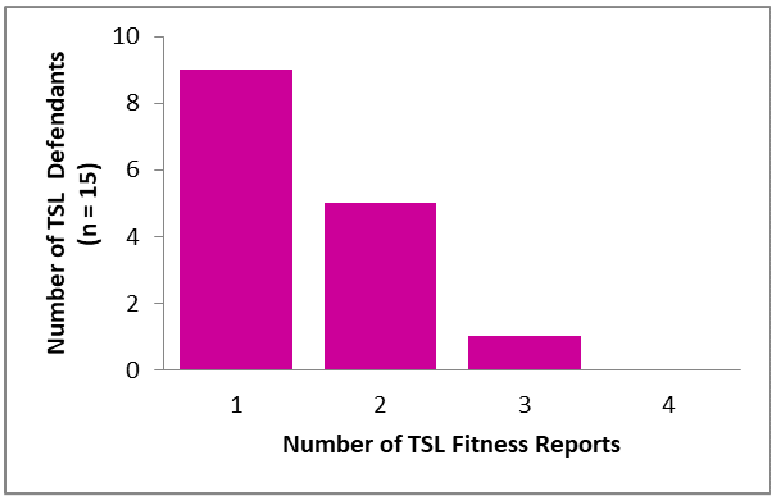

Figure 7. Number of TSL fitness reports per defendant

The following tables specifically refer to characteristics of the reports studied. Table 12 sets out the offence categories listed under the TSL legislation. The predominant offence categories featuring are aggravated robbery (22.8%), indecent assault (18%) and indecent act on a child (13.6%).

Table 12: *Offence Type and Number by Report*

Offence type	N of Reports	Percent
Sexual violation; Attempted sexual violation	1	4.6%
Sexual violation; Sexual connection	1	4.6%
Sexual violation; Sexual connection with a child	1	4.6%
Indecent act on child	3	13.6%
Indecent assault	4	18.0%
Indecent assault; Abduction for sexual connection	2	9.0%
Indecent assault male 12-16 years; kidnapping	1	4.6%
Murder	2	9.0%
Wounding with intent GBH	1	4.6%
Aggravated robbery	5	22.8%
Use firearm against a law enforcement officer	1	4.6%
Total	22	100%

4.2.2. Health assessor decisions within three strikes reports

The reports which featured TSL offences were primarily undertaken by psychiatrists, with only one report written by a psychologist. In this case, the psychologist did

comment on the TSL. Overall, just under a third of the assessors commented on TSL as seen in Table 13.

Table 13: *Discussion or Not of Three Strikes Law by Assessor in Report*

Discussed	N	Percent
Discussed	7	32%
Not Discussed	15	68%
Total	22	100%

Table 14 sets out the offences in the TSL and lists if assessors discussed TSL in relation to the particular offence category.

Table 14: *Specific Strike Offence Discussed Versus Not*

Offence	Discussed	
	Yes	No
Sexual violation; Attempted sexual violation	0	1
Sexual violation; Sexual connection	0	1
Sexual violation; Sexual connection with a child	1	0
Indecent act on child	1	2
Indecent assault	2	2
Indecent assault; Abduction for sexual connection	0	2
Indecently assaults male 12-16 years, kidnapping	1	0
Murder	0	2
Wounding with intent GBH	0	1
Aggravated robbery	2	3
Using firearm against law enforcement officer	0	1
Total	7	15

Table 15 (p. 108) sets out under which category within the FST reports the assessors discussed the TSL. These categories included the discussion being placed under the CP(MIP) Act, the *Presser* criteria, the general FST heading and the category 'Other', a stand-alone category. With only seven reports, this represents a very small sample; however, the health assessors tended to discuss the TSL criteria under both the CP(MIP) Act criteria and *Presser* criteria, as well as under a further heading of 'Other' or FST. In two reports, the health assessors discussed TSL solely under FST. The sole

psychologist discussed their findings under both CP(MIP) criteria and 'Other' and did not refer to *Presser* criteria. The 'Other' category was a heading produced in some reports as a stand-alone section about TSL.

Table 15: *Three Strikes Law Discussion Category*

Where Discussed	N
CP(MIP) & Presser	1
CP(MIP) & Presser and 'Other'; stand-alone paragraph	1
CP(MIP) & Presser and FST	2
CP(MIP) & 'Other'; stand-alone paragraph (*Psychologist)	1
FST	2
Total	7

4.2.3. Summary

Of the 71 defendants identified during the research period as having fitness reports, 20 defendants (28%) were found to have offences gazetted in the TSL. However, the TSL sets out that only those individuals who undertook their offending subsequent to the TSL and who were aged 18 years and older at the time of their offending would meet the requirements of the TSL. Only 15 of the 20 defendants (75%) were potentially liable to be sentenced under the TSL, should they be found fit to stand trial and subsequently guilty.

While this is a small sample, the TSL defendants also reflected the socio-demographic characteristics of the larger retrospective sample and were overwhelming male with only one female in this sub-group. Similarly, most defendants were in the 'under 35' age group with fewest in the over 60 category. The ethnicities of this sub-group were again relatively consistent with the two equally prominent ethnicities being Māori (n=5) and European (n=5), followed by Pasifika (n=2), Asian (n=2) and Other (n=1). In this regard, Māori are particularly over-represented given they are one third of the sample yet only comprised 15.6% of the New Zealand population in 2015 (Statistics New Zealand, 2015).

4.3. QUALITATIVE THEMATIC ANALYSIS

A thematic analysis was undertaken using Braun and Clarke's (2006) approach to examine the written content within the relevant health assessor reports that referred to

the TSL. Analysis enabled the development and naming of theme(s) emerging from the sampled three strikes reports in which assessors commented on TSL. Due to the low number of such reports (n = 7), only two themes emerged.

4.3.1. Theme 1: Knowledge of three strikes law

Theme 1 described a spectrum of knowledge about the TSL from very little, to some, to a good understanding.

4.3.1.1. Lack of knowledge

In most reports, the defendants had not heard of the TSL and the health assessors commented on the emotional states of defendants when hearing about the law. As discussed by one assessor: "*When questioned regarding the three strikes legislation and how this applied to his court hearing, the defendant was perplexed. He stated he had not heard of this and was not sure how it would apply to him*" (Psychiatrist). Some defendants were reported to have no knowledge whatsoever of the TSL: "*He did not appear to understand the concept of the colloquially termed three strikes rule or whether this might be a qualifying charge*" (Psychiatrist).

In one report, the health assessor indicated that he or she had been asked by a Judge in a previous report for consideration of a 'three strikes' implication. The assessor then reported the following under the general FST heading:

> Mr X could not recall our discussion about the 'three strikes legislation' from when I reviewed him in early May 2015. He thought that it likely meant "three strikes and you're out… it means getting locked up". He thought that his lawyer had likely talked to him about this and noted that he would ask her about it again. He accepted an explanation about this legislation and appeared to understand that this was an added level of severity to his charge. (Psychiatrist)

The health assessor later discussed the finding under both CP(MIP) and *Presser* criteria in terms of what the defendant had and had not been able to retain about the charge against him. After discussing that the defendant had retained that the charge was serious, she reported:

> He has not appeared to retain information regarding the three strikes legislation, but appears aware of the seriousness of this and has noted that he will talk to his lawyer about this issue. He appears to understand the possible consequences of court proceedings. I suspect his understanding of the three strikes legislation will improve with repetition of the consequences. (Psychiatrist)

On another occasion, a health assessor relayed how the defendant responded when the health assessor had raised the TSL with the defendant:

> He did not appear to fully understand the implications of this and did not appear concerned about it. When I asked him about the three strikes legislation later in the interview, he was either unable or unwilling to recall what I had said before. I therefore explained it to him again. (Psychiatrist)

Of interest, in this report, the health assessor had contacted the defendant's lawyer, who had informed the health assessor that the lawyer had told the defendant about TSL, and how this related to his charge. Nevertheless, although the health assessor had presented the TSL information again, the defendant was not able to recall the information: "*He had not appeared to retain information regarding three strikes legislation*" (Psychiatrist). Thus, the defendant was twice informed about TSL but still did not understand it. This could, in turn, relate to the defendant's capacity.

4.3.1.2. Some awareness

Another defendant had also discussed the TSL with his lawyer, but appeared to have a reasonable understanding:

> He stated he has had a discussion with his lawyer related to the alleged charge and the concept of the three strikes warning. He stated that the current alleged charge would be considered his "*first*" strike, particularly if he was found guilty, or he enters a guilty plea… He stated "This will be my first one. If I do this three times I will definitely go to prison". (Psychiatrist)

This health assessor found that the defendant had a reasonable understanding of the TSL. Another health assessor also discussed the same defendant's general satisfactory awareness and knowledge of the TSL:

> Mr X's understanding of the three strikes rule was explored and Mr X showed an awareness that the first strike was a 'warning'. Mr X understood the second strike in terms of – if the maximum sentence was seven years and he received three years, he would have to serve the whole three years and would not be entitled to parole. Mr X understood the third strike in terms of serving the whole seven years. Mr X initially showed less awareness of the implication that other offences were also subject to the three strikes rule but his understanding of this improved following careful explanation. (Psychologist)

It was apparent that many defendants had a partial but not detailed understanding of the TSL. One health assessor, after discussing the nature of the charge and what this entailed, indicated that a discussion on TSL followed:

> This led on to a discussion of the three strikes rules, which he was able to tell me meant in this instance that if he was found guilty (of this offence) then he would "*get a warning*" and the punishment that the court decided, that if he did it again he would "*get another warning and three years*" and that if he did another time after this then he would "*get seven years (in prison)*". (Psychiatrist)

The same health assessor then reported that it was unclear if the defendant understood the broad aspects (of the TSL) including, "*That this particular charge was a member of a group of serious charges that had been identified for particular attention, to deter repeat, serious offending*" (Psychiatrist). In this evaluation, it was apparent the defendant did not have a sense of what constituted a TSL offence. The health assessor considered that the defendant, despite this factor, was well aware that there would be: "…*very serious consequences*" for him should he continue to offend with this type of serious offending. This health assessor summed up the defendant's knowledge of the TSL as: "*Included in this is his understanding of the general principles of the three strikes or warnings that this charge falls under for sentencing (should he ultimately be found guilty of this and repeats such behaviour in the future)*" (Psychiatrist). As was evidenced in this group of defendants, many had a partial understanding of TSL, including a sense that with increasing strikes there were increasing consequences.

4.3.1.3. A good grasp

One defendant who was aware of the TSL had a reasonably good grasp of the legislation: "*He was aware of the three strikes legislation, stated that he had one strike already and if convicted could face a second strike and a prison sentence without parole*" (Psychiatrist). Another defendant assessed also had some initial understanding of the TSL, albeit not the finer points of the law:

> Mr X independently showed some understanding that his current charge …was subject to the Sentencing and Parole Reform Act 2010-strike 1. He appeared to understand that the penalty for further offending would be graver, however, even after further clarification, it was unclear whether Mr X had sufficiently processed the information to the point that he fully understood the meaning of strikes 2 and 3 and this aspect could likely benefit from repeat explanations in his native language during any court process. (Psychiatrist)

One defendant was aware that he faced a first strike and had: "*a reasonable and simplistic understanding of the three strikes warning"* and understood that if he offended three times "*I will definitely go to prison*" (Psychiatrist).

In summary, it was apparent the defendants' understanding of the TSL varied, from one defendant who had a good grasp of the future implications of this law, to a defendant understanding that future strikes caused more serious consequences, to those defendants who had not heard of this law and were not able to grasp the implications of the law during the assessment interview with the health assessor.

4.3.2. Theme 2: Creating awareness

Health assessors who raised the TSL in their report were found to have universally assessed the defendant's understanding of the TSL. In the first instance, the health assessors generally questioned the defendants about their understanding of the TSL: "*he had a working knowledge of three strikes legislation*" (Psychiatrist). If understanding was not present, health assessors often commented that they carefully went through the simple details of the legislation and asked the defendant if they understood. A possible next step would be for the health assessor to gain further evidence of the defendant's understanding by asking defendants to explain their understanding of the TSL in their own words.

On all occasions, when the defendants did not know about the TSL, the health assessors gave an explanation of what the TSL law involved and "*his understanding of this improved following careful explanation*" (Psychologist). In most explanations given about the TSL, the first warning was explained in detail. The 'final warning' (strike 2) and the third strike were detailed in an abstract rather than concrete fashion that 'additional serious offending' would lead to more serious consequences:

> It was explained in broad terms, and if the provisions were triggered, the legislation meant that a finding of guilty will mean that a conviction is entered, and the Judge may warn the defendant about what would happen if the defendant committed another serious offence and the warning would mean that if the defendant did commit a further serious violent offence, and was sent to prison, the defendant would serve the full term. (Psychiatrist)

To determine the defendants' retention of information about TSL, health assessors revisited the TSL topic towards the end of the interview and asked defendants what they recalled about the TSL: "*When I asked him about the three strikes legislation later in*

the interview, he was either unable or unwilling to recall what I had said about this" (Psychiatrist).

The health assessors then reported back to the judge (via their reports) if the defendant understood the TSL and their level of understanding: "*He did not appear to understand the concept of the colloquially termed three strikes rule or whether this might be a qualifying charge*" (Psychiatrist).

Hence, it was apparent health assessors were attempting to educate the defendants about TSL during the brief interview process. The assessors commented on the defendants' understanding of the TSL and their ability to retain this understanding during the assessment process. The implication arising from these summaries was that if the defendant was able to recall and repeat the basics of the TSL, they had enough understanding of the law in terms of fitness capacity. However, some health assessors may simply ask defendants if they understood the TSL. While they may have asked the defendant to repeat back what they understood, this is uncertain, given it was not detailed in the reports. However, some health assessors went further and required more robust evidence of understanding; they asked defendants to repeat back in their own words their understanding of TSL. Health assessors then evaluated the defendant's understanding of TSL: "*he accepted an explanation about this legislation and appeared to understand that this was an added level of severity to his charge*" (Psychiatrist).

If the defendant did not know about the TSL, and could not retain the information given to him or her during the course of the fitness interview, then the defendant was not considered to understand the law.

4.3.3. Summary of themes

Two related themes arose in the small sample of reports referring to TSL written by health assessors. The defendants' knowledge of TSL ranged from no previous awareness of this legislation through to defendants having a good understanding of the basic tenet that additional offending (of a similar nature) would lead to more serious consequences in terms of sentencing.

Some defendants were able to identify the three strikes related to this law and to summarise the consequences of these strikes. In regards to the defendants who did not know about the TSL, health assessors introduced this law to them, and attempted, during the course of the interview, to assess if the defendants had retained a basic

understanding of the law. Firstly, they told them about the law in simple terms, and towards the end of the interview sought to find out if the defendant had recalled and understood the concepts. Secondly, if the defendant could not recall the health assessor's summary of the TSL, this was repeated and the defendant was then re-assessed as to his or her subsequent understanding and or recall of this law.

CHAPTER 5. THEMATIC ANALYSIS OF HEALTH ASSESSOR INTERVIEWS

5.1. INTRODUCTION

Thematic analysis enables the synthesising of complex data into rich seams of insightful determinations. As Terry, Hayfield, Clarke and Braun (2017) commented: "Rich and complex data on a given topic are the crown jewels of qualitative research, allowing us deep and nuanced insights" (p. 22).

In this research, the data were mined from semi-structured face to face interviews. The source of the 'gems' in this study were the health assessors who volunteered to participate in the research. These health assessors were both psychologists and psychiatrists. Their views on the impact of the TSL on their assessments of defendants mandated for FST assessments were collected and analysed using inductive coding and theme development.

5.1.1. Sample description

The 15 health assessors in this study were employees of the RFPS. Participation was voluntary and health assessors were alerted to the study first, by means of an invitation from the business support administrator at this service, and second, from a notice placed at the health assessors' monthly forum. The author subsequently contacted the potential health assessors and undertook with them the formal research participation protocol. The first 15 health assessors who volunteered to take part in the research were then recruited for the study. Of these 15 clinicians, nine were clinical psychologists and six were consultant psychiatrists. In terms of experience in writing FST reports the majority of participants (11) had at least five years' experience. The remaining four had less than five years' experience in this area.

5.1.2. Findings from semi-structured interviews

Five broad themes were identified. These included the view that the TSL was a 'sledge-hammer' legislation and complex law. Health assessors also considered that often they were the first professional group to discuss the TSL with the defendants and did not consider this was their job. Two further themes were that the TSL was viewed as having unintended consequences for already vulnerable populations, and that health

assessors were not clear 'what they should be doing' concerning various aspects of the TSL. Health assessors were forced to make decisions on areas for which they had not previously had specific training or practice guidelines. Under each of these themes, sub-themes that targeted important aspects of the overall theme were detailed.

5.2. THEME ONE – 'SLEDGE-HAMMER LEGISLATION'

Theme One, 'sledge-hammer legislation', was a strong theme amongst nearly all respondents, with the perception that the legislation was harsh, politically inspired and did not promote social justice or rehabilitation. In this regard, it was considered unfavourably by most respondents. Two sub-themes emerged; the first in which health assessors pondered if the TSL was really a deterrent to future offending, and the second, the apparent consequence of the TSL in terms of reduced options for rehabilitation for sentenced prisoners under TSL.

The legislation was viewed as 'sledge hammer legislation' with many assessors considering it 'horrendous' in terms of the application of criminal justice. Respondents viewed the law negatively. According to one: "*At a personal level I think it's a stupid piece of legislation so it always infuriates me coming up against it clinically, medically, or legally*" (Psychiatrist, 14). This position demonstrated the pressure that dealing with the TSL ultimately placed on the assessor.

The respondents focused on the negative effects of the legislation as they saw it. While one health assessor used the descriptive term 'sledge hammer legislation', several other health assessors used terms that implied the legislation was a blunt instrument, and excessively punitive for defendants.

Respondents also tended to view this legislation as 'black and white' because it did not respond to the mitigating or contextual factors of the case. One psychologist framed this in a psychological fashion, referring to the TSL: "*It sort of takes away the greyness case by case*" (Psychologist, 6). This indicates that the TSL was viewed as not enabling a focus on the individual details of the case. Concerns included the restricted sentencing options mandated by the law and what the respondents viewed as the concurrent reduction in access to offence-related therapy: "*In other cases we do perhaps take away people's liberty and their right to change, their right to be given support*" (Psychologist, 6).

Many respondents saw the legislation as politically driven, derived from the involvement of the Sensible Sentencing Trust who was instrumental in promoting the TSL to the ACT Political party in New Zealand. This party was part of the coalition government in 2008 who introduced the law: "*I don't think it's sensible. I think its Sensible Sentencing Trust driven amendments which I don't think are very good personally*" (Psychiatrist, 12). This assessor expanded her view of the inequities she believed would be produced:

> It will perpetuate the inequalities within the justice system and … the other issue is that, the laws are essentially passed by politicians and, and are subject to … the Sensible Sentencing Trust and the moral majority and people who, whose lives are completely different … the criminogenic vulnerabilities are, are just a million, million miles away. I don't like the introduction of the three strikes and, and I think it's really damaging, that absolutely no mitigation for anything can be taken into consideration. (Psychiatrist, 12)

On occasion, assessors compared the TSL in New Zealand with the corresponding law from the United States to explain their objections: "*I'm aware in the States where they've got similar laws, United States that there's been some instances of miscarriages of justice and totally outrageous penalties*" (Psychologist, 8). Several respondents found aspects of the TSL resonated with the negative, punitive consequences they observed in the United States' TSL. Assessors, in these instances, were dismayed that they may be the agents of injustice, rather than a 'helping profession'. One respondent criticised the imbalance between the crimes and the corresponding sentences: "*Regarding the offences some of them have variable levels of severity, so somebody who commits at the very lowest end of the severity of that particular offence-could find themselves doing a really disproportionately high amount of time*" (Psychiatrist, 12). In this instance, the psychiatrist raised another concern about the legislation; namely that offence characteristics are not necessarily able to be taken into account during the mandated sentencing process.

The TSL was almost universally, considered by assessors to be hugely and detrimentally impactful on defendants. At the same time, respondents were unsure if the law would have a deterrent effect as discussed in the next sub-theme. Regardless of whether the TSL was in fact a deterrent, assessors were required to conduct assessments on TSL. Assessors were also concerned about missed opportunities for rehabilitation if

defendants were found fit and sentenced to imprisonment following the TSL assessment process.

5.2.1. Deterrent effect

Despite some participants viewing the TSL as being coarse legislation without fine tuning: " (*I*)*t's sledge hammer legislation*" (Psychiatrist, 12), the deterrent effect of TSL was contentious. One respondent cautioned that the negative effects of the TSL were stronger than any positive features:

> Despite all the efforts they make, the forces that pull you down are much stronger than the forces that pull you up to be frank, so it has no benefit for the individual, it has no benefit for the system … and the arguments that by giving people these long sentences they will have a deterrent effect is just nonsense. (Psychologist, 1)

This respondent considered that the TSL had no deterrent effect on the individual's criminal behaviour or benefit to society.

In addition to the questions raised about the TSL's deterrent potential and effect, a related sub-theme was that the focus on the anticipated deterrence by the legislators actually resulted in reduced access to rehabilitation pathways. This is discussed as the next sub-theme.

5.2.2. Reduced rehabilitation

Assessors are clinicians, either psychiatrists or psychologists. Thus, their primary role as assessors is to evaluate the clinical and mental health status of an individual and, where appropriate, to recommend treatment. Respondents consistently observed that defendants subject to a second or third strike would be unlikely to receive therapy in prison for many years. This was of concern to participants who were assessors trained in therapeutic interventions.

A recurrent concern was that prisoners should get rehabilitation in prison, rather than just punishment, even if they have re-offended. Assessors had to cope with the realisation people who were found unfit might access services while those found fit and sentenced to prison might not access services. As one respondent observed: "*I think particularly as psychologists we are more about developing a therapeutic relationship to gain the best out of our client, to work with them and … to get the potential*"

(Psychologist, 9). In each case, the psychologist considered developing a therapeutic relationship was key to working with a defendant.

Mental health concerns were often seen by the respondents as a contributing factor to offending and re-offending. Respondents believed that rehabilitation was crucial. However, the TSL was not seen as promoting rehabilitation; rather, the institutional focus following a second or third strike was regarded as punishment. The assessment became relevant to rehabilitation decisions:

> Oh this person is on their second strike. You know if they do this again, some poor unfortunate mental health patient who keeps on when he's unwell, keeps on touching women on the bum or the breast or something. So if he does it again, he's going to get seven years in prison. You know this is quite a substantial rehabilitation issue; we probably should bring him in for treatment. (Psychiatrist, 6)

Indeed, the TSL was even seen as a psychological barrier to engage in mental health services as rehabilitation was not a primary option*:* "*You don't have the incentive to engage in any programmes or to do any work and in fact you won't be eligible for most of the programmes…*" (Psychiatrist, 11). This respondent questioned if prison under TSL would, therefore, be cementing all the 'bad thinking' prior to any access to rehabilitation. It was suggested that it was not a sensible model to incarcerate individuals for long periods without access to rehabilitative services: "*Putting someone in a prison without access to treatment and rehabilitation for a very, very long time, to me is, it's not wise, it's not helpful it's just the system we have set up*" (Psychologist, 8).

In effect, respondents saw this as setting up offenders to fail. If offenders understand that they may not be released, they may not have incentives to change their behaviour. Thus, TSL was seen as working against a rehabilitation model. The 'sledge hammer legislation' was not considered conducive to encouraging individuals to strive individually to improve and live up to their potential.

5.2.3. Summary

Respondents perceived this legislation in negative terms. The law was not considered as an optimum law for rehabilitation and a pathway towards a more just and safe society. Rather, participants viewed the law as politically motivated, harsh and a barrier to rehabilitation.

5.3. THEME TWO - THE COMPLEXITY OF THE LAW

Theme Two, the complexity of the TSL, was evidenced by two sub-themes. Firstly, in the sub-theme 'It's hard to get your head around it', assessors discussed finding it difficult to determine how the law impacted on fitness assessments. Most assessors reported that the legislation was complicated in terms of the application of criminal justice versus mental health considerations.

Assessors also found the law complex in terms of whether it was primarily a fitness or sentencing issue. This constitutes the second sub-theme. Opinions were divided as to whether the TSL was relevant at all to FST, with some assessors viewing TSL as a sentencing matter.

5.3.1. It's hard to get your head around it

The complexity of the TSL was highlighted by many of the respondents, particularly those assessors who were new to New Zealand. For example, one assessor reported: "*I'm new to the country so it's a new rule to me*" (Psychologist, 9). Assessors who were relatively inexperienced in the role were also often uncertain about the finer details of the law. These aspects included the exact nature of the first warning, final warning and third strike, and the consequences of each strike. One assessor noted: "*I don't know enough about, I don't know that much about it really*" (Psychologist, 8).

In addition, many respondents revealed it was extremely difficult to remember which were the exact 40 serious violent and sexual offences to which the law applied: "*I wouldn't definitely know what qualifies as a three strikes offense and what doesn't*" (Psychiatrist, 14). A strategy that some respondents used was to refer to a list of the 40 relevant offences as indicated in the Act: "*I've got the crib sheet now of the list of strikeable offenses, because I never remember which ones are on it and which ones aren't*" (Psychiatrist, 12). Appendix G lists the 40 relevant offences.

Respondents noted that they were trained as clinicians, not lawyers. They observed that to understand this complex legislation, they would need to become experts in the law. For one respondent, this was an absurd state of affairs because the assessor held a clinical role in which understanding complex law: "*Is of course impractical and you know crazy*" (Psychiatrist, 14).

These points demonstrated that assessors found it hard to understand parts of the legislation. In this regard, the next sub-theme about whether the respondents regard TSL as a fitness or sentencing issue, exemplified the complexity of the law.

5.3.2. Fitness or sentencing issue

In this sub-theme, respondents drew attention to an underlying complexity of assessing for TSL. This complexity was concerned with the respondents' opinion as to whether a TSL assessment was best seen as a fitness issue or a sentencing issue. Many respondents undertook the assessment of the TSL as a fitness issue: "*I mention the three strikes act and I usually mention that as a potential issue as regards fitness*" (Psychiatrist, 13). Most assessors agreed that they *would* comment on TSL under 'fitness', but did not always believe it was appropriate for assessors to make the decision to raise TSL.

Rather, some respondents questioned if the TSL was better considered a sentencing issue for the judiciary. As the following assessor observed, this area was confusing for many respondents: "*More a sentencing issue, confused, goes both ways. Ultimately serves public protection, however, also takes away client rights and liberties*" (Psychologist, 6). The issue for this psychologist appeared to be that TSL *was* viewed mainly from the perspective of "a sentencing issue", to increase public protection. However, this psychologist also acknowledged that TSL could reduce the defendant's rights. This psychologist viewed it primarily as a sentencing issue.

The respondents consistently reported that for a defendant to understand the TSL, he or she needed to comprehend the *future* implications of this law, not just the present. As one participant noted: "*Fitness… it's making sure the defendant understands the implication they are making, and that fits into and proves a factor in our assessment*" (Psychologist, 4). In this regard, while several respondents did view TSL as a fitness issue, they acknowledged it could be potentially raised if sentencing occurred.

Another respondent explained why he thought TSL was a fitness issue. In his opinion, the defendant's 'fitness' was the most significant and crucial factor for the defendant. Inclusion of TSL in the assessment potentially determined whether they stood trial or not:

> I think it is a fitness issue, I think it is a fitness issue because of course fitness can also be raised at sentencing, so it can be raised at any point up until the sentencing

> occurs. But I think primarily it's a fitness issue because whether someone pleads guilty or not guilty or whether they even stand trial might turn on that very issue. It might turn on that issue whether they understand three strikes or not. (Psychiatrist, 15)

Some participants had difficulty in incorporating TSL assessment as it did not seem to fit into the assessment process at the beginning, as the application of TSL was actually implemented at a later date. One respondent who found a defendant did not understand the implications of the TSL, considered the decision making around the importance of this factor was within the 'sentencing aspect' rather than the fitness aspect:

> So I think in some instances …it may be part of fitness issue and particularly the really grey borderline people where …they're really not going to understand the whys. But as I say, it's kind of like even if they don't understand it, doesn't make any difference to their defence. It doesn't make any difference to how they instruct, it doesn't make any difference to their rights, so it wouldn't necessarily impact. But nonetheless there's somewhere it is way beyond their capabilities to understand that nitty gritty. (Psychiatrist, 12)

Hence, this psychiatrist appeared to consider that TSL assessment can relate to fitness, but on the whole is not solely likely to be responsible for an unfit finding. Thus, this health assessor could have perceived that it was the *sentencing* that the defendant did not understand.

The participants appeared to relate to this complex question in two ways. Some were clear that the legislation pertaining to sentencing did not have to be part of a fitness determination. Others, as in the above quote, appeared to consider it may do. Overall, most respondents deemed the TSL law as primarily a sentencing issue: "*I think in essence the law is around sentencing and is around a legal disincentive to an offender*" (Psychologist, 5).

The TSL focuses on disposition, and for some participants it appeared to be complex to integrate their comments on the TSL into the assessment process. Many participants commented on where they would place their assessment of the TSL within the parameters of a fitness interview and subsequent report. That is, the TSL was qualitatively different from aspects of fitness that were already required to be assessed:

> We've got, you know, very clear about the plea, the process, the communication, defending themselves, we have all of those areas but then we just have this very

> complex three strikes rule, and how do we assess they understand that? (Psychologist, 9)

The comments of this psychologist reinforced the view that the TSL is different and complex, and hence hard to determine where it fits in. Respondents discussed that when they were required to assess TSL (within their fitness assessments), they would choose to discuss their findings under the sections of the Act. Firstly, in regards to the defendant being able to plead; and secondly, to the defendant adequately understanding the nature or purpose or possible consequences of the proceedings. One respondent commented: "*I think the strike is actually just an extension of 'do you understand the consequences of pleading guilty'?*" (Psychiatrist, 15). A second respondent reflected upon this relatively abstract notion:

> But ultimately it concerns me that if we are saying that someone has to be fit to stand trial and one of those is to understand the plea, and if they decide to plead guilty to one of these 40 offenses then, it concerns me that they have to be fully aware of the consequences and the three strikes rule. And it's quite an abstract concept as it is. (Psychologist, 9)

In this regard, the psychologist appeared to consider that defendants did need to understand the TSL, and this was best conceptualised as part of the defendants' abilities to understand their pleas, *including* that the defendants understood the consequences of doing so. By extension, if the defendants were considered not to understand the TSL, this would impact on the ability of the defendants to plead: "*…(T)hey weren't really competent to decide which plea*" (Psychologist, 10).

Some respondents remarked that TSL was both a fitness issue *and* a sentencing issue. These respondents indicated that they would place their discussion of the TSL under the section of the CP(MIP) Act 2003, in which the assessor evaluated if the defendant could 'adequately understand the nature or purpose or possible consequences of the proceedings'. As one participant detailed:

> Well it should be both. On the basis that, I need to know irrespective of whether I'm guilty or not, I need to know where my plea is going to go, if I understand fully the tariff. Very often somebody will be very quick to put up their hand and say I did it just because it was simple that I, I just broke a glass. Who stole the $100 on the other hand? The person might not be quick enough to put his hand up, because of the all the repercussions that go with theft. So yes understanding that certainly has an impact from the fitness perspective. And from a sentencing

> perspective, well of course that's what the three strikes and above, well you've been recidivist and you understand the nature, quality of your crimes and all the rest of the kit and caboodle that goes with not being insane, then well yeah, I think it certainly is a sentencing issue. (Psychiatrist, 11)

Importantly, respondents had opposite views on the relationship of a defendant *not* understanding the TSL to a finding of potential unfitness. On the one hand, some respondents agreed with the following psychologist that defendants would probably be found unfit if they did not fully understand the implications of the TSL:

> I think in our context … because the capacity to understand is often so marginal I suppose there is a tendency to err on the cautious side for me. So if I don't have a very clear sense that they really understand the implications then I would tend to argue that they are probably unfit. (Psychologist, 4)

On the other hand, if the defendant appeared to be fit, apart from not fully understanding the TSL, then this would *not* definitely compromise a finding of fitness:

> I think you know if a person doesn't understand the TSL and that's the only thing they don't understand about the whole process that's the thing they don't understand, yes, probably not put me off completely or move me to a point I say he's not fit. (Psychologist, 1)

This complex example appears to relate to the confusion as to how much weight should be given to the defendant's understanding of TSL in the overall fitness assessment.

In summary, it is apparent that consensus was not reached by assessors concerning their understanding of the position of TSL and fitness assessments. On the one hand, this lack of uniformity continued to provide opportunities for assessors to present different perspectives for the judiciary to consider. On the other hand, it appeared there may be a lack of consistent training in terms of understanding what an assessment of TSL really means for an assessor. These quandaries were examples of the how the TSL could impact on FST assessments.

5.3.3. Summary

The responses of all participants were unequivocal that the TSL was complex. Respondents gave numerous examples of how it was difficult to understand diverse areas of the TSL. Topics discussed included the need to understand and apply the TSL consequences, as opposed to solely mental health criteria, when assessing a defendant.

In addition, respondents differed in considering TSL a fitness or sentencing matter, or both.

5.4. THEME THREE - NOT MY JOB

A dominant theme amongst nearly all respondents was that it was not their job to be the first people or profession to discuss the TSL with the defendants. Simultaneously, respondents found nearly all of the defendants had no knowledge of the TSL, as reported by the following respondent:

> I actually talk to them about it and try and use really simple language and I explain. First I ask them are you, are you aware of what the three strikes means? And are you aware that your current offense would qualify as a first strike? And I explain it to them because in 100% of the cases I've seen they haven't known. (Psychologist, 6)

Most respondents raised the TSL with defendants. However, they considered there may be ethical, legal and therapeutic impacts when introducing the TSL to the defendant. It was commonly recognised by both psychologists and psychiatrists alike that: "*That's not my job*" (Psychologist, 9). This perspective was reinforced by the statement: "*I don't think it should be for me to be the first person to explain the three strike law rule*" (Psychiatrist, 3). Indeed, respondents indicated that it was ethically dubious when lawyers had not discussed this aspect with their clients: "*So I see a lot of people where legal counsel have made no attempt whatsoever to, to raise this with them … that's not right*" (Psychiatrist, 12).

Respondents made recommendations regarding who should impart the TSL information to the defendant. Suggestions included the defendants' lawyers, judges, court liaison nurses and the police. The majority of respondents thought it was the lawyers' role.

Respondents acknowledged that they were not lawyers and believed it was unreasonable to add this task to the assessor's role. They believed they did not have adequate legal knowledge of the TSL, as indicated by the following participant:

> One of the difficulties I've had is I'm not a legal person, I don't come from a legal background, I'm a psychologist and I do a fitness assessment. So that throws me, because I don't really understand the legal kind of aspects anyway … what would work better is if they come with some understanding of the three strikes. (Psychologist, 6)

One respondent voiced a common opinion that the educational role regarding TSL would be better undertaken *earlier* in the court process. It was considered only fair to both the defendant and the assessor that they already had knowledge of the TSL:

> I think it is something that should be done first at least by the lawyer. I don't mind following up to make sure they understand it, but it seems unfair for me to have to explain it if they never heard of it. (Psychiatrist, 3)

The assessors discussed that the inherent 'unfairness' of this situation impacted negatively on both the assessor and the defendant. Consequently, the first sub-theme highlights the fact that this role is seen as onerous for the assessor. The second sub-theme illustrates an example of a particular area of the TSL that health assessors may consider is not within their role to voice an opinion on, namely 'manifestly unjust'. The final three sub-themes of this theme address resultant negative effects. The first describes the emotional impact on the assessor of introducing a difficult subject during the assessment; the second, discusses the perception that rapport was impacted as a result; and the final sub-theme articulates the emotional impact the introduction of TSL is seen to have on the defendants.

5.4.1. Onerous role

Assessors viewed discussion of TSL with defendants as onerous, and that it brought a 'punitive' aspect to the assessment process, which impinged on the actual assessment role. The assessor had a complex task. He or she assessed the defendant's mental health, intellectual functioning and mental impairment in general. The imposition of another dimension to the assessment added an extra task from that of a general clinical assessment, thereby potentially further burdening the assessor. One psychiatrist commented:

> Assessors acknowledged that more and more was expected to be discussed in fitness reports: "And so in that context a lot of people now, a lot of defence counsel and a lot of judges expect the issue of an understanding of the strike legislation to be incorporated". (Psychiatrist, 12)

Assessors not only evaluated mental health and impairments, but were also expected to educate the defendants on complex legal matters and assess their understanding of these. Respondents did not consider this was their role. Not only did this add to the length and complexity of the task, but many respondents found that the actual assessment process was in some way impacted by the need to assess for the TSL: "(B)*ut*

a bit of me, I think, rails against doing a specific assessment around that" (Psychiatrist, 12). It appeared that the health assessor resisted this process. It was seen as *not* being the assessor's role; and the information giving (and evaluation around TSL) was potentially perceived as being an onerous and even punitive role.

For one psychologist, this additional function was compared to that of a punishing institutional agent:

> And I think particularly as psychologists, we are more about developing a therapeutic relationship to gain the best out of our client to work with them and … by putting that in I think it kind of turns us into the punitive correction officer when that's not our job. (Psychologist, 9)

In this sense, the addition of a TSL assessment, in which a health assessor is required to describe the potential punishment that accompanies TSL, may be viewed as part of a punitive regime. Some health assessors expressed their discomfort with this aspect of the TSL assessment role. There was potential for both the health assessors and the defendants to share this view. The empathetic, enquiring role of the assessor was compromised during the specific TSL assessment process.

The next example demonstrates an additional problematic aspect of the TSL, namely the term 'manifestly unjust'. The concept, and the assessor's role in evaluating this concept, is explored below.

5.4.2. Manifestly unjust

It was apparent that at least one health assessor did not consider it was their role to comment on whether a sentence under the TSL would be manifestly unjust. While only one health assessor commented on this area, it is considered that with increasing numbers of defendants facing third strikes this area would become more prominent as time went on. The term 'manifestly unjust' comes from the Sentencing and Parole Reform Act (2010) and appears in a number of sections under s 86. The term 'manifestly unjust' is not defined in the legislation.

Even very experienced assessors found some aspects of the TSL law complex and difficult to interpret. One particular aspect of TSL that is very complex was the term 'manifestly unjust'. In this sense, health assessors were required to gain an appreciation of what they understood is the meaning of this term and how it could potentially be assessed. One respondent (a psychiatrist) discussed a case under s 86E of the

Sentencing and Parole Reform Act 2010. This section addressed the consequences when murder is a stage-2 or stage-3 offence. Under (2)(b) the court must: "Order that the offender serve that sentence of imprisonment for life without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so".

In one case, the Judge asked an assessor (psychiatrist) whether life without parole was "manifestly unjust" for a serious offence. The psychiatrist felt ill-equipped to make that determination: "*We talked about what that would mean and how we would interpret that, not being lawyers*" (Psychiatrist, 13). The respondent believed it was incumbent upon assessors to weigh the concept of 'manifestly unjust' in their assessments: "*There's always that little bit of 'manifestly unjust' attached and I think that's part of it you see and you take that into account*" (Psychiatrist, 13).

In summary, assessors gave examples of how they had been impacted by the complex nature of the TSL, including recalling the exact nature of the law, and in regards to the application of it. In the next section the author considers areas in which the law has impacted on the health assessor

5.4.3. Emotional impact on the assessor

Respondents viewed raising the TSL during the assessment process as potentially resulting in an escalation of defendants' emotions, leading to consequences for all. Several psychologists indicated that managing an assessment of TSL took an emotional toll. The psychologists painted a picture where defendants had shared a number of personal and important details of their lives with the assessors, and then been effectively 'blind-sided' by a discussion of the TSL. The health assessor needed to manage this situation during the interview and later:

> So if we all of a sudden are this person that's, you know, trying to assess their fitness and now we're saying to them by the way – potentially you could have this maximum prison sentence without parole – we are, we become the ogre and the monster and I could see that causing quite a lot of tension there. (Psychologist, 9)

Thus, raising the TSL was generally counter intuitive to the mental health assessment process, causing discomfort, and even sometimes anxiety, for these psychologists. The respondents were aware that the TSL necessarily represented an additional concern for the defendant. Initially, the defendants needed to process what the TSL meant, and

what the current strike would mean in terms of their sentencing. They also needed to process what an additional strike would mean if they reoffend in the future.

Another negative impact upon assessors was the burden of having to educate offenders about TSL. The interviews tended to take longer in order to educate the offender. The assessor was aware that the TSL discussion would be likely to provoke an emotional response in the defendant: "*This aspect (of) him not understanding the three strikes rule and not having any insight as to the implications of entering a guilty plea and therefore getting his first strike, it threw me*" (Psychologist, 6). In this example, it was apparent that introducing the TSL caused apprehension for the psychologist. The assessor was troubled by the ramifications of the defendant pleading guilty without understanding the consequences of this Act. Further, the assessor was concerned with the impact if the defendant was found fit (or unfit) to stand trial. While this respondent did not directly state it, the underlying assumption could be that this was a role for the lawyer, rather than for the assessor.

Several respondents acknowledged that the additional TSL aspect of the fitness assessment increased the pressure on the assessor both during and after the assessment: "*So I think I'm aware that actually it probably would matter and I probably would want support...*" (Psychologist, 9). For this psychologist, the addition of TSL to a fitness assessment potentially triggered the need for additional support.

Respondents also observed that the consequences of the TSL for the defendants were extremely serious. Consequently, some defendants had increased anxiety. In turn, the interview required relatively more time and effort:

> What they're facing is extremely serious and they get quite anxious about it. So it becomes a little bit of a problem because the levels of anxiety arise and then you have to do a little bit of work with calming things down. Especially if their understanding of the three strikes is non-existent or very poor. So you have to explain a lot about it. (Psychologist, 10)

Given the TSL topic was seen to create anxiety, health assessors sometimes interviewed defendants who were defensive:

> They find themselves in a position where they become much more defensive and so that has to be kind of carefully dealt with and it can obviously make an assessment more complex and much longer, because you have to work really hard to get them to understand it and or to calm them down. (Psychologist, 10)

Thus, the TSL assessment impacted psychologically upon the respondents. The assessor was required to cope with discussing the TSL while undertaking the other facets of the complex fitness assessment. While assessors did not consider it was their job to be the first to talk to defendants about the TSL, they often took this role by default during their assessments. Hence, in a sense, they could be seen to be the 'bearer of bad news' and face the psychological impact of this information upon the defendants. Assessors have to cope with this added domain in their assessment and with the arising emotion.

5.4.4. Rapport

Health assessors reported the wider psychological effects of imparting negative information to defendants. One important consequence for health assessors, as indicated by both a psychologist and a psychiatrist, was that the rapport built up during an assessment could be impacted during this process. The method of educating and assessing this area could impact on the connection between the health assessor and the defendant: "*Well it usually upsets the defendant I have to say. Could destroy the rapport of the interview…it does often change the course of the interview*" (Psychiatrist, 14).

One health assessor insightfully observed that defendants could feel humiliated by the process. Typically, a health assessor checked understanding by asking the defendant to repeat information. If defendants did not understand the law, they found this process difficult:

> By the time you get around to it the second time, they realise they've got to remember and it causes a bit of embarrassment and shame if they can't remember. And that's another issue one has to take into consideration, because it can interfere with the rapport that is established in the interview. (Psychologist, 10)

Establishing and keeping rapport is clearly important in a health assessment. As reported by the respondents above, introducing the TSL presented a challenge to maintaining rapport once this topic is raised. Reduced rapport was a potential bi-product of a TSL assessment. This was an unwelcome side effect of a process that health assessors considered was not their role. The health assessors were typically aware that raising TSL would have a detrimental emotional effect upon the defendant.

5.4.5. Emotional impact on the defendant

Being the *first person* to discuss the TSL with an uninformed defendant during a health assessment was viewed as highly likely to have a negative clinical impact on the defendant. As discussed earlier, assessors did not consider it was their role to be the first to discuss TSL with the defendant. Consequently, many health assessors observed that this discussion produced an emotional impact on the defendant: "*Well, probably it's the first time they're hearing it so there's anxiety, stress, probably anger*" (Psychologist, 9). Another respondent reported that: "*Anxiety escalates in all cases*" (Psychologist, 6). It was acknowledged that this anxiety was often in response to hearing that the impact of the TSL on sentencing requirements: "*It could be quite upsetting to hear that; perhaps the consequences could be more severe*" (Psychologist, 8).

These psychologists raised the important point that it was nearly always upsetting for defendants to discover the seriousness of the TSL as first raised by the assessor. Emotional or escalated reactions by defendants could occur when the person was in the 'borderline' range of fitness and, therefore, potentially less cognitively able to understand and process the content of what was being discussed with them:

> Well normally if the person is kind of fit or borderline fit and you mention this thing that they don't really get it, really. I've seen a few that get quite upset because it feels like something that they are now being fronted with because they've never heard of and it's like a threat- and certainly when you explain the implications of it, you can see how they clam up. (Psychologist, 1)

Many health assessors linked the defendant's likelihood of becoming emotionally distressed with the defendant's particular cognitive skill set, such as being less able to process information:

> Well I think some of them are definitely quite spooked if they haven't even heard about this before and it's especially when I'm spelling it out and I think that can be pretty scary for them when they're not great at processing information so, so they might just hear you know, locked up forever! Oh my god!! Get 20 years for it". (Psychiatrist, 12)

This respondent noted the health assessor had the dual role to educate and manage the defendant's anxiety following the raising of TSL. For many defendants, the escalating consequences of TSL could also be confronting:

> It causes a lot of anxiety for a lot of people who find it difficult not to offend for example, for a variety of reasons due to their life course, persistent offending and their various problems. And so the idea that their next offence they're going to be in prison for seven, 10, 14 years or something like this, causes a lot of anxiety. (Psychiatrist, 14)

Respondents also questioned if the defendants' amplified level of stress would influence their general assessment process and, later, their ability to adequately cope in court:

> I have found that … in all the cases, anxiety has escalated … and that would of course impair their performance in court. Because as we know, high levels of anxiety impact on cognitive functioning and in all cases … when they come and see me they're already anxious. I have to go through the charges; I have to ascertain their understanding. Frequently I give them psychometric tests which, which puts them under pressure as it is and then on top of it when I throw in the three strikes rule. (Psychologist, 6)

One respondent believed that the court process could be influenced by the defendant's increased anxiety, particularly if they were overwhelmed by additional information: "*The additional anxiety further undermines their capacity (and) could impinge in ability to communicate with defence counsel*" (Psychiatrist, 15).

The concern about the process being anxiety provoking is important. It dramatically exemplified how the TSL assessment process impacts during the fitness assessments. This resulted in an increased level of complexity. The assessor must not only clinically assess a person but also manage the individual's emotional response. This appears to place an additional burden on each of the respondent professions, both psychiatrists and psychologists. The assessment is effected both by the need to include this content and the process issues such as the influence on rapport. Given that assessors almost universally considered that it was not their role to be the first to raise TSL with the defendants, it appeared particularly unfortunate that these types of consequences tend to occur during the process.

5.4.6. Summary

Most, if not all, respondents considered it was not their role to be the first people to discuss the TSL with defendants. Indeed, they believed that psychologists and psychiatrists were not the best suited to this role. Rather, it was seen as the role of legal professionals or court staff. However, assessors often found they were taking on this

role by default, and this brought certain adverse consequences to the fitness assessments. The process of educating the defendant about TSL, while essentially, at the same time, assessing their capacity to understand the TSL and associated ongoing issues, felt burdensome from the professional perspective of most respondents. This additional process disadvantaged both the assessor and the defendant. The discussion of TSL provoked anxiety for the assessors and the defendants, had additional emotional consequences for the defendant and reduced the rapport.

5.5. THEME FOUR - UNINTENDED CONSEQUENCES

A common theme amongst health assessors was that the TSL had 'unintended consequences'. Those impacted included a number of vulnerable offending populations, victims and, ultimately, society. A strong theme that arose for assessors, and in particular psychologists, was an apprehension in regards to vulnerable populations. They specifically expressed concern for young people, Māori and Pasifika, people with intellectual disability and deaf people. Disquiet was voiced by a number of respondents who worked with particular populations. Four psychologists discussed these specific groups of vulnerable defendants within the sub-themes below.

5.5.1. Vulnerability of young people

Respondents saw 'young people'; that is, people under the age of 25 years, as particularly vulnerable to the effects of the TSL. For example, one assessor predicted the TSL would affect young people more significantly because they have a greater opportunity to re-offend. Also, it was seen as extremely unfortunate if they are convicted of a second or third strike as it will effectively deprive them of the major part of their early adulthoods:

> First of all it tends to hit young people much harder than older people for most young people offend between the ages of 17 and 24, that's the time they commit most of their offences, and if they are in that sort of mode that you offend – it's very likely that you pick up this massive bloody sentence before you are 24 years of age and there is your life gone literally gone. (Psychologist, 1)

In addition, the respondent reflected upon the effect of long incarcerations for young people under the TSL, with consequent exposure to negative factors in prison. This was of particular concern as the young people were seen to still be developing their

cognitive abilities and forming their values. These young people would not only experience incarceration, but potentially wider, enduring effects of imprisonment:

> I just think that that's the implication for the young person but there are massive implications of the system, we are facing a complete over-population in prison and this is one of the reasons people are sitting in prison serving these long sentences that serve absolutely no purpose other than they become now more eligible for gang membership, because that is where they recruit prisoners. Never a good place to be, it's not a place for rehabilitation, forget about that, it is a place where you get worse not better. (Psychologist, 1)

The very nature of the law with its punitive focus was considered likely to impinge on the ability of the individual to have the skills to fit back into society in a pro-social fashion:

> They come from it and they will continue to do crime because that's all they know and they hope next time they don't get caught. So there's that 'what else can a person do when you've served seven, eight, 10 years in prison between the ages of 24 and 34 you get out and nobody wants to employ you'. You are bound to go back to crime that's the only way to survive. I don't think there is any thought given to that. (Psychologist, 1)

This assessor expressed a level of foreboding about a young person who was destined to be sentenced under TSL. It was apparent that health assessors expressed objections both about the legislation and the TSL assessment process. Another area of particular concern for health assessors was the impact of the TSL on Māori and Pasifika.

5.5.2. Vulnerability of Māori and Pasifika

Several health assessors observed that the TSL would have a significant negative effect on Māori and Pasifika. There were concerns that some defendants from within these cultures were susceptible to agreeing with the health assessor when asked if they knew about the TSL. This practise of agreeing with authority could mask a defendant's lack of knowledge of the TSL. If the health assessor did not inquire further, he or she could conceivably not discover that the defendant had, in fact, no knowledge of the TSL:

> In most cases, I've had lots of especially Pacific Island clients who even on the cusp of intellectual disability, they tend to say yep, yep, yep. Yet when I ask them to repeat it and how it applies to their case, I get a confused response or a blank response. (Psychologist, 6)

This would be of obvious concern given the serious implications for the defendant of pleading guilty to a charge under the TSL. This health assessor also noted that she would highlight the important cultural dimension within her FST report. She also reported that Māori and Pasifika defendants may not always be clear on the results of the strikes. The health assessor discussed that some defendants could, on occasion, misunderstand the result of a first strike (namely a warning only) and assume it meant a maximum penalty. Counter intuitively, she reported that some of the defendants were not distressed by this prospect:

> But in, in cases where I've had … Māori and Pacific Island clients coming through and it's a first strike, it appears as though they have this perception, 'oh yeah well I'll be punished, I've done wrong' … the last case I had was a first strike, and that was for aggravated robbery, and when I went through the three strikes rule with the guy, he was not fazed by that because he believed he was going to serve the maximum penalty for his first offense. And he wasn't fazed by that. (Psychologist, 6)

This extract gave an example of a Māori or Pasifika defendant having a profound misunderstanding of the TSL, as he believed the first strike would result in the maximum sentence. This placed a burden on the health assessor to attempt to ensure that the defendant was aware of the true nature of the law and did not have an inaccurate, alarming misperception of the law.

Another respondent reflected upon whether the prospect of imprisonment had a deterrent effect upon Māori and Pasifika:

> In my experience predominantly as a forensic psychologist, …the prisons are covered with Māori and Pacific Island but mainly Māori, who are not deterred by prison anyway because in a lot of section 88 reports I've done, they've got family members who are there, gang members who are there and hence disenfranchised groups are further disadvantaged in that way. (Psychologist, 6)

This observation suggested there may be an unfortunate phenomenon whereby some people may not be deterred because they are aware that people within their peer group are also imprisoned. The same participant discussed what she viewed as the inherently racist nature of the TSL:

> We're well aware there are certain ethnic groups who are over-represented in the prison and, and what does that say? Lock them up throw away the keys because there's no hope for them? And it almost becomes fascist or one could say almost

> racist. I know it's a very emotive word I'm using, but just my experience of predominantly working with Māori. (Psychologist, 6)

In this sub-theme, the vulnerability of certain ethnic groups was recognised and reflected by one psychologist. Issues raised were not necessarily specific to the actual assessment process but appeared to relate to a wider social perspective by the respondent as a member of the dominant cultural system.

5.5.3. Vulnerability of the Deaf population

A smaller social group vulnerable to TSL were defendants who were d/Deaf. This population is comprised of a number of groups including those who view deafness as part of the disability model and view deafness in audiological terms, with individuals' often referred to as 'deaf', and those who perceive deafness as not a disability but a particular community as 'Deaf' (O'rourke & Grewer, 2005). The latter group are often members of a group called the Deaf Community, defined by their own culture and norms (O'rourke & Grewer, 2005).

One respondent was very clear that the TSL could not be adequately translated using Sign Language:

> But the gentleman was deaf and Sign Language was his first language. But actually when we looked at the three strikes rule, it was impossible to translate. You cannot translate it into Sign Language easily and in order to be able to work with someone that's deaf, who actually kind of has a deprivation of communication, life, education and possibly intellectual disability, in order for them to understand something like that you need a lot of work. (Psychologist, 9)

This had further, practical implications: "*So you need to have session after session because the three strikes rule is all about if you do this again, if you do that again*" (Psychologist, 9). The health assessor was concerned that even with the provision of additional sessions, Sign Language did not adequately translate the concept of TSL for many people with hearing impairment:

> Now there's no 'if' in Sign Language and it's such an abstract concept that when you've got someone very concrete in front of you, then it doesn't work. So actually, he just had no understanding and because I've worked with the deaf population for over 10 years now, I would be confident in saying that the deaf people that come to our attention as assessors, that use Sign Language, will lack the ability to understand those three strike rules. (Psychologist, 9)

This phenomenon raised an important issue of adequately assessing this population in regard to the TSL.

5.5.4. Vulnerability of people with intellectual disability

Additional concerns were raised regarding people with an intellectual disability. The impairment may interfere with concepts of time and understandings of consequences:

> People with intellectual disability don't have a really good concept of time and consequences. So when you say to them there's going to be a more severe consequence 10 years, five years, a year from now, it becomes extremely difficult for them and that's when you kind of get stuck. (Psychologist, 10)

These concerns also applied to people who were on the borderline of being diagnosed with intellectual disability, which health assessors generally describe as 'being on the cusp'. The addition of the TSL assessment added further complexity. One psychiatrist explained how he dealt with this matter: "*Clients on the cusp of fitness are tricky, close to the line these are the hard ones, not clear that they may or may not know about three strikes, quite happy to leave that to the Judge*" (Psychiatrist, 7).

The suggestibility of defendants with intellectual disability was noted. An assessor reported that people who are described as: "…*whom even on the cusp of intellectual disability they tend to say yep, yep, yep*" (Psychologist, 6). Importantly, another assessor claimed: *"If a person on the cusp and went on to second or third strike (it) could be manifestly unjust*" (Psychologist, 8).

In these examples, the respondent was referring to the example of a defendant with borderline intellectual disability who may be suggestible. The point was made that evaluating the person in regards to TSL may also need consideration of the 'manifestly unjust' corollary of TSL.

5.5.5. Summary

Some respondents discussed the impact of TSL on specific populations. Respondents felt strongly that many vulnerable groups including young people, Māori and Pasifika, the d/Deaf and people who were intellectually disabled were subjected to assessment of their knowledge of TSL.

5.6. THEME FIVE - WHAT SHOULD WE BE DOING?

The fifth theme was that the health assessors sought solutions to the complexity in assessing fitness involving TSL. Health assessors needed to make a number of decisions during the process where there were no clear organisational or practice guidelines. This theme included four sub-themes. The first suggested that the health assessors required clarification before a TSL FST assessment. The second sub-theme dealt with whether a TSL assessment was an evaluation of the person's *capacity to understand,* or *actual understanding,* of TSL. The third sub-theme addressed respondents' question regarding whether there was a higher threshold for an understanding of TSL for higher strikes. The fourth and final sub-theme presented health assessors' recommendations for the creation of practice guidelines, which may assist to address some of the above areas of uncertainty.

5.6.1. Clarification required before assessment

Health assessors needed additional transparency in two aspects of TSL assessments. Firstly, they wished to be informed by the courts that the defendant was facing a TSL offence. Secondly, they sought to be notified that the courts specifically wanted this aspect addressed. As one psychologist noted: "*I'd like clarity because it remains to me quite confusing for me*" (Psychologist, 6).

This respondent wanted to know in advance if an assessment on TSL was required in a fitness report. Indeed, most health assessors wanted to be explicitly instructed when they had to assess an understanding of TSL as part of a fitness assessment. One health assessor claimed it was outside of the scope of his role to be determining if he should, or should not, be including TSL within his assessment: "*(I)t's fundamental because I think—I do not have the remit as a health assessor to make any determination around that. The court needs to give some indication to me*" (Psychologist, 7). One respondent felt very strongly about this: "*It's not signalled to us, it doesn't appear on the bloody summary of facts or anything else and it's like well if you want us to assess for this, you have to signal to us*" (Psychiatrist, 12).

Health assessors needed guidance regarding the content of TSL assessments required in their fitness reports. The respondents indicated that it was unclear if they should be deciding to undertake a TSL assessment at all. The courts gave direction on some occasions and not others, leading to mixed messages in which some respondents

responded by always undertaking a TSL assessment, while others waited for direction from the court. It was apparent assessors did seek clarity in this regard.

Participants raised two additional questions concerning technical or clinical issues faced during an interview. The first involved a determination by health assessors if TSL assessments were more correctly a capacity issue or a matter of defendants' procedural knowledge.

5.6.2. Capacity or procedural knowledge

Health assessors were unclear regarding what they should be assessing. For many respondents, it was difficult to determine whether the defendants had inadequate knowledge of TSL or whether defendants did not have the capacity to understand TSL. That is, participants contemplated whether the defendant would be found fit if the defendant had been provided with adequate information about the TSL. One assessor succinctly summarised this dilemma:

> When we do our assessments we discover that there have been minimal conversations that have occurred with the lawyer sometimes, between the defendant and the lawyer. That's a tricky one isn't it, because you then have to determine is the person's lack of procedural knowledge is an issue of capacity or is it a function of them not being given basic information. (Psychologist, 7)

Hence, a number of questions arose. Is the defendant's lack of procedural knowledge about the TSL a result of a lack of education about TSL? Or does the defendant not have the requisite capacity to understand the relevant information?

The health assessors grappled with these questions. The answers impacted upon the health assessors' reports. For example, in some instances, a defendant may have the capacity to understand the TSL, but not have had the opportunity to express his or her understanding because he or she was not told the relevant information. For these defendants, they may demonstrate the relevant capacity to understand the TSL. Clearly this issue has a very serious legal effect on the defendant. As noted in the previous section, respondents had differing views on whether a defendant not understanding the TSL would mean they were unfit.

Many health assessors responded to this dilemma by deeming that a lack of knowledge, or ability to acquire and recall knowledge immediately, did not preclude the health assessor from concluding that the defendant would likely to be found fit:

> I think you know if a person doesn't understand the TSL and that's the only thing they don't understand about the whole process, that's the major thing they don't understand. Yes – probably not put me off completely or move me to a point I say he's not fit. (Psychologist, 1)

As summed up by Psychologist 1, a lack of knowledge about the TSL did not cause the health assessor to find the defendant unfit solely on this ground. In this sense, a lack of knowledge of the TSL did not outweigh the 'usual' assessment of fitness in regards to the clinical areas of fitness generally assessed. However, some respondents still considered an adequate knowledge and understanding of the TSL was an important area. This was particularly in regards to the defendant having the capacity to understand the 'deterrent' aspect of the TSL: "*Does the person understand the three strikes is a deterrent? That would be pretty much the nuts and bolts of what I am assessing. Does this person know that*?" (Psychologist, 5). This aspect was deemed important by the health assessor in terms of defendants' capacity to understand the future effect the TSL would have on their sentencing, should they reoffend.

The next theme probes the issue of ambiguity regarding whether a higher strike requires a higher capacity/knowledge of procedural matters by the defendant.

5.6.3. Higher strike demands higher capacity

Respondents acknowledged that as defendants faced subsequent strikes, the assessment of the increasing level of strike would call for a more 'semi-structured' assessment. This was due to the gravity of the sentence increasing as the strike moved from a second to a third strike. As one respondent noted: "*I think it would matter because the gravity of the seriousness of where they're at in their legal proceedings starts to get more relevant*" (Psychologist 8).

One health assessor used a medical analogy to convey this point:

> As the strikes increase, the gravity increases… like it's consenting someone for a blood test versus heart transplant-the higher the gravity, the higher the complexity …the more competent they have to be in order to satisfy yourself they are fit. (Psychiatrist, 15)

This provided a helpful illustration of the correlation between the level of the strike and the potential gravity of the corresponding sentence. In the estimation of Psychiatrist 15,

the defendant would have to be found to have a higher level of competency when facing a second or third strike than when facing a first strike.

Another respondent discussed the rights of a very impaired defendant who was facing a third strike. The respondent believed a decision of fitness could impact on the person's rights:

> I guess if I am seeing someone who is very impaired—and is receiving a third strike with no awareness—it could impact the person's rights. If he enters guilty and is found fit to go through trial he could be locked up with no awareness. (Psychologist, 6)

This respondent considered the TSL assessment aspect was extremely important; more so as the level of strike and consequent penalties increased. The defendant facing a third strike required the capacity to understand the impact of TSL on his or her sentencing. In this sense, an increased knowledge and capacity to understand the TSL when facing increasing strikes was seen as a necessary component of fitness. These examples of difficult assessment issues led to the theme that simple practice guidelines were supported by most respondents.

5.6.4. Practice guidelines supported

Health assessors expressed that they had minimal guidance on how they were required to provide a TSL assessment when producing an assessment of fitness. Many health assessors saw the merits of having practice guidelines with corresponding training. These guidelines would help the health assessor to avoid having to 'make it up as they go along'.

One respondent reported: "*I think guidelines are always helpful*" (Psychologist, 4). This position was echoed by the clear majority of respondents. A rationale for standardising assessments was presented by one psychologist who noted that at a training presentation on the TSL: "*Everyone seemed to have differing opinions, they were uncertain; the questions were indicating that, you know it just isn't clear*" (Psychologist, 9).

Health assessors made recommendations on the format and content of the guidelines. The following is derived from several interviews. Health assessors suggested that guidelines be one page in simple English. They wanted training on TSL for health

assessors. Also, they wanted very clear guidance on who is responsible for educating defendants about TSL.

A respondent suggested that in the guidelines, health assessors needed to be advised regarding precisely what content a judge wanted in the TSL related fitness reports:

> What does a first strike mean? And in practice this is what could happen. What does a second strike mean? In practice this is what could happen. What does a third strike mean? In practice this is what could happen. You know what stage is this person at, in the strike proceedings, do they know that? What are the key issues that the courts would consider reasonable for somebody to understand which might just be that they understand that the punishments will be worse, the more times they offend? (Psychiatrist, 12)

These points appear clear and present a solid foundation for the content for guidelines.

Most health assessors were keen to work towards a shared understanding of content and methods of assessing for TSL understanding within the potential guidelines. Suggestions included that appropriate questions or phrases be incorporated to simplify the assessment process:

> I think makes it quite important that we will almost have ready-made phrases or questions to ask the question in the same way. It is such a difficult area the way in which you ask it can even make it more difficult, so I would say, we have to design a fairly simple question and try to use that consistently, because if you are asking them a complicated way and I ask in a simple way we are going to get different responses. (Psychologist, 1)

Similarly, another recommended a standardised 'interview schedule' for health assessors during the court process (should they be called to give evidence):

> This education for all of us whose responsibilities to do this, plus some kind of standardised interview schedule I think I would find helpful. So that you know it has been reviewed and I can talk confidently in court, this is my methodology that I followed and it has been approved. (Psychologist, 5)

One believed that guidelines were the starting point for health assessors to: "*…drastically review, at least as assessors, what we're assessing for. I think our focus needs to be much more decisional competence, the ability to …participate in a trial process*" (Psychologist, 7). Regardless of whether TSL was at issue, this assessor

believed that all fitness assessments needed to focus more strongly on the area of 'decisional competence' rather than the current statutory criteria.

Another recommendation was for a basic information sheet detailing each of the three strikes and their consequences, plus a hand-out detailing the relevant 40 offences under the TSL: "*A list such as this of qualifying offenses might be helpful just for me to have. Because I'm not going to remember all those*" (Psychiatrist, 14). This format was supported by a second psychiatrist.

One respondent added that references to case law should be included:

> Well actually it radically changes our methodology of assessment and I think if there's case law the court feels this is an important aspect, then I think it needs to be reflected, and this (the guidelines) should be targeted at that level. (Psychologist, 7)

While this point of view would need to be considered in the preparation of guidelines, it would need to be balanced by the need to keep the guidelines simple and straightforward as noted by several respondents.

Health assessors viewed themselves as well positioned to develop the guidelines and drive this initiative: "*Because it is assessors I guess that have to drive this*" (Psychologist, 9). This psychologist implied that health assessors would be the professionals most likely to be motivated, by their role, to establish guidelines. In tandem with lawyers and court representatives, they would formulate the guidelines, with an emphasis on consistency.

To sum up the provision of guidelines, in the words of one respondent: "*I think that would be quite helpful, we're basically working in the dark*" (Psychiatrist, 13). Guidelines would hopefully shed light on the content and process of the assessment of TSL.

5.6.5. Summary

In theme five, health assessors asserted that they did not have clear guidance about what they *should* be doing in their fitness reports concerning the TSL. This lack of certainty arose throughout the referral, assessment and report writing process with health assessors generally not receiving notification that a TSL report was required, or indeed that the offence(s) were listed under the TSL legislation. Health assessors appeared to

consider they were 'feeling their way in the dark' by making all of the decisions about the inclusion of TSL and how best to assess and present their findings without guidance. Brief and simple guidelines were supported by most participants to provide practical guidance.

The themes that arose from the structured conversations with the 15 health assessors were varied and broad. While the original focus of the interviews was the impact of the TSL on fitness assessments, it was apparent that all respondents did not *just* consider the specific psychological impact upon themselves and defendants but also a range of wider issues, including political dimensions. The participants were also passionate about a number of areas related to the *actual* assessment of individuals under this legislation and paid particular attention to vulnerable populations whom they considered were not served well by the legislation.

A number of 'gems' of insightful data were unearthed during the 15 interviews conducted with the FST health assessors. These expert psychologists and psychiatrists highlighted the complex nature of the TSL, the negative views generally held towards this law, the role ambiguity that emerged and the pressure that assessing this area placed on both the health assessors and the defendants. Guidelines were seen as potentially useful.

CHAPTER 6. DISCUSSION

6.1. INTRODUCTION

This discussion analyses the findings in the previous chapters. The research was based on the premise that health assessors were likely to be impacted by the addition of a new area of enquiry (TSL) within their traditional health assessor role when undertaking fitness assessments. The focus on TSL did not represent a traditional area of the role. In the last two decades, New Zealand legislation was enacted, including the CP(MIP) Act 2003, the ID(CCR) Act 2003 and, more recently, the Sentencing and Parole Reform Act 2010, known colloquially as the TSL. Undoubtedly, the first two Acts changed the way health assessors operate because health assessors have a statutory role. This study, however, analysed the impact of the TSL on the assessment of FST by health assessors. Given that little has been written on the role of health assessors in New Zealand, and virtually nothing on the relationship with TSL legislation, it is important that the health assessors' voices emerged from this research. The use of both qualitative descriptive methodology informed by quantitative data enabled the exploration of this issue.

The TSL legislation was not based on mental health or intellectual disability considerations, but was a sentencing and parole law, as evidenced by the title; the Sentencing and Parole Reform Act 2010. The arrival of this contentious legislation, unlike the two earlier Acts, had not been so clearly delineated in terms of how it could affect the work of the health assessor. Indeed, health assessors were not mentioned in this Act in any capacity. In the course of my health assessments, it became apparent that judges were, nevertheless, seeking assessment and comment by health assessors as to defendant's understanding of this law. Subsequently, I wondered how widespread the practice was of health assessors commenting on a defendant's knowledge of the TSL and how this may impact on the defendant's FST. The author also pondered how this phenomenon was actually impacting on the health assessor. No previous research has been undertaken on this particular aspect of the work of the health assessor in New Zealand.

This research included two phases. The first phase involved a retrospective file review of FST reports on defendants between the period 30 June and 30 October 2015 to establish a baseline of health assessors assessing defendants for TSL. Secondly, the author undertook in-depth semi structured interviews with 15 health assessors, both

psychiatrists and psychologists, from the RFPS. The findings generated from these two phases of research were presented in Chapters Four and Five. This current chapter synthesises the key findings and integrates relevant scholarship.

The ensuing discussion has been framed in terms of the impact on health assessor of the TSL on FST assessments. While health assessors comprise both psychologists and psychiatrists, the author is a psychologist and have framed the 'overall' impact on health assessors from a psychological perspective; that is, with a discussion on emotional states. The psychological states covered in the discussion are unease, umbrage, uncertainty and concern. The key findings are summarised into overarching themes. Finally, consideration was given to possible ways forward to develop and support the role of health assessors in this assessment context.

6.2. UNEASE CONCERNING THREE STRIKES LAW

The concept of 'unease' appears to sum up one of the major impacts of the TSL on health assessors, namely an almost universal sense of disquiet about the TSL. This sense of unease was associated with particular aspects of TSL, albeit the categories over-lap to a degree. Firstly, and specifically, health assessors agreed that the law complex and harsh in practise. The legislation was viewed as a blunt instrument, which was excessively punitive. Concerns ranged from alarm over sentencing and proportionality concerns to uneasiness that health assessors may need to comment on the area of 'manifestly unjust'.

Secondly, health assessors felt unease that the law was *not* seen to be promoting social justice or treatment/rehabilitation from their perspective. They considered the legislation insensitive in regards to the application of criminal justice. In addition, they were also uneasy with what they perceived as the 'failings' of the TSL, particularly in the area of failing to promote social justice or rehabilitation via therapy. Thirdly, health assessors appeared to have gained a negative impression of California's application of their TSL and this caused significant unease for health assessors. Fourthly, health assessors viewed the New Zealand law as being politically inspired, and based on consideration of California's TSL. While health assessors were keen to express these were their own personal views, the over-arching impression was that these factors impacted on the health assessors emotionally and clinically. The four areas are discussed in depth below.

6.2.1. Application of the law

Health assessors were uneasy about how they viewed the application of the law. Health assessors viewed the law as inhibiting sentencing flexibility and reducing or eliminating the ability to address background or individual issues due to the prescribed sentencing approach embedded in the law. Unease towards the legislation was also engendered in a number of additional ways. Many of the health assessors were knowledgeable about aspects of the legislation, which they viewed as harsh and unfair.

Aspects raised included the lack of 'proportionality' associated with the law, and that 'offence characteristics' were not able to be taken into account during the mandated sentencing process. Further, the stated deterrent effect of the TSL was seen as being ineffective. Health assessors posed that the negative effects on defendants resulting from this law would be stronger than any positive features. In this way, the health assessors' personal unease broadened to feelings that the TSL would have no deterrent effect on the individual's criminal behaviour and would not benefit society.

Concerns about the negative effects of the TSL were supported by past research and commentary on TSL, such as the TSL was counter to embedded principles of justice, as it administered disproportionate sentences that may be considered unjust. This has been seen in overseas jurisdictions, including both the United States (Jin & Hidalgo-Wohlleben, 2016; Stolzenberg & D'Alessio, 1997; Taibbi, 2013; Tonry, 1996) and Australia (Australian Women Lawyers Association, 1999; McCulloch, 2000). The research and commentary on the inequities of TSL in California (United States) and the Northern Territory (Australia) led to legal and political challenges to the law.

In California, it was successfully argued that the principles of both proportionately and restraint (in terms of looking at least restrictive options in sentencing) were not adhered to (Roberts, 2003). In addition, research demonstrated that the TSL disproportionately affected African-Americans, who were over-represented under TSL legislation (Hinds, 2005; Jin & Hidalgo-Wohlleben, 2016). In 2012, Proposition 36 was introduced in California and reformed the TSL, restricting it to its original intent of imprisoning violent and sexually violent criminals who reoffended in terms of the new initiative (Laird, 2013).

In the Northern Territory, researchers and commentators were particularly concerned about the inequities found against the indigenous population (McCulloch, 2000), with

particular reference to youth and indigenous women (Australian Women Lawyers Association, 1999). Challenges to the TSLs occurred at both a legal and political level. Actions included querying the constitutional validity of this law, pursuing litigation to reduce the impact of the laws and raising potential violations of Australia's human rights obligations in relation to internal laws (Zdenkowski, 1999). The Australian Labour Government, following its election, subsequently repealed the two TSL laws in the Northern Territory in October 2001.

In New Zealand, similar concerns about the harshness of the legislation were raised by commentators; a view reflected by health assessors in the current study. The TSL has been called "one of, if not the most controversial sentencing initiatives enacted in New Zealand's recent history" (McDonald, 2011, p. 6). The principles of proportionately and restraint may not be safe-guarded in a TSL and may remove the judge's discretion at sentencing on a number of issues, including the defendants culpability and the nature of the offence (Brookbanks, 2012, Brookbanks & Ekins, 2010).

One particular reference within the TSL, 'manifestly unjust', was identified from a clinical perspective as causing unease to health assessors. One health assessor was uncomfortable about being required to address the area of 'manifestly unjust', in terms of assessing if life without parole would be manifestly unjust for the defendant concerned. The health assessor acknowledged, notwithstanding this concern, that addressing relevant background issues was part of the FST report. This was one specific manifestation of a broader issue, namely unease with the roles health assessors are required to take on under TSL. Unease concerning the 'manifestly unjust' clause could be considered representative of health assessors facing new, legal nomenclature and being required to respond to it. In this sense, the TSL is again affecting clinical practice. While health assessors can fulfil a request to discuss 'manifestly unjust' issues as they see them within a defendant's background, the association with TSL and extremely important sentencing issues can be seen as continuing to exert an uneasy influence. This is engendered by the evident 'cross over' between health and justice perspectives in an area which is not defined by law.

Health assessors may be assisted to become more familiar with the term 'manifestly unjust', and what it entails, by looking at past case law on TSL. This may help clinical practice by providing examples of relevant content under this criterion. Several recent New Zealand cases referred to 'manifestly unjust'. Examples include: *R v Marks*

[2017]; *R v Harrison* and *R v Turner* [2016] NZCA 381; *R v Campbell* [2016] NZHC 2817; and *R v Nuku* [2018] NZHC 2510. Areas considered relevant to the 'manifestly unjust' area included the defendant's mental health and intellectual or other mental impairment. In addition, the social background, exposure to violence, neglect, lack of schooling and attempts (or not) at rehabilitation were seen as relevant. Comment on previous convictions, the current charge and the defendant's remorse were also of interest.

Commentators also used the phrase 'manifestly unjust' in a parallel process to criticise the entire TSL as 'manifestly unjust'. Media reported Criminology Professor Greg Newbold as stating that Judges had not applied the three strikes rule because they felt it was manifestly unjust. "The judges are interpreting the law very liberally. The judges are effectively saying the law itself is manifestly unjust and they are refusing to apply it" (Hurley, 2018, p. 6). TSL statistics (Table 2, p. 34) would appear to support this assertion as four of the five people sentenced under a third strike to date were not sentenced to serve their sentences in their entirety (Statistics New Zealand, 2019).

6.2.2. Perceived failings of the three strikes law

Health assessors were uneasy about the perceived inadequacy or 'failings' of the TSL. Health assessors did not consider this law was promoting social justice or rehabilitation. Rather, the law was seen as promoting 'black and white' solutions without recourse to the 'grey' or contextual factors which contribute to addressing re-offending. A reduction in access to offence-related therapy for defendants sentenced under TSL provoked unease on a number of levels. People subject to incarceration under the TSL may not get the benefit of rehabilitation available under other pathways. Indeed, policy and programme advisors within the Department of Corrections stated that reducing reoffending was at the forefront of their endeavours and "We know that well designed rehabilitation interventions delivered to appropriately selected offenders can reduce reoffending" (Ryan & Jones, 2016, p. 1). Again, this commentary supported the position of the health assessors that therapy and rehabilitation were cornerstones of reducing re-offending rather than the 'black and white' position of the TSL, which did not target this important aspect. It is understandable that health assessors were perturbed about this new law.

Health assessors consistently feared that defendants subject to a second or third strike would not be able to access therapy or, if so, therapy would not be made available until

towards the end of their sentences under TSL sentencing. The TSL was not considered to facilitate rehabilitation, as inmates did not have the incentive to engage in treatment and, consequently, cemented negative or criminal thinking. This clearly impacted on the health assessors as it raised a dissonance between their professional aims and their particular role related to assessing capacity concerning the TSL.

Health assessors' primary role is to evaluate the clinical and mental health status of an individual. Hence, it was understandable that TSL assessments would raise a therapeutic/non therapeutic tension. In addition, health assessors expressed discomfort with the apparent inequity when defendants found unfit may have access to therapeutic services, while sentenced prisoners may not get rehabilitative services in prison. While some health assessors understood that defendants may be offered therapy at the end of their sentences, they remained concerned that offenders ineligible for parole may not have the incentive to engage in therapy or programmes. Summing up, it was apparent that health assessors were uncomfortable because they wanted all offenders to be eligible to therapy and rehabilitation if needed.

The issue of rehabilitative versus punitive goals was analysed by Wills (2016), which fore-shadowed the concerns expressed by the current health assessor respondents. She identified this concern under the theme 'competing positions' as important to health assessors writing FST reports (Wills, 2016). The participants in this study expressed similar concerns to Wills' participants, reporting on the inherent disquiet arising from the professional having to fulfil his or her obligations to court, while experiencing a sense of unease arising from clinical and ethical concerns.

Commentators in New Zealand discussed factors which can impede access to treatment in prison, and it is apparent that the TSL is representative of this comment. Lambie (2018) comprehensively discussed many contributing factors regarding the lack of access to rehabilitation and treatment in prison. He observed that the increase in prison population numbers can correspond to the practices of 'penal populism' where "politicians offer vote-winning, simplistic solutions for selected law and order problems…" (Lambie, 2018, p. 9). While Lambie did not specifically refer to the TSL, it is apparent that the TSL can be viewed as a 'poster child' for a sentencing law which considers deterrence and punishment more important than rehabilitation.

Given that health assessors viewed the TSL as reducing or preventing access to treatment and rehabilitation in prison, this is of concern. Mental illness is common in the offender population in New Zealand prisons, with nearly 91% of inmates having a lifetime diagnosable mental illness or substance abuse disorder, according to a 2016 New Zealand survey (Indig, Gear, & Wilhelm, 2016). This study highlighted the following important consideration "that improved integration of mental health and substance use disorder treatment would be an important strategy for improving the health and reducing the re-offending of New Zealand prisoners" (Indig et al., 2016, p. 78).

It was, therefore, not surprising that health assessors were negatively impacted by thoughts of defendants not having equitable access to appropriate rehabilitation and treatment once sentenced under a second or third strike. Indeed, some health assessors extrapolated from this point and considered that the TSL was not a sensible model to rehabilitate individuals, and it may fuel the opposite behaviour. If inmates did not have incentives to engage in treatment, their criminality could be cemented. This clearly impacted on the health assessors as it raised a dissonance between their professional aims and their role relating to TSL.

6.2.3. Association with Californian three strikes law

Health assessors appeared to have gained a negative impression of California's TSL and the association of this law with the New Zealand TSL made them uneasy. Health assessors were concerned because of the punitive consequences observed as resulting from the Californian TSL.

The California legislation highlighted a number of areas which had contributed to the health assessors' unease about New Zealand TSL. The imbalance between certain crimes and the corresponding sentences was highlighted; that is, the sentence was disproportionate to the offence (Roberts, 2003). Further, the law automatically resulted in offenders with two previous serious felonies effectively being sentenced to jail for life following conviction of a third felony (Taibbi, 2013). Consequently, a number of Californian decisions were viewed as blatantly unjust, such as one offender sentenced to 25 years to life for stealing a slice of pizza (Stolzenberg & D'Alessio, 1997). The law was also seen to discriminate unjustly against minority peoples, in particular the African American population (Hinds, 2005; Jin & Hidalgo-Wohlleben, 2016). These aspects highlighted similar concerns to those raised by health assessors concerning the

imposition of TSL in New Zealand. Health assessors were dismayed that they may be perceived as agents of injustice rather than as a member of the 'helping profession'.

In 2012, Proposition 36 in California was introduced to radically reform the TSL. While this initiative did not seek to repeal the TSL, it restricted it to its original intent: namely, the imprisonment of offenders who had prior convictions for violent crimes or sex offenses (Laird, 2013). While the TSL in California was reformed to an extent, it is not surprising that the draconian nature of the TSL in its original form caused consternation and unease by association.

6.2.4. New Zealand three strikes law considered politically inspired

The final area in which unease was clearly expressed was in terms of the New Zealand law being politically inspired. This unease related both to the political nature of the law, and the association with the Californian TSL. Indeed, New Zealand representatives of the Sensible Sentencing Trust, had visited the United States in 2007 to learn more about the TSL Act in California (Oleson, 2015). As Brookbanks (2012) observed the Sensible Sentencing Trust drew inspiration from the California legislation at that time (Brookbanks, 2012). On their return, the ACT New Zealand Party adopted it as one of its key policies and later formed a coalition with the National Party who introduced the TSL legislation following a public referendum in 1999. Serious concern was expressed by commentators including that the 'penal populism' movement in California unduly swayed the public, and that strikable offences were defined too widely, including non-violent felonies (Sutton, 2013).

Several health assessors viewed the legislation as politically driven, based on the involvement of the Sensible Sentencing Trust who promoted the TSL to the ACT Political party in New Zealand. Health assessors considered that this law was essentially politically driven, by people who did not perceive the reality of criminogenic vulnerabilities, that is the factors which contribute to offending. Again, unease was strongly expressed that potentially mitigating factors, such as social history, mental health concerns, provocation, the nature of the offence could not be taken into account and inequalities within the justice system would be perpetuated.

Health assessors' unease about aspects of the TSL was reflected within the political sphere in New Zealand in 2017 and 2018. On 1 November 2017, the Justice and Courts Minister the Hon. Andrew Little stated the intention that Labour would be repealing the

legislation, as it had failed to work as a deterrent and had not reduced offending rates (Matthews, 2018). At the time, the Labour Party could be seen as walking in the footsteps of the Australian Labour Party who repealed the TSL in the Northern Territory.

One rationale for repealing New Zealand's TSL was that it was an inadequate deterrent to violent or sexual offending (Northcott, 2017). The Hon. Andrew Little was of the opinion that offenders would be unlikely to consider this law before committing further crime: "Criminals don't go around calculating what might happen as a consequence" (Northcott, 2017, p. 1). In addition, the law did not target the root of the problem and Andrew Little considered that "Too many people cycle through the system and banging people through prison clearly isn't working" (Northcott, 2017, p. 2). While this commentary was also political commentary, it appeared to reflect the views of the health assessors, in the sense that they viewed the law as essentially politically driven, rather than responding to factors which contributed to an individual's offending. Of interest was that much of the research about the TSL in the Northern Territory in Australia had eventually contributed to the repeal of the TSL in this domain (Australian Women Lawyers Association, 1999).

6.2.5. Conclusions

Health assessors experienced discomfort with the extension of their role to include assessing fitness in regards to TSL, and with the law itself. Health assessors had to undertake the extremely challenging role of assessing for FST, while coping with feelings of unease engendered by the TSL.

The retrospective file review determined that only one third of the health assessors addressed TSL in their reports. This was potentially problematic as not all defendants were subject to examination of the same criteria during their fitness assessments. No data are available on *why* the health assessors who did not assess in regards to TSL made this decision. The reasons could vary. Some health assessors may not have been informed about the TSL; others may have understood the TSL but chosen not to comment on it, because they did not consider it their role. Still others may have believed they should only comment if directed by a judge.

In contrast, the health assessors who were interviewed all reported they would assess for TSL. Thus, it appears that the health assessors who volunteered to take part in this

study may have been those that were more likely to address the TSL within their reports. These respondents demonstrated their professionalism and willingness to co-operate with new tasks engendered by new laws.

While no current research exists on the relationship of health assessors to the TSL specifically, broader comment occurs in the literature about health professionals in regards to the law, within the United States (Jenkins, 2007). Jenkins (2007) reported that professionals who provided counselling and psychotherapy faced dilemmas regarding privacy and professionalism. Winkelman (2009) reviewed and summed up Jenkin's theory as "the contrast between the intimacy of the relationships we form in our work and the starkness of the law stirs up a level of anxiety in us" (p.106). Jenkins' answer to this dilemma is to be informed and to continue to take part in discussions concerning legal duties and ethical principles.

No participants in the current study expressed burnout or low morale; however, on occasion their frustration with dealing with the TSL could be detected. One answer identified from the above literature is for health assessors to both become more informed and to discuss TSL at appropriate forums.

In conclusion, it is apparent that the first impact of the TSL on the respondent health assessors, namely unease, built on the emerging New Zealand literature in the FST area, and is a legitimate concern. Based on research in related areas, it appears that participation of health assessors in medical ethics education and debate may be useful in reducing unease while undertaking FST assessments involving the TSL. This debate may extend to health assessors potentially engaging as agents of change if they object to laws such as the TSL.

6.3. UMBRAGE: NOT OUR ROLE

A dominant theme was that health assessors did not regard being the first professional to broach the TSL with defendants as their job and they took umbrage that this should be the case. This was a far-reaching concern as nearly all of the respondents interviewed found that the defendants they were assessing had no knowledge of the TSL. Health assessors' objections raised the issue of role ambiguity in regards to the health assessors interacting with the TSL.

Many health assessors also thought that any TSL assessments within a FST assessment could be seen to blur the boundaries between the legal profession and health professionals. Health assessors were clear that it was 'not our role' to broach the TSL with defendants whom they were assessing for FST; and they took exception, particularly so when health assessors were the *first* professionals to discuss TSL with the defendants. They did not believe they had a clear direction on whether they should be always assessing for TSL. When such a request was made by a judge it was clear. However, when this was not the case, health assessors appeared to make up their own minds as to the need to include such an assessment. This was reflected in the early statistics gathered in which one third of health assessors discussed TSL, while two thirds did not (with cases involving TSL charges).

Health assessors thought that the defendant's counsel needed to have broached and explained the TSL to the defendant. They did not believe it was their job to be the first to introduce the complexities of this sentencing law to the defendants. Further, this law was considered relevant by respondents to the lawyer/client role when discussing such areas as what plea to make. The raising of TSL included both *informing* the defendant and *educating* him or her about the TSL.

6.3.1. Role ambiguity

When health assessors add an educative dimension, they may experience role ambiguity. Research on role ambiguity for nurses offered a definition: "Role ambiguity, that is, the lack of clear consistent information about the behaviour expected in a role" (Chang & Hancock, 2003, p. 156). Chang and Hancock (2003) studied nurses during the challenging period as new graduates. They used a five item subscale to assess role ambiguity with the first item related to a lack of clarity of job description and duties (Chang & Hancock, 2003).

Chang and Hancock's (2003) study provided evidence for the existence of role ambiguity, and found this to be the most important factor which contributed to stress during the first months as a graduate nurse. While health assessors are by the very nature of their role experienced health professionals, the relevant point appears to be that role ambiguity can have negative consequences for the receiver. These negative consequences, in the case of health assessors, appear to have included the feelings of umbrage produced when assessing for TSL in what was not always a clear process. Umbrage can be provoked both when defendants are found to have no previous

knowledge or education about the TSL and, at another level, for some health assessors considering that undertaking any assessment of TSL is not their role.

The sense of discomfort has been provoked, in part, due to expectations for many health assessors that mental health and mental impairment concerns are central to FST capacity assessments. As early as 1989, Mester commented on competence issues and took the view that welfare concerns rather than justice obligations were central to the psychiatric profession:

> Condemning and punishing are usually procedures alien to a psychiatrist and his/her connection, albeit indirect, with their implementation may become a source of distressing guilty feelings. Welfare is the main object of medicine rather than the execution of justice, which is the object of the legal professions. (Mester, 1989, p. 647)

Mester (1989) extrapolated that ethical discomfort raised by giving reports in these circumstances could result in, amongst other things, professional identity confusion and conflict between opposing moral values. These points are equally relevant to the current health assessors' situation in New Zealand. It was apparent that in relation to being the first to raise TSL, prior to an assessment of this topic, that health assessors not only felt discomfort but umbrage that this role had been foisted on them.

While role ambiguity has not been directly discussed concerning health assessors and TSL in the literature, a number of New Zealand studies commented on this theme for various other mental health professionals in New Zealand (Prebble et al., 2013; Tarrant, 2014; Wills, 2016). Tarrant (2014) described and explored the role of the court liaison nurse within the criminal courts in New Zealand. One finding was the presence of "two conflicting cultures" (Tarrant, 2014, p. ii), namely justice and health, which generated considerable tensions for the court liaison nurse. Given that health assessors acknowledged the umbrage produced by being 'the first' to introduce and attempt to 'educate' defendants on TSL, it is apparent that the present study endorsed Tarrant's view that tension can arise from conflicting cultures.

One important difference between the roles of the court liaison nurse and the health assessors was that the court liaison nurses did not have a statutory role, potentially leaving them ethically exposed. Health assessors, however, have a statutory role (s 14 (1) CP(MIP) Act 2003), and are experienced in the forensic setting (Armstrong & Friedman, 2016; Sakdalan & Egan, 2014; Tan et al., 2018). While FST legislation does

not specifically refer to the TSL, health assessors have scope for wide-ranging comment under the undefined term 'mental impairment', which has intentionally been undefined to capture wide ranging areas of impairment (Brookbanks, 2011). These differences imply that the sense of umbrage engendered for health assessors is related to the apparent 'imposition' of TSL assessment into their role, rather than any feelings of inadequacy with their role.

Intersecting roles involving health and justice in New Zealand, such as care managers working under the ID(CCR) Act 2003 and nurses in a custodial setting, have also evidenced that conflicts of role can lead to strong feelings. Care managers in New Zealand described this dilemma in terms of "role ambiguity between 'custodian' or 'therapist'" (Prebble et al., 2013, p. 110).

A recent study of health care professionals, specifically doctors and nurses within a hospital setting, reported that role ambiguity could potentially lead to lowered performance within a health setting (Rovithis et al., 2017). Rovithis et al. (2017) considered that this occurs when the person's duties were not clearly delineated; a parallel with the finding that health assessors experienced ambiguity in their FST role with aspects of the TSL. While Rivithis et al.'s study was not a forensic setting, it is apparent that clarifying expectations for health assessors in regards to TSL may reduce their feelings of role ambiguity and umbrage. Health assessors were clear that defence lawyers or other court personnel needed to be educating the defendants prior to health assessments.

This area is important as it raises issues which are likely to affect clinical practice. Broaching the TSL with defendants who had not previously heard of this law during a sensitive FST assessment could raise ethical questions in terms of professional identity issues. Mester (1989) discussed a psychiatrist's evaluation of competence or FST, and found the role "often arouses ethical questions, it touches issues such as professional identity and the relationship between the aims of medicine and the purposes of the law" (p. 649). It is unsurprising that adding the assessment of TSL to FST assessments provoked ethical dilemmas some 30 years later. The current study suggests the scales are being tipped slightly out of balance towards the role of fulfilling the purpose of the law rather than therapeutic aims in regards to TSL.

6.3.2. Rapport compromised

One specific consequence of health assessors having to educate defendants about TSL was a reduction in the level of rapport. Health assessors acknowledged that the rapport could be impacted by the introduction of TSL, a law concerning sentencing and future potential consequences. This was not just a straightforward loss of rapport at the first introduction of the TSL, but could involve the defendant feeling embarrassed or ashamed at the second stage of the TSL assessment when the health assessor asked the defendant what they could recall about the legislation. Again, health assessors were required to use their clinical skills to assist defendants who may have experienced negative feelings during the 'second step' of this process of educating/assessing for TSL knowledge, recall and understanding.

These skills assisted the defendant concerning both content matters (education about the TSL) and process matters (handling the emotional issues that may arise during the introduction of the TSL topic). Given the negative consequences of a complex assessment process, it is not unexpected that health assessors felt umbrage. These findings suggest that health assessors as the first to educate defendants about TSL is not the best model.

6.3.3. Stress on health assessor and defendant

The introduction of TSL, no matter how skilfully broached, can 'blind-side' many defendants and the health assessor had to be aware of this as the assessment progressed. Introducing the TSL during an assessment interview impacted on health assessors. In anticipation of discussing the TSL with defendants, health assessors could become anxious, which in turn could fuel feelings of umbrage.

Raising the TSL impacted the defendants' emotions. It was reported that many defendants became anxious, angry or, on-occasion, more defensive after learning about this law. The health assessor was then required to inform, educate and assess the defendant's understanding of TSL while simultaneously attempting to calm the person. The health assessors coped with this process while having the dual awareness that it was "not my job" to be "the bearer of the bad news". Again, this produced tension, and the health assessor felt umbrage.

Health assessors regarded the duty to broach/educate and assess the defendants about TSL as generally onerous and unfair. Feelings of unfairness or disruptions to identity

can cause stress and tension in a work environment (Fila & Eatough, 2018; Smollan & Pio, 2017). Smollan and Pio (2017) investigated the impact of stressful organisational change within a New Zealand health care service provider. They found that "Disruptions to identity can be stressful" (Smollan & Pio, 2017, p. 56), because it compels the individual to think about the essentials of who he or she is (Alvesson, 2010; Brown, 2015). This study is relevant to the health assessors because multiple identities (personal, role, social and organisational) were important factors when roles were changed (Smollan & Pio) and having a clear identity, within one or more of these areas, helped to mitigate the stress of organisational change. Smollan and Pio (2017) found that "participants who believed that they could cope with stressful change maintained or enhanced a positive work-related identity" (p.74). Despite the health assessors general belief that it was not their role to broach the TSL, it was apparent that health assessors had a strong role identity which assisted them to cope with change.

6.3.4. Solutions: Broaching three strikes law with defendants

It was considered only fair to both the defendant and the assessor that the defendants already had knowledge of the TSL. One participant suggested that the lawyers first educate the defendants and then health assessors confirm the defendant's understanding of TSL. While this would enable the assessor to better conduct an assessment on TSL and understand the defendant's retention of the TSL, it does put a great responsibility on a non-legally trained health assessor. In this sense, health assessors had clarity that they should not be the first to broach the TSL topic because it was not under the remit of the health assessor, but rather a legal matter.

In terms of identifying methods to assist in reducing the tension arising from the intersection of health assessors and TSL, case law can be helpful. Case law from *R v Raukura* [2014] in New Zealand appeared to suggest that, on this occasion, the judge considered it the role of the lawyer to ensure that by the time the defendant instructs his counsel to enter a plea of guilty, he or she has an understanding of the consequences of a strike warning (*R v Raukura* [2014] at [43]). Health assessors' stated role is to "assist the Court determine whether a defendant is unfit to stand trial" (s 38 CPMIP Act 2003). Health assessors have been trained as clinicians in a therapeutic milieu. Most defendants have no knowledge, or appear to have no knowledge, of TSL and it is understandable that many health assessors take umbrage at bearing the burden of broaching TSL with defendants. Health assessors already have a complex role.

Defence lawyers, ideally, would impart information about the TSL and avert issues for health assessors.

6.3.5. Conclusions

This study found a strongly held belief by health assessors that they should not be the first to broach TSL with defendants *during* a FST assessment. Given that many health assessors find themselves in this very position, it is unsurprising that they experience strong feelings of umbrage. Some health assessors also took offense to being required to assess for TSL within a FST per se. Consequences of being the first to broach and educate the defendant about TSL included a potential loss of engagement and a reduction in the rapport engendered between health assessor and defendant. Health assessors were required to add this additional area of assessment into an already lengthy and complex process. They were clear that the role of introducing and educating defendants about TSL lay with the legal profession; in particular, the defence counsel.

This research has found a common understanding between health assessors that being the first to introduce TSL is "not my role". Developing a shared understanding of the limits of the health assessor role is important for health assessors to enhance their practice and reduce feelings of umbrage about the (mis)allocation of tasks to health assessors. In the future, health assessors may need to introduce this view to senior health professionals such as Clinical Leaders or Directors of Area Mental Health Services for further discussions with members of the Ministry of Justice and legal profession.

6.4. UNCERTAINTY: COMPLEXITY OF THREE STRIKES LAW

The complexity of the TSL was highlighted by all health assessors. A general perception was that the relevant law "was hard to get your head around" due to a number of complex issues impacting on process and content. This led to feelings of uncertainty for health assessors. Process-wise, health assessors observed a lack of an agreed 'allocation' process, in which some judges specifically requested TSL FST and other judges did not. Sometimes, health assessors themselves decided whether to assess for TSL.

In terms of the TSL assessment content, health assessors were uncertain for what exactly they were assessing. Issues arose such as did a higher strike demand a higher capacity in terms of TSL, and debate as to if the TSL was a fitness issue, a sentencing

issue or both. Case law provided some guidance to address aspects of the TSL for health assessors. However, the case law was not widely discussed during the interviews in this study, suggesting that case law may not have been widely known by all the health assessors. Recommendations included health assessors discussing this area as a group, accompanied by guidelines, which would reduce their uncertainty.

6.4.1. Obligation to undertake three strikes law assessments

Health assessors identified uncertainty as occurring given the allocation process for TSL assessments was not clear, and forced health assessors to make decisions as to the inclusion or not of TSL in their FST assessments. Uncertainty followed from what appears to have been an 'ad hoc' method of introducing defendants to the TSL by legal practitioners or the courts. Health assessors were unsure if they should be always commenting on the TSL for defendants subject to this Act. No decision was required if a Judge had requested health assessor opinion in the area; however, this was by no means always the case. Consequently, health assessors varied greatly in how they went about deciding to assess in the area of TSL. Some health assessors made their own check of the defendant's charges against the 40 offences listed under the TSL and, if so, chose to comment on the TSL. Others waited to be alerted that the charge was a TSL offense by a member of the court, and then went ahead with the assessment. As a result, the health assessors considered that this could result in variable practices and inconsistencies.

While the retrospective file review (in 2015) found that less than a third of the health assessors addressed the area of TSL in the FST assessments, practices towards assessment appear to be changing. By completion of the interviews in this study in 2017, the health assessors reported that, in the main, they would address TSL within their reports regardless if they were specifically asked to comment by a Judge.

Wills (2016) found that health assessors raised the lack of legal process in regards to many aspects of the FST process. Health assessors in the current study observed that uncertainty featured in most aspects of TSL assessment, impacting on both themselves and defendants.

6.4.2. Higher strikes: Higher complexity

Health assessors were also uncertain concerning the exact nature of their assessment role as a defendant was facing a higher strike. Uncertainty concerned both the content

of an assessment and the opinion and decision making around capacity issues with the increasing gravity of strikes. In general, respondents considered that as defendants faced subsequent strikes, the assessment of the increasing level of strike (from first, second to a third strike) would call for a more 'semi-structured' assessment due to the gravity of the strike sentence. Comment was made that as the strike increased, so did the seriousness for the defendant. Accordingly, health assessors needed to find the defendant *more* competent to satisfy themselves that the defendant was fit to stand trial. This notion was raised by Exworthy (2006) in the United Kingdom: "The principle of proportionality, requiring greater capacity for complex decisions when the consequences are more serious, can be observed more clearly in health care settings than in the courtroom" (p.466). Exworthy concluded the method of achieving this principle was laid out in the statutes. In New Zealand the CP(MIP) Act 2003 applies but does not specifically comment on the TSL.

A legal commentator in the field in New Zealand considered that a third strike entails an "added complexity" (W. Brookbanks, personal communication, November 20, 2018). This in turn impacts on the defendant. In the case of *R v Marks* (2017) the issue of the added complexity of a third strike and the relevancy of the TSL to the issue of FST is detailed. As noted by Brookbanks (2018):

> The issue, it seems, is whether the defendant has the cognitive capacity to understand the added complexity of a third strike offence in determining whether to enter a guilty plea. If not, then as the Court found in the *Queen v Marks* he or she may be judged unfit to stand trial provided there is evidence of mental impairment. (W. Brookbanks, personal communication, November 20, 2018)

This communication is important, as it clarifies the complex point that health assessors may be uncertain on; that both a mental impairment *and* a lack of cognitive capacity to understand a third strike (in relation to making a plea) are required by a defendant facing a third strike to be found unfit.

For respondents, the complexity of the relationship between capacity, understanding of TSL and unfitness extended to reflection on the increasingly severe level of punishment defendants would face, should they be found fit to stand trial and convicted. One respondent discussed the rights of a very impaired defendant who was facing a third strike. The respondent believed a decision of fitness could impact on the person's rights given his or her impairment. This health assessor thought that the possibility existed that such a person may face the sentencing consequences of the TSL without the

awareness and comprehension of the law (should they be found fit to stand trial). This respondent believed the TSL assessment aspect was extremely important; more so, as the level of strike and consequent penalties increased. The psychologist's thinking was that the defendant facing a third strike required the capacity to understand the impact of TSL on his or her sentencing. The health assessor reflected that the assessment of TSL knowledge and capacity became a 'rights' issue at this point, given the potential severity of the sentencing consequences.

This raises issues concerning how far a defendant's knowledge of legislation needs to extend, when facing a serious violent or sexual offence. For example, could a defendant charged with a serious sexual or violent offence be found unfit to stand trial if the defendant (with a mental impairment) did not understand the risk of the sentence of preventive detention? Although beyond the scope of this thesis, this type of question may arise in the future.

6.4.3. Dilemma: Fitness versus sentencing issue

The complexity of the TSL was also evident at a meta level, in so far as health assessors were uncertain if this law was a fitness issue, sentencing issue or both. On the one hand, when assessors chose to assess for the defendant's knowledge and understanding of the TSL, it appeared to signal that they accepted it as a potential issue concerning the defendant's FST. On the other hand, it appeared some health assessors chose to assess for TSL only when asked by the Judge, which may imply they were not convinced it was a fitness issue. The CP(MIP) Act 2003 sets out that a finding of unfitness to stand trial may be made:

> (1) A court may make a finding under this subpart that a defendant is unfit to stand trial at any stage after the commencement of the proceedings and until all the evidence is concluded. (s 7 (1) CP(MIP) Act 2003)

Some health assessors said they would comment on TSL under FST but were uncertain if this assessment was really their responsibility or a legal matter at sentencing. When assessing for FST, health assessors believed that to fully understand the TSL, defendants needed to comprehend the implications for the future that would follow from sentencing under the TSL "*Fitness…it's making sure defendants understand the implication they are making-and that fits into and proves a factor in our assessment*" (Psychologist, 4).

Demonstrating the overall uncertainty in this area, some health assessors viewed the TSL as a sentencing issue. Health assessors noted that this law was couched as the Sentencing and Parole Reform Act 2010, indicating that it impacted on *sentencing*.

Many respondents took the 'middle ground'; that is, to question if the TSL did fall solely under a fitness criteria, considering that it appeared a judicial issue. With regard to the judicial process, many respondents viewed this legislation as potentially falling under both the 'sentencing' and 'fitness' determinations. This would equate to the health assessor considering TSL under a 'fitness' criteria but with the 'sentencing' mandate in mind.

To date, in New Zealand, health assessors have been asked to address questions about TSL during the FST pre-plea assessment. In the case of *Queen v Marks* (2017) the issue of the relevancy of the TSL to the issue of FST was detailed. It appears that the judiciary is issuing opinion via case-law that a defendant could potentially be found unfit to stand trial if he or she did not have the cognitive ability to understand the implications of the TSL prior to the decision to make a guilty plea or not. In this regard the author considers that the TSL (Sentencing and Parole Reform Act, 2010) is by its very title a sentencing issue and, based on case law, a FST capacity issue.

6.4.4. Solutions: Case law, group discussion and guidelines

6.4.4.1. Case law gives guidance to health assessors

The uncertainty surrounding many aspects of the TSL is addressed, to some extent, in case law such as R *v Raukura* (2014), *R v Marks* [2017] and *R v Campbell* [2016]. These cases may provide guidance for health assessors uncertain as to their role with the TSL assessment process during FST. For example, in *R v Raukura* (2014) at (42), Judge Aitken discussed the evidence and set out that neither expert (health assessor) was asked to comment on the defendant's understanding of the significant consequence for him of a guilty plea and conviction. In the next paragraph (43) Judge Aitken gave her view that "where an offence carries a Strike Warning then a defendant must be able to understand the impact of that warning at the time he instructs counsel to enter a plea of guilty". Judge Aitken considered that in order to ensure a defendant "understands the sentencing options that follow a guilty pleas and what they mean in practical terms" he or she will need to have "a basic understanding of the consequences of a Strike Warning" (*R v Raukura* (2014) at (43)).

This judgement implies that health assessors should assess a defendant's ability and capacity to understand the TSL law in terms of their capacity to understand sentencing options and the practical consequences of these following a warning, final warning or third strike offence. Judge Aitken was clear that a strike warning carries considerable adverse consequences on future offending, and she considered that the primary purpose of such a warning is to provide deterrence to future violent offending (*R v Raukura* (2014) at (44)).

In terms of reducing uncertainty for health assessors, the capacities set out by Judge Aitken provided a clear set of minimum capabilities for the understanding of a first strike warning at (45), including that the defendant understands pleading guilty means a conviction will be entered. Judge Aitken also commented on the important point of the defendant being able to understand the future consequences of the TSL, including that if he was sent to prison in the future on a final warning (second strike), he would have to serve the whole of his imprisonment. While health assessors were uncertain as to the optimum content of their assessments, the minimum capabilities addressed above are very much in keeping with what health assessors do when undertaking a TSL assessment within a FST report.

Case law clarified the complex issue of precisely how much defendants need to know about the offences to which the TSL applies. Judge Aitken decided that while a defendant may not necessarily need to know all of the serious violent offences to which this law applies, in her view, they would need to know this warning applies to some (not all) criminal offences and is likely to include all criminal offences involving serious violence *R v Raukura* at (46). Reference to case law is likely to reduce feelings of uncertainty for health assessors and provide guidance concerning specific assessment needs.

6.4.4.2. Group discussion

Due to the apparent 'ad hoc' development of health assessors' knowledge, they developed different methods of learning about the relevant law. A starting point was learning which offences were covered under TSL and having a strategy to find this out, namely by referring to s 86 of the TSL where the 40 offences are listed. Some health assessors printed the entire list of TSL offences as 'a cheat sheet' to identify which were the correct offences. While this appears a sound strategy for determining relevant offences under the TSL, it raises several questions in regards to clinical practice. For

example, whose role is it to alert a health assessor that his or her FST assessment included a TSL offence? Secondly, and importantly, once the charge(s) are identified as TSL, who makes the decision that the health assessor should address TSL as part of their FST assessment? At the present time, it appears that unless health assessors are directed by a Judge to look at TSL, they make up their own minds as to the need to include it. Furthermore, they reported that they were basically making the process up as they went along.

To reduce uncertainty, respondents recommended that health assessors could discuss TSL as a group during which they could formulate a process for dealing with the TSL or other new legal developments. The desire for health assessors to agree on a process in regards to the relevant facets of TSL, concurred with the finding of Wills (2016) who found that health assessors in general experienced a "lack of agreed process" in many aspects of the FST process in action (p.1). At the same time, health assessors valued their ability to be flexible when addressing aspects of mental impairment and fitness. This finding corresponded with Wills' finding that *flexibility* was important for health assessors when undertaking FST reports.

6.4.4.3. Guidelines/checklists

Health assessors recommended that guidelines or checklists may serve to reduce uncertainty for health assessors during the actual FST assessment process. There is currently no guideline or set of instructions to steer the practice of the health assessor in this regard.

A widely used definition of clinical practice guidelines is that of Field and Lohr (1990): "Practice guidelines are systematically developed statements to assist practitioners and patient decisions about appropriate health care for specific circumstances" (p.38). According to an Australian scholar "it is important to reduce subjectivity and arbitrariness during assessment: so far as that is possible by the provision of clear guidelines for what constitutes unfitness" (Freckelton, 1996, p. 56). Applying this to TSL would suggest that guidelines in this area may be relevant to assist health assessors overcome the uncertainty around this complex area. While Freckelton (1996) advocated for standardised FST assessments, he also cautioned that psychiatrists and psychologists needed to concede that "cultural, linguistic and idiosyncratic cognitive limitations can impact profoundly upon the efficacy of standardised assessments, as can the presence of

multiple disabilities in an accused" (p. 56). This statement offered a balance for health assessors between standardisation of reports and flexibility of assessment.

The aim of clinical guidelines would be to improve the ability of health assessors to understand the basics of the TSL and, in turn, reduce the uncertainty extant within this specific area of assessment. This, in turn, would enable a consistent level of assessment concerning TSL. International research within the medical field found that certain characteristics contribute to the use of guidelines, including "specific recommendations, supporting evidence, a clear structure and an appealing lay out" (Wollersheim, Burgers, & Grol, 2005, p. 188).

Research from the United Kingdom concerning hospital level practice guidelines determined that a typical practice guideline "contains a summary of recommended clinical practice for a specific condition together with the rationale and supporting evidence" (Fox, Patkar, Chronakis, & Begent, 2009, p. 465). These practice guidelines are created to assist practitioners to make optimum decisions about health care in particular circumstances. Fox et al. (2009) discussed examples of research in which guidelines assisted both clinicians and patients. However, they cited a number of views which raised concerns about guidelines. These included that guidelines could fail to take into account diverse clinical factors, have a poor record of changing clinical practice and could negatively impact on clinicians if they felt they were forced to use inflexible guidelines.

Apparently speaking for the majority of health assessors, one reported that the assessment of TSL was a departure from the 'usual' assessment, and in this way implied TSL assessments were not straightforward. He suggested that guidelines needed to take into account relevant case law:

> Well actually it radically changes our methodology of assessment and I think if there's case law the court feels this is an important aspect, then I think it needs to be reflected, and this (the guidelines) should be targeted at that level. (Psychologist, 7)

Guidelines could be presented in the form of a brief 'checklist' designed to build on the experience of health assessors working with the TSL legislation. Gawande (2010) wrote the book *The Checklist Manifesto* and is a general and endocrine surgeon and associate professor at Harvard Medical School. Gawande advocated for the simple

checklist system for highly skilled professionals, including clinicians, who undertake complex activities. His model was founded on a checklist with three headings "development, drafting and validation" (Gawande, 2010, p. 200). This checklist appears an unpretentious yet sophisticated, system to ensure a complex role can be effectively managed.

At the current time, the author suggests that, as a bare minimum, health assessors access s 86A of the Sentencing and Parole Reform Act 2010 and print the 40 offences targeted under the TSL (See Appendix G). The list would enable the health assessor to understand early in the FST process if the defendant is facing a TSL offence. In addition, it is recommended that health assessors access the Ministry of Justice site in which a simple guideline is given about TSL and the three strikes (See Appendix I). This one page hand-out accurately presents, in simple form, the salient factors of the TSL which can inform both the health assessor and the defendant during an interview process.

6.4.5. Conclusions

The complexity of the TSL impacted on all health assessors in a number of ways, leading to uncertainty in regards to many aspects of this law. This uncertainty extends to numerous areas including process issues including the allocation/non-allocation of TSL FST requests, decision making around whether to always include a TSL assessment, what to include in an assessment and does an increasing strike lead to a more complex assessment if a higher strike demands a higher capacity for the defendant. Answers to these complex questions can be gained from case law, and uncertainty reduced through group discussion. Guidelines or checklists may also assist.

6.5. CONCERN FOR VULNERABLE POPULATIONS

Health assessors expressed concern regarding four populations who aroused empathy in terms of their considered vulnerability to the TSL. These populations were young people, Māori and Pasifika, the Deaf and people with intellectual disability. Although these groups appeared disparate, they were linked by presenting with aspects of vulnerability as identified by health assessors. Concern was expressed as to how members of these groups would be impacted by the TSL in the future.

6.5.1. Young adults

In New Zealand, the TSL only applies to individuals 18 years and above (Sentencing and Parole Reform Act 2010, s 86A Interpretation, stage-1 offence (b) (ii)). Adolescents typically span the period 12 to 18 years; the period between childhood and entering adulthood (Jaworska & MacQueen, 2015). The period of adolescence is also one in which risk-taking increases and emotional reactivity occurs (Casey, Jones, & Hare, 2008).

Recent research expanded the adolescent developmental period to include young adulthood, often up to, or about, 25 years (Jaworska & MacQueen, 2015). These researchers posited that one means of thinking about the "developmental trajectory" in adolescents was to understand that higher-order cognitive functioning matures later than other areas of functioning (Jaworska & MacQueen, 2015, p. 292). Research confirmed that the learning rate for individuals is thought to be from age 8 through to 25 years (Van Duijvenvoorde, Achterberg, Braams, Peters, & Crone, 2016). A further important feature for the period of young adulthood is that the incidence of many psychiatric illnesses rises dramatically during this time (Kessler et al., 2005). These findings imply that offenders from within the young adult period would need additional support and intervention to reduce offending rather than the imposition of TSL sentences.

6.5.1.1. Concerns

This research on adolescent development highlighted the vulnerability of young people in the areas of biology, social and personal responsibility. It was, therefore, unsurprising that health assessors had concerns regarding 'young people' under the age of 25 years as being 'different' and more vulnerable in some ways than older defendants to the TSL. While the current research did not specifically look at the under 25s, the research did reflect that the largest group of defendants referred to in FST reports (60%) were within the *youngest* category, in this case under 35 years. Health assessors were concerned that, under TSL sentencing, young people who reoffended could face deprivation of liberty during the majority of their late adolescence or early childhood.

Concern was raised that young people would potentially have detrimental exposure in prison to numerous negative factors including gangs, social justification or normalisation of offending and new offending practises. Also, health assessors contended that youth may not have access to rehabilitation and treatment while in

coercive care, under TSL sentencing practices. Importantly, young people need to be reinforced to make pro-social actions or they are likely to seek reinforcement/reward from their former criminal activities.

6.5.1.2. Conclusion

Research indicated that youth offenders' successful 're-entry' to the community requires a multifaceted approach including the development of a positive personal connection to the community, appropriate housing and employment skills and opportunities (Gibson & Duncan, 2008). The current research supported the concerns of health assessors about young people's need to access services rather than face lengthy prison sentences with no possibility of parole. In order for successful community returns to occur, individuals need to make positive internal choices and have access to external resources (Serin & Lloyd, 2009). While the Corrections Department in New Zealand has "placed reducing re-offending at the forefront of our collective effort" (Ryan & Jones, 2016, p. 1), they have not targeted longer sentences as necessitated under TSL; rather they have developed numerous strategies in an attempt to assist offenders to live a good life and avoid reoffending. In this regard, the TSL does not appear to fit with the current culture of addressing reoffending through treatment and rehabilitation.

It was concerning for health assessors that young people may not get rehabilitation and treatment as a priority. The judiciary also highlighted the importance of rehabilitation for offenders who are convicted of TSL offences (R v Campbell [2016]). Given that health assessors are undertaking FST TSL assessments at the beginning of the court process, it is understandable that health assessors may be concerned that youth may not get positive rehabilitative inputs. Therapeutic opportunities would consequently be lost during vital developmental stages.

6.5.2. The deaf community

6.5.2.1. Concerns

Members of the Deaf population posed particular concerns for one psychologist, which served to highlight the diversity and extent of the impact of the TSL. This health assessor questioned whether health assessors could adequately assess a Deaf person even when they were fluent in Sign Language (as this health assessor was). Sign Language is New Zealand's third official language under the New Zealand Sign Language Act 2006.

The literature suggested that two primary models of deafness exist. The first model is the disability model, which is informed from the medical view with a focus on aetiologies of deafness. The second model, known as the 'cultural model', arose from a "social constructionist approach where deaf people are viewed as different rather than disabled" (O'rourke & Grewer, 2005, p. 672). Within this second model, deafness is reflected in a positive manner, in which the condition is different from that of the hearing population but not abnormal (Young, Monteiro, & Ridgeway, 2000). Culturally, Deaf individuals identify themselves as Deaf; they use Sign Language as a mode of communication and form a distinct community (C. Smith, personal communication, January 26, 2018). Within this community, obstacles to communication are faced during contacts with the hearing world (O'rourke & Grewer, 2005; Young et al., 2000).

Assessment of Deaf people for FST was considered particularly challenging, with issues of "social justice, access and equity involved" (Davidson et al., 2015, p. 145). Davidson et al. (2015) noted their concern that there were "issues of social justice, access and equity for deaf defendants where culture, Sign Language and English literacy can impede accurate assessment and thereby compromise the rights of the individual" (p. 145). Sign Language for legal language was also considered to be a developing lexicon, as few Deaf professionals worked in this area (Davidson et al., 2015)

6.5.2.2. Implication

Given the concern raised by a health assessor immersed in the Deaf culture, it is important that all practicable steps are taken to assist the assessment of a Deaf person during a FST assessment, and particularly for TSL assessments given the potential results of sentencing under this Act. It is apparent that the Deaf individuals may have a potential violation of their human rights if they do not have access to an interpreter or communication assistant during the FST process, particularly when an unfamiliar concept like TSL is involved. It is recommended that a deaf interpreter and a Sign Language interpreter would ideally be utilised in an FST assessment (Davidson et al., 2015). A health assessor qualified in Sign Language would also present as a good option during such assessments; however, with both options the issue remains that concepts in TSL may not be easily translatable. This needs to be raised and taken into

account in FST assessments under TSL for the Deaf population by health assessors to help alleviate concern for this population.

The health assessors were aware of the disparate impact of the TSL assessment process upon the identified vulnerable groups. This was against the background of health assessors not necessarily agreeing with the tenets of the law.

6.5.3. Māori and Pasifika

Māori and Pasifika populations were seen as vulnerable groups and over-represented in the criminal justice system, by health assessors during the in-depth interviews. The retrospective file review concurred, as the study found the sample of adult defendants referred for FST reports featured an over-representation of Māori and Pasifika. Māori represented 30%, Pasifika 28% and European 31%. Asian defendants had only a small representation at 6% and 'Other' ethnicities comprised the final 1%. These results were similar to those of two recent New Zealand studies on FST, albeit that their sample populations were youth defendants (Armstrong & Friedman, 2016; Tan et al., 2018). These figures were indicative of a continuing over-representation of Māori and Pasifika within the criminal justice system. Department of Statistics figures showed that in 2013 Māori comprised 14.96% of the New Zealand population, Pasifika 7.4%, European 74% with an increasing number of Asian peoples, 11.8% and 2.9% 'Other' (Statistics New Zealand, 2019).

Turning to the TSL defendants accessed in the retrospective file analysis, Māori were over-represented; comprising one third of the study sample. While the numbers within this sample are very small, they appear to support the assertion by Rumbles (2011) that the TSL legislation would disproportionately impact on Māori, in this case by the prevalence of Māori within the TSL offending categories.

Scholars and practitioners also analysed the effect of TSL on Māori. In agreement with Rumbles (2011), Oleson (2015) confirmed that minority groups were indeed overrepresented in 2012 as 'strikers' with Māori (who represented 14.6% of the population) comprising 47.6% of the 'strikers'. Pasifika (who represented 9.2% of the population) comprised 15.2% of the 'strikers' (Oleson, 2015). Importantly, in 2012, 51% of the prison population were Māori, 12% were Pasifika, 33% European, 3% Asian and 4% 'other' or unknown (Statistics New Zealand, 2012). The percentage of Māori and Pasifika 'strikers' appeared to closely follow the overall percentage of particular

ethnicity within the New Zealand prison population, and was reflected in the results of the current study, with Māori comprising 33% of the defendants subject to TSL reports.

While the numbers within this sample are small, they appear to support the assertion by Rumbles (2011) that the TSL legislation would disproportionately impact on Māori, in this case by the prevalence of Māori within the TSL offending categories. This could suggest that Rumbles' assertion that there was a systemic bias against Māori in the criminal justice system was, at the very least not being disproved. It is recognised that on-going work needs to occur to reduce the over-representation of minority groups, such as Māori, in both criminal justice and mental health statistics (Brookbanks, 2014).

Based on the current research, there was an over-representation of Māori in FST assessments. Health assessors were also uncomfortable working in a system that appeared to have an over-representation of Māori and Pasifika. This was disturbing as it may reflect a systemic bias against Māori within the criminal justice system. In addition, one health assessor highlighted a process during FST interviews over which they expressed alarm. This health assessor noted that members of this vulnerable group may demonstrate cultural features which may lead them to have more difficulty acknowledging to the health assessor that they did not know about the TSL. This practice could hide the defendant's lack of knowledge about TSL, and potentially lead to them proceeding through the criminal justice system with no knowledge or only partial knowledge of the TSL.

The disquiet of health assessors when assessing Māori (and Pasifika peoples) for FST with TSL assessments may reflect wider community concerns about the impact of colonisation on Māori. This impact included the imposition of cultural norms including, and especially within, the criminal justice system (Jackson, 1988). Some commentators reported that Māori over-representation within prisons is considered more closely related to socio-economic status than ethnicity (Ministry of Justice, New Zealand Police, & Department of Corrections, 2016). However, other commentators believed the over-representation was related to, at least in part, "direct and indirect discrimination within the criminal-justice system and society more broadly" (Morrison, 2009, p. 152). Lambie (2018) was hesitant to completely endorse this view of ethnic bias, as he noted that recent research had identified that "compared to other countries, little research exits in NZ investigating bias in the criminal justice system, and thus firm conclusions cannot be made" (p. 19).

Comment on the potential effects of Māori by the TSL can also be found in *R V Harrison; R V Turner* [2016] NZCA 381. The court looked at the legislative history of the TSL, including the earlier version of the TSL law, namely the Sentencing and Parole Reform Bill 2009. The court commented that a Regulatory Impact Statement (RIS) prepared by the Ministry of Justice in February 2009 identified the key objectives of the proposed law as increasing public confidence in the criminal justice system and enhancing public safety.

The RIS said it was not possible to be certain the proposed measures would meet the latter goal, and referred to the increased potential for disproportionate sentencing options including the considerable potential for the Act to disproportionately affect Māori [68]. The potential for disproportionate sentencing did not deter the lawmakers, and the New Zealand Cabinet, in 2009, changed the threshold for a strike from a qualifying sentence of five years to a qualifying offence; see *R V Harrison; R V Turner* [2016] NZCA 381 [70]. It appeared that supporters of this law were concerned that the use of the qualifying sentence would "exclude too many offenders" (Chisnall, 2016, p. 415). Looking at the origin of the TSL it can, therefore, be speculated that the proponents of this regime did not take into account the catchment reach of this legislation.

6.5.3.1. Implication

Health assessors were concerned that Māori and Pasifika were over-represented under the TSL in the New Zealand justice system. Their observations sit within a broader critique on New Zealand's criminal justice system vis a vis Māori, with scholars and practitioners making recommendations to address these concerns. Mental health professionals including health assessors, are advised to include Māori cultural concepts as part of a fitness assessment (Elder, 2017). Māori cultural identity should also be included in neuropsychological assessment (Dudley, 2014). Health assessors are also advised to be cognisant of the need to encourage Māori during an assessment interview, to ensure that their results are a valid estimation of their true capacities (Wong et al., 2000). Such encouragement could counter any perceived tendency to minimise a lack of knowledge of the TSL. Cultural inequity within the criminal justice system in New Zealand may benefit from the 'Te Whare Tapa Wha model', together with the possibility of a court for Māori (Lunt, 2017). These initiatives may benefit Māori who are assessed for TSL under FST assessments.

Health assessors, in general, were uneasy about the TSL. Repealing this legislation, as occurred in the Northern Territory in Australia would end both the TSL sentencing and the need for health assessors to consider this law. This action would stop Māori and Pasifika groups being impacted by this particular law and, in addition, from the health assessors' viewpoint, alleviate the negative impacts of the TSL on these ethnic groups during FST assessments.

6.5.4. Intellectual disability

Health assessors highlighted their concerns about the capacity of defendants with intellectual disability, or on the cusp of such, regarding their understanding of TSL. These defendants were seen as vulnerable given the complexity of the TSL legislation, as it was judged more difficult for these groups to grasp than the intellectually able population.

Individuals on the 'cusp' of, or borderline for, intellectual disability face additional obstacles. While they may be considered 'fit to stand trial' against the usual CP(MIP) 2003 and *Presser* criteria, the TSL may present an extra hurdle. Indeed as the Court of Appeal observed in the case *R v Harrison; R v Turner* [2016] NZCA 381, the rationale of the TSL was to reduce crime through deterrence and incapacitation, and that those who receive a warning under this act will think "*very, very hard*" about committing another TSL offence [76]. Those individuals, who could not modify their behaviour in the future, in terms of committing additional TSL offences, face harsh penalties. Health assessors had disquiet about defendants in this category. If they are found fit, they may be relatively more severely impacted, have difficulty evaluating their behaviour and be unable to learn from their experiences (Brookbanks, 2012).

In Brookbanks (2012) opinion:

> There is probably little dispute that the Three Strikes Law will impact more severely on those who, on account of mental impairment, are unable to properly evaluate the consequences of their behaviour and, more importantly to learn from previous experience. (p. 12).

A person's ability to reason may be impacted by his or her conditions; hence, he or she may be unable to fully appreciate the significance of the TSL. Health assessors were aware of this possibility and it is apparent that it contributed to their feelings of concern

for defendants subject to various forms of mental impairment, including intellectual disability.

6.5.4.1. Implication

Health assessors raised a number of examples of interacting with, and responding to, populations whom they regarded as vulnerable. They were apprehensive about how defendants would deal with life under TSL, should they reoffend, and recognised vulnerability in their client populations.

Arguably, if psychologist health assessors considered that the TSL represented political or social oppression towards vulnerable groups they should take appropriate action, based on the Code of Ethics for Psychologist Principle 2.4 and the practice implications as detailed at 2.4.1. "Psychologists recognise the vulnerability of some individuals, groups, or communities and take appropriate action in relation to this". In terms of FST, this may mean detailing any concerns about the potential impact of the TSL that they perceive on a particular defendant to draw attention to possible special vulnerability. This could occur if a psychologist was assessing a defendant under a third-strike offence, and had to consider the phase, 'unless manifestly unjust'. It is debatable whether this action could potentially mean taking political action to repeal the TSL, as this may not conform legally to the duties of health assessors to undertake their role.

Of interest is that the psychologists' Code of Ethics appears more specific than that of the psychiatrists'; thus, psychologists may have a greater burden (Code of Ethics Review Group, 2012; Royal Australian and New Zealand College of Psychiatrists, 2018). Code of Ethics may reflect a greater regulation of psychologists but, dependent on interpretation, could suggest that psychologists could be more active in vocalising their views on the TSL than psychiatrists, who may not feel obligated to take such actions.

6.5.5. Conclusions

Overall, the expressions of concern in regards to vulnerable groups exemplifies the caring and therapeutic nature of health assessors who seek to undertake FST assessments without disadvantaging the individuals or members of vulnerable groups whom they are assessing.

6.6. LIMITATIONS OF THE THESIS

The current research only examined the impact of the TSL on the assessments of FST by health assessors based at one New Zealand District Health Board. The RFPS may have a particular professional culture, which reflected the practices and responses of these employees. The findings from this particular cohort of health assessors may not be representative of the practices and opinions of health assessors throughout New Zealand. The thematic analysis was content specific, both in regards to participants, the time frame and the geographical area in which the study was conducted.

The semi-structured interviews with health assessors focused only on the area of the impact of TSL, and did not gain an overall perspective on the many facets involved in the assessment of FST which impact on the complex role of the health assessor. To understand the entire role of the health assessor would have required a much larger study, involving additional participants and a longer time-frame for data collection. However, the retrospective review did provide a snapshot of the health assessors' perspectives on TSL during the defined period.

The initial open questions to the health assessors were broad and allowed respondents to determine their answers from a wide perspective. In addition, the semi-structured interviews provided a pathway for the voices of health assessors to be heard, albeit within this limited research perspective. Furthermore, the 15 health assessors who were interviewed were 'self-selecting' and, therefore, may have been more interested or better informed concerning the TSL than other health assessors. That said, health assessors based in other District Health Boards may identify with some of the emerging themes. The work of health assessors continues to evolve, and these findings were only relevant to the time period. The retrospective review of files was also limited to a relatively short time period of four months in 2015.

The author was, and remains a health assessor at the RFPS, where the research was based. This insider position potentially had a risk of influencing the semi-structured interviews and the data collection and analysis. The author was cognisant of this risk, reflected on it and put various measures in place to counter it as discussed in the methods section, Chapter 3.

6.7. CONTRIBUTION OF THESIS

This work contributes to existing FST knowledge by providing insight into how the TSL has impacted on the essential work of health assessors, both psychiatrists and psychologists, working in a District Health Board area in New Zealand. This is the first study of its kind in New Zealand to capture the health assessors' perspectives of the interface between the work of a health assessor assessing FST, with the introduction and subsequent impact of new sentencing criminal justice legislation, namely the TSL. It goes some way to recognising the expert and complicated role of the health assessor and the resultant impact that the TSL legislation has had on this practice.

The study contributes valuable knowledge and literature to inform health assessor practice with legislation that leads to a direct intersection with the justice sector. The findings enhance understanding of the challenges health assessors encounter and how they manage them. It provides a rare insight into the ethical dilemmas the health assessors' experience.

Importantly, the findings provide recommendations for brief guidelines/checklist to be produced to assist health assessors in the role of assessing TSL in relation to FST. In addition, it advocates for the education and professional support of health assessors in this role to provide clarity in regards to what the health assessors legally should be doing, and/or ideally should be doing within their practice (and reflected in their reports) in this regard. The research will serve as a base for future studies of the mental health–legal interface, particularly in relation to health assessors undertaking FST reports, and intersecting with forensic law in New Zealand. It will provide a base to further articulate the practices in relation to ethical decision making.

The research also provides additional comment on the international debate on the legal and health interface, and demonstrates that for the health professionals interviewed, a strong preference was indicated towards mental health, rehabilitation and social justice priorities. Health assessors were able to speak up within this study and raise their resistance to what they perceived as an objectionable law. Health assessors articulated that vulnerable groups were likely to be negatively impacted by the TSL which raised a number of important issues, including highlighting possible CRPD dimensions.

Finally the research may contribute to the wider debate on the efficacy of the TSL within New Zealand society.

6.8. SUGGESTIONS FOR FURTHER STUDY

The area of relating specific tests or sub-domains of tests, such as the WAIS to TSL capacity would be a valuable area for future research. The development of this area could help to reduce uncertainty and ambiguity as to a defendant's understanding of TSL. However, future researchers would need to consider that any standard reference to a particular test could reduce flexibility.

Further New Zealand research may also address the important clinical assessment process regarding FST for defendants seen to have difficulty participating in the process, such as those vulnerable groups discussed in this research. The Law Commission (2019) in the United Kingdom undertook consultation and policy development in this area and recommended a new legal test to more accurately identify defendants who are unable to participate effectively in their trials. The key, in their estimation, was to accommodate people's impairments. Included in their recommendations were that defendants would have a statutory entitlement to have the assistance of an intermediary if required and for judges and lawyers to have training to help identify defendants who need support, and what support was required (The Law Commission, 2019). However, as of 8 July 2019 the Law Commission had not received a response from Parliament concerning the suggested changes to the law.

Effective court participation for vulnerable groups is relevant to New Zealand because not only did New Zealand's fitness to plead doctrine "have its origins from English common law" (Brookbanks, 2011, p. 13) but "the rules governing 'unfitness to stand trial' in New Zealand are a combination of statute and common law, including decisions from courts in New Zealand, Australia, Canada and the United Kingdom (Brookbanks, 2018, p. 127). However, almost simultaneously, New Zealand made the assessment process more complex by integrating a requirement for the assessment of whether a person understands the TSL. Therefore, it is timely for New Zealand to be considering reforms or, at the very least, the process for inclusion of TSL consideration in FST assessments. Placing additional factors for assessment into the mix makes it more complex, at a time when other jurisdictions, like the United Kingdom, have attempted to clarify and simplify the assessment of FST.

While the TSL is not currently under review, the New Zealand government has recently launched an inquiry into mental health and addiction, with the purpose being to promote a new approach to mental health care which moves towards an emphasis on human

rights and social wellbeing (New Zealand Government, 2018). Research on these recommendations within the New Zealand context could also focus on the recommended 'pathway' for defendants in regards to TSL. This research could help to answer many of the health assessors' questions concerning their role in the TSL assessment process. For example, do lawyers need training specifically in the TSL, especially with a focus on educating their clients in this area? Who informs the health assessor that a TSL assessment is required?

Internationally, academics are questioning the fairness of finding defendants unfit to stand trial when considering the consequences, as demonstrated in Australia by McSherry (2017) and Freckelton (2018). There is a call for development in several Commonwealth countries including in the United States (Bonnie, 2018) and Canada (Ferguson, 2018). McSherry argued that accommodations be established and research has been conducted in this area. New Zealand based research could target what (if any) additional processes may be required to assist a defendant who is facing a TSL charge to be able to undertake a fair court process.

Additional research could be undertaken to develop a framework for practice, encompassing clinical guidelines/checklists for assessing TSL within FST assessments. This research could identify the contents of these guidelines/checklists to suit health assessors undertaking TSL assessments as part of a FST, and reduce negative impacts on this important group of people and their necessary role. Considerations may include the need to keep guidelines/checklists brief and discretionary to suit the needs of health assessors to be able to provide flexible assessments, while presenting relevant information in easily accessible form.

Finally, when future law that deals with liberty deprivation arises, research on the consequences for vulnerable groups need to be undertaken *in advance*, in the interests of those subject to those laws.

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APPENDICES

APPENDIX A: ETHICS DOCUMENTS

Locality agreement: DHB and Regional Forensic Psychiatry Service

WDHB Approval of Research

Waitemata District Health Board
Best Care for Everyone

RM13426 Impact of the three-strikes act on fitness to stand trial assessments

WDHB Contact: Anne Huddleston

Department: Mason Clinic
Project Type: Observational research
Duration: 6/06/2016 - 4/12/2017
Title Abbreviation:
External Reference:

Description: Research question: How does the three-strikes law impact on the assessment of fitness to stand trial by Health Assessors (Psychologists and Psychiatrists) at the Mason Clinic?
The two-parts of intended research are:
Part 1: Retrospective File Audit
Part 1 of the proposed study will employ a descriptive study design to examine different factors and issues associated with the defendants who face charges under the three-strikes law together with fitness to stand trial assessments within the New Zealand criminal justice system. As this is an archival study, it will make use of a retrospective cohort of defendants who were formally assessed for fitness to stand trial between 30 June 2015 and 30 June 2016 by the New Zealand Courts in the Auckland and Northland region. This archival data will be anonymised and will be non-identifiable.

Part 2: Face to face interviews
I intend to interview a targeted number of psychologists and psychiatrists within the Mason Clinic, WDHB, in face to face interviews. I will then undertake thematic analysis of the results of these interviews (following Braun and Clarke's 2006) approach. I will look at the themes and consider making recommendations concerning ongoing Health Assessor assessments in the Fitness to Stand area.

Locality Review

The undersigned agree to the following:

- The study protocol and methodology has merit.
- The local lead investigator is suitably qualified, experienced, registered and indemnified.
- Resources, facilities and staff are available to conduct this study, including access to interpreters if requested.
- Cultural consultations have occurred or will be undertaken as appropriate.
- Appropriate confidentiality provisions have been planned for.
- Appropriate arrangements are in place to notify other relevant local health or social care staff about the study, and for making available any extra support that might be required by participants.
- Conducting this study will have no adverse effect on the provision of publicly funded healthcare.
- There is a stated intent that the results of this study will be disseminated and where practical and appropriate the findings of the study will be translated into evidence based care.

Awhina Research & Knowledge can assist in the determination of ethics approval requirements, budgets, contracts, funding applications and statistical consultations. Enquires to research@waitematadhb.govt.nz

Dept/Org	Role	Name (Print Clearly)	Signature	Date
Mason Clinic	*Manager*	*Pam Lightbown*		10/8/16
Mason Clinic	*Head of Division*	*Jeremy Skipworth*		14/8/2016

Please return completed form to Awhina Research & Knowledge Centre
Alternatively, emails received from approvers are acceptable as electronic sign-off.

AUTEC

AUTEC Secretariat

Auckland University of Technology
D-88, WU406 Level 4 WU Building City Campus
T: +64 9 921 9999 ext. 8316
E: ethics@aut.ac.nz
www.aut.ac.nz/researchethics

15 December 2016

Kate Diesfeld
Faculty of Health and Environmental Sciences

Dear Kate

Re Ethics Application: **16/427 The impact of the New Zealand three-strikes law on the assessment of fitness to stand trial by health assessors.**

Thank you for providing evidence as requested, which satisfies the points raised by the Auckland University of Technology Ethics Committee (AUTEC).

Your ethics application has been approved for three years until 15 December 2019.

As part of the ethics approval process, you are required to submit the following to AUTEC:

- A brief annual progress report using form EA2, which is available online through http://www.aut.ac.nz/researchethics. When necessary this form may also be used to request an extension of the approval at least one month prior to its expiry on 15 December 2019;
- A brief report on the status of the project using form EA3, which is available online through http://www.aut.ac.nz/researchethics. This report is to be submitted either when the approval expires on 15 December 2019 or on completion of the project.

It is a condition of approval that AUTEC is notified of any adverse events or if the research does not commence. AUTEC approval needs to be sought for any alteration to the research, including any alteration of or addition to any documents that are provided to participants. You are responsible for ensuring that research undertaken under this approval occurs within the parameters outlined in the approved application.

AUTEC grants ethical approval only. If you require management approval from an institution or organisation for your research, then you will need to obtain this.

To enable us to provide you with efficient service, please use the application number and study title in all correspondence with us. If you have any enquiries about this application, or anything else, please do contact us at ethics@aut.ac.nz.

All the very best with your research,

Kate O'Connor
Executive Secretary
Auckland University of Technology Ethics Committee

Cc: anne.huddleston@waitematadhb.govt.nz; Brian McKenna

APPENDIX B: CONSULTATION WITH MĀORI AND PASIFIKA

Consultation with Mātauranga Māori Committee, AUT University

School of Rehabilitation and Occupation Studies

Verification of Māori Consultation Processes

This document provides verification that the research project named below was discussed with the School of Rehabilitation and Occupation Studies Mātauranga Māori Committee, AUT University. Specific comments and recommendations are indicated below.

Research Title:
The impact of the New Zealand three-strikes law on the assessment of fitness to stand trial by health assessors at the Regional Forensic Psychiatry Services, WDHB.

Researcher(s): Anne Huddleston, Prof Kate Diesfield, Prof Brian McKenna		**Date:** 6/7/16
Discussion Areas	**Addressed**	**Comments/ Recommendations**
Whakapapa: Relationships		
Researcher experience in field	x	
Consultation with local stakeholders	x	C5, R6
Consenting process		
Clarity of data usage	x	
Dissemination of findings	x	C4
Benefits to participants	x	C7
Tika: Validity of the research		
Clear purpose of project	x	
Relevance to Māori	x	
Likely outcome for participants, communities, other stakeholders	x	
Participant recruitment methods	x	R2
Māori involvement in project (participants, researchers, etc)	x	R2, R4, R5
Manaakitanga: Responsibility and respect		
Participants' access to appropriate advice		
Participants treated with dignity and respect	x	
Privacy and confidentiality	x	C6, R1
Whānau support		
Transparency of research process	x	
Mana tangata: Power & Authority		
Reciprocity (acknowledgements, compensation, gifts)	x	C7, R5
Risks of participation identified	x	C6, R1
Ownership of outcomes		
Informed consent process		

Comments

1. The project aims to evaluate the impact of the "three-strikes" law on fitness to stand trial assessments and on the health assessors. The assessors will primarily be from the Mason Clinic, but recruitment may expand beyond here (see recommendation).
2. The first part of the study is an archival project examining reports over a 12-month period. Reports that specifically relate to the three-strikes law will be involved. Sociodemographic data, including ethnicity, will be obtained along with the assessment findings.
3. The second part of the study will involve interviews with the assessors, centring on their knowledge of the three-strikes law and how this relates to their assessments.
4. Anne will present a seminar on the three-strikes law at the Mason Clinic to ensure staff are familiar with it and its implications.
5. It was noted that Anne had undertaken a considerable amount of consultation with Māori to date.
6. The question was raised as to whether the participants in part II of the study (health assessors) may be identifiable given the few assessors that work at the Mason Clinic. Anne thought it unlikely that any of the

current assessors at the Mason Clinic are Māori.

7. The assessors that are interviewed will be given grocery vouchers as acknowledgement of their participation.

Recommendations

1. If possible, remove reference to the "Mason Clinic" in the thesis and any publications to reduce the potential of identifying the participants involved.
2. It would be useful to include at least one Māori participant in Part II of the study, even if it meant recruiting from outside of the Mason Clinic.
3. Use the Ministry of Health ethnicity codes for classifying ethnicity (http://www.health.govt.nz/nz-health-statistics/data-references/code-tables/common-code-tables/ethnicity-code-tables). It would be beneficial to include iwi when recording ethnicity.
4. An official Māori Advisor should be nominated for the project to provide ongoing advice as the project is progressed.
5. It would be beneficial if a Māori psychologist/psychiatrist familiar with fitness to stand trial assessments also viewed the reports to provide assistance with interpreting findings or identifying aspects relevant to Maori. It would be appropriate to acknowledge this assistance with the project in some way.
6. Anne should approach the Cultural Advisory group at the Mason Clinic and discuss the project with them.

Feedback on these comments and recommendations is to be provided by: 31/7/17

Signature: Gwyn Lewis Date: 13/7/16

Representative, Mātauranga Māori Committee

Email concerning Māori consultation

Anne Huddleston

From:	Kate Diesfeld <kate.diesfeld@aut.ac.nz>
Sent:	Wednesday, 13 July 2016 11:40 a.m.
To:	Anne Huddleston
Subject:	Form attached.
Attachments:	Huddleston PGR 9 KD signature.pdf

And we just received a very affirming email from G Lewis regarding your Maori consultation and review. Well done, Anne. Great job.

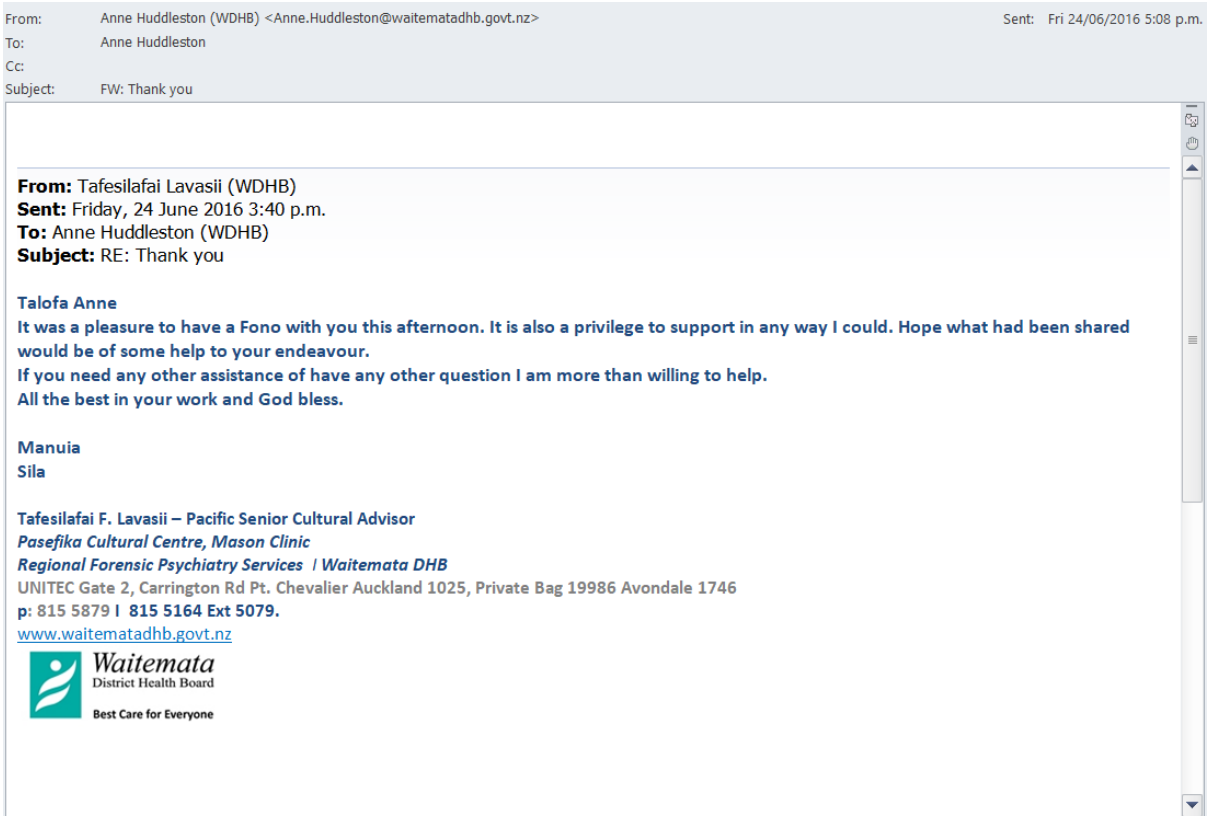
Best wishes
Kate

AUT

Kate Diesfeld
Professor
Public Health
Auckland University of Technology

P 09 921 9999 ext 7837 E kdiesfel@aut.ac.nz W aut.ac.nz

Consultation with Pasifika Cultural Advisor



From: Anne Huddleston (WDHB) <Anne.Huddleston@waitematadhb.govt.nz> Sent: Fri 24/06/2016 5:08 p.m.
To: Anne Huddleston
Cc:
Subject: FW: Thank you

From: Tafesilafai Lavasii (WDHB)
Sent: Friday, 24 June 2016 3:40 p.m.
To: Anne Huddleston (WDHB)
Subject: RE: Thank you

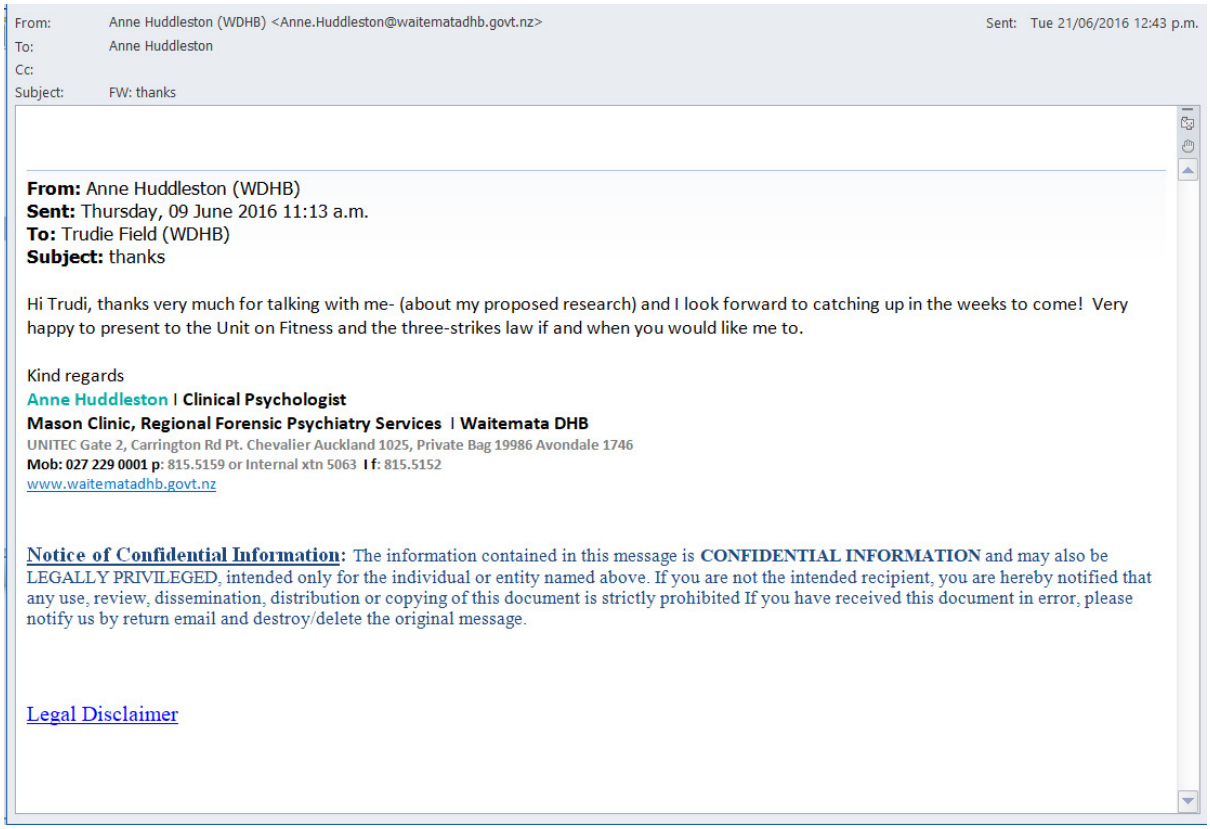
Talofa Anne
It was a pleasure to have a Fono with you this afternoon. It is also a privilege to support in any way I could. Hope what had been shared would be of some help to your endeavour.
If you need any other assistance of have any other question I am more than willing to help.
All the best in your work and God bless.

Manuia
Sila

Tafesilafai F. Lavasii – Pacific Senior Cultural Advisor
Pasefika Cultural Centre, Mason Clinic
Regional Forensic Psychiatry Services I Waitemata DHB
UNITEC Gate 2, Carrington Rd Pt. Chevalier Auckland 1025, Private Bag 19986 Avondale 1746
p: 815 5879 I 815 5164 Ext 5079.
www.waitematadhb.govt.nz

Waitemata District Health Board
Best Care for Everyone

Letter of thanks to Trudie Field, Registered Nurse, RFPS for cultural input



From: Anne Huddleston (WDHB) <Anne.Huddleston@waitematadhb.govt.nz> Sent: Tue 21/06/2016 12:43 p.m.
To: Anne Huddleston
Cc:
Subject: FW: thanks

From: Anne Huddleston (WDHB)
Sent: Thursday, 09 June 2016 11:13 a.m.
To: Trudie Field (WDHB)
Subject: thanks

Hi Trudi, thanks very much for talking with me- (about my proposed research) and I look forward to catching up in the weeks to come! Very happy to present to the Unit on Fitness and the three-strikes law if and when you would like me to.

Kind regards
Anne Huddleston I **Clinical Psychologist**
Mason Clinic, Regional Forensic Psychiatry Services I Waitemata DHB
UNITEC Gate 2, Carrington Rd Pt. Chevalier Auckland 1025, Private Bag 19986 Avondale 1746
Mob: 027 229 0001 p: 815.5159 or Internal xtn 5063 **I f**: 815.5152
www.waitematadhb.govt.nz

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Legal Disclaimer

APPENDIX C: LETTERS

Invitation to participants

Invitation

✓ To all **Health Assessors**

This is a call for Health Assessors who write Fitness to Stand Trial Reports- to have your say about the Three Strikes Law!

For details contact:-

Anne Huddleston–

anne@waitematadhb.govt.nz

Mobile: 027 229 0001

APPENDIX D: PARTICIPATION INFORMATION SHEETS AND CONSENT FORMS

Information-sheet semi-structured interview participants

Participant Information Sheet

14 December 2016

Project Title

The impact of the New Zealand three-strikes law on the assessment of Fitness to Stand Trial by Health Assessors.

An Invitation

My name is Anne Huddleston; I am a Doctor of Health Science candidate at Auckland University of Technology's Faculty of Health and Environmental Sciences. This research will contribute to my DHSc.

You are invited to participate in research. It will investigate the impact of the Sentencing and Parole Reform Act, 2010 (known colloquially as the three-strikes law) on the assessment of Fitness to Stand Trial by Health Assessors. You and other Health Assessors at the Mason Clinic are invited to voluntarily participate in this research, which will neither advantage nor disadvantage you.

What is the purpose of this research?

There is meagre research on the three-strikes law and the impact of this law on Fitness to Stand Trial assessments. The topic Fitness to Stand Trial is extremely relevant to the work of Health Assessors. It is envisaged this research will provide valuable information on the three strikes law.

This research will indirectly benefit defendants who are undergoing the Court process in New Zealand in terms of their Fitness to Stand Trial, who have charges, which compel them to be dealt with under the Sentencing and Parole Reform Act 2010 (three-strikes law).The research may increase the knowledge of Health Assessors and therefore improve the assessments for defendants. The defendants going through this process will include Maori and Pacific Peoples. According to Rumbles (2011) and Oleson (2014), both cultures were over-represented within the three-strikes law statistics. This research will add to existing research on the impact of the three-strikes law on Maori and Pacific Peoples.

How was I identified and why am I being invited to participate in this research?

Following the 'Invitation' issued to all Health Assessors as part of the recruitment advertisement, for Health Assessors who write Fitness to Stand Trial Reports- to have your say about the Three-Strikes Law, you have been identified as a potential participant because you are a Health Assessor who has undertaken Fitness to Stand Trial assessments.

How do I agree to participate in this research?

If you agree to take part could you email or phone the primary researcher, Anne Huddleston at anne.huddleston@waitematadhb.govt.nz Phone 027 229 0001 within the following month. An interview time will then be set up at your convenience and at the time of your interview you will be required to sign a consent form.

What will happen in this research?

Your contribution would be voluntary and would involve participating in one semi-structured interview, face to face interview that will last approximately one hour. The interview will take place at the 'Judges Room', Rata Unit, Mason Clinic after hours.

How will my privacy be protected?

All personal information will remain strictly confidential and no material that can personally identify you will be used in this study. It is noted that there is a limit on the confidentiality offered, however, due to the fact that the participants are drawn from a small pool and are potentially known to each other. With your permission the interview will be recorded and transcribed by myself or an experienced transcriber who will sign a confidentiality agreement. In addition you will be provided with the opportunity to review and confirm the transcript of your interview. Health Assessors views will be grouped for analysis so as not to identify any individual participant.

The transcriptions of the interview will be kept in a locked cabinet at that Primary Supervisor's office in AR337 at AUT University. The consent forms will be kept separate from the transcriptions. The consent forms will be held in AR337 at AUT and destroyed six years after the doctorate is awarded. Information gathered from the interviews will be used in my thesis, academic publications and presentations.

It is noted that the Primary Researcher (Anne Huddleston) does have a role as a Health Assessor (Psychologist) within the organisation being studied.

What opportunity do I have to consider this invitation?

You are able to withdraw from the study at any time. If you choose to withdraw from the study, then you will be offered the choice between having any data that is identifiable as belonging to you removed or allowing it to continue to be used. However, once the findings have been produced, removal of your data may not be possible.

Will I receive feedback on the results of this research?

You will receive general feedback on the results of this research via the Research Committee at the Mason Clinic at the completion of this study. You can also tick the option to receive a summary of the research findings on the Consent Form.

What do I do if I have concerns about this research?

Any concerns regarding the nature of this project should be notified in the first instance to the Executive Secretary of AUTEC, Kate O'Connor, *ethics@aut.ac.nz*, 921 9999 ext. 6038. Please keep this Information Sheet and a copy of the Consent Form for your future reference.

Whom do I contact for further information about this research?

You are also able to contact the research team as follows: Project Supervisor, Professor Kate Diesfeld, Faculty of Health and Environmental Studies, AUT University, 09 921 9999 Ext 7837 or the researcher, Anne Huddleston, 027 229 0001.

This project has been approved by the Auckland University of Technology Ethics Committee on 15 December 2016, AUTEC Reference number 16/427.

Ethics 111116

Consent form participants

Consent Form

Project title: The impact of the New Zealand three-strikes law on the assessment of Fitness to Stand Trial by Health Assessors.

Project Supervisor: *Kate Diesfeld*

Researcher: *Anne Huddleston*

- ○ I have read and understood the information provided about this research project in the Information Sheet dated 14 December 2016.
- ○ I have had an opportunity to ask questions and to have them answered.
- ○ I understand that notes will be taken during the interviews and that they will also be audio-taped and transcribed.
- ○ I understand that taking part in this study is voluntary (my choice) and that I may withdraw from the study at any time without being disadvantaged in any way.
- ○ I understand that if I withdraw from the study then I will be offered the choice between having any data that is identifiable as belonging to me removed or allowing it to continue to be used. However, once the findings have been produced, removal of my data may not be possible.
- ○ I agree to take part in this research.
- ○ I wish to receive a summary of the research findings (please tick one): Yes○ No○

Participant's signature: .....

Participant's name: .....

Participant's Contact Details (if appropriate):

.....

.....

.....

.....

Date:

Approved by the Auckland University of Technology Ethics Committee on 15 December 2016 AUTEC Reference number 16/427

Note: The Participant should retain a copy of this form.

APPENDIX E: DATA COLLECTION TOOLS

Data collection form for retrospective file review

Date of S.38 Fitness Report: _____

Anonymous file number:_____

Demographic Factors

Gender: ☐ Male ☐ Female

Age: ☐ Under 34.9 ☐ 35 to 39.9 ☐ 40 to 59.9 ☐ 60 and over

Ethnicity:

☐ Pacific Peoples
☐ Maori
☐ European
☐ Asian
☐ Other

Offence related factors

1. No of current strike ☐ 1st
☐ 2nd
☐ 3rd

2. Name of current charge/s:

☐ (1) section 128B (sexual violation):
☐ (2) section 129 (attempted sexual violation and assault with intent to commit sexual violation):
☐ (3) section 129A(1) (sexual connection with consent induced by threat):
☐ (4) section 131(1) (sexual connection with dependent family member under 18 years):
☐ (5) section 131(2) (attempted sexual connection with dependent family member under 18 years):
☐ (6) section 132(1) (sexual connection with child):
☐ (7) section 132(2) (attempted sexual connection with child):
☐ (8) section 132(3) (indecent act on child):
☐ (9) section 134(1) (sexual connection with young person):

Ethics 111116

- ◻ (10) section 134(2) (attempted sexual connection with young person):
- ◻ (11) section 134(3) (indecent act on young person):
- ◻ (12) section 135 (indecent assault):
- ◻ (13) section 138(1) (exploitative sexual connection with person with significant impairment):
- ◻ (14) section 138(2) (attempted exploitative sexual connection with person with significant impairment):
- ◻ (15) section 142A (compelling indecent act with animal):
- ◻ (16) section 144A (sexual conduct with children and young people outside New Zealand):
- ◻ (17) section 172 (murder):
- ◻ (18) section 173 (attempted murder):
- ◻ (19) section 174 (counselling or attempting to procure murder):
- ◻ (20) section 175 (conspiracy to murder):
- ◻ (21) section 177 (manslaughter):
- ◻ (22) section 188(1) (wounding with intent to cause grievous bodily harm):
- ◻ (23) section 188(2) (wounding with intent to injure):
- ◻ (24) section 189(1) (injuring with intent to cause grievous bodily harm):
- ◻ (25) section 191(1) (aggravated wounding):
- ◻ (26) section 191(2) (aggravated injury):
- ◻ (27) section 198(1) (discharging firearm or doing dangerous act with intent to do grievous bodily harm):
- ◻ (28) section 198(2) (discharging firearm or doing dangerous act with intent to injure):
- ◻ (29) section 198A(1) (using firearm against law enforcement officer, etc):
- ◻ (30) section 198A(2) (using firearm with intent to resist arrest or detention):
- ◻ (31) section 198B (commission of crime with firearm):
- ◻ (32) section 200(1) (poisoning with intent to cause grievous bodily harm):
- ◻ (33) section 201 (infecting with disease):
- ◻ (34) section 208 (abduction for purposes of marriage or sexual connection):
- ◻ (35) section 209 (kidnapping):
- ◻ (36) section 232(1) (aggravated burglary):
- ◻ (37) section 234 (robbery):
- ◻ (38) section 235 (aggravated robbery):
- ◻ (39) section 236(1) (causing grievous bodily harm with intent to rob or assault with intent to rob in specified circumstances):
- ◻ (40) section 236(2) (assault with intent to rob).

3. three-strikes law mentioned or discussed in reports	1st opinion	◻ Yes	◻ No
	2nd opinion	◻ Yes	◻ No
	3rd opinion	◻ Yes	◻ No

CONTINUE DATA QUESTIONNAIRE ONLY IF 'YES' ANSWERED IN QUESTION 3

Fitness to stand trial related issues

4. Previous finding of Fitness to Stand Trial in court: □ Fit □ Unfit
   Date Assessed: _____

5. Nature of mental impairment:
   - □ Intellectual Disability
   - □ Mental Disorder (i.e. Axis 1 diagnosis)
   - □ Acquired Cognitive Disorder (brain injury, dementia, etc.)

6. **Finding of 1st Health Assessor:** □ Fit □ Unfit
   Profession: □ Psychiatrist □ Psychologist

three-strikes law discussed under following criteria:

a. CP(MIP) Act 2003 criteria:

- □ Ability to enter a plead
- □ Understand the nature, process and consequences of the court proceeding
- □ Ability of the defendant to instruct counsel for the purpose of mounting a defence

b. Baragwanath criteria:

- □ Understanding what it is that he has been charged with
- □ Pleading to the charge and exercising his rights of challenge
- □ Understanding that the proceedings would be an inquiry as to whether or not he did what he was charged with
- □ Following in general terms, the course of the proceedings before the Court
- □ Understanding the substantial effect of any evidence given against him
- □ Making a defence to, or answering, the charge
- □ Deciding what defence he would rely on
- □ Giving instructions to his legal representative (if any)
- □ Making his version of the facts known to the Court and to his legal representative.

c. Other criteria:

- □

d. Record information discussed:

Approved by the Auckland University of Technology Ethics Committee (AUTEC) on 15 December 2016. Reference number 16/427.

Guide to semi-structured interview

1. What is your current knowledge concerning the three-strikes law, and how do you see this law impacting on Fitness to Stand Trial assessments?
2. If you assess for three-strikes law, how do you do it?
3. How much does it matter (if at all) whether this is strike one or two or three?
4. What tensions, if any, arise in assessing for three-strikes law understanding?
5. In your estimation, what is the impact of integrating a three-strikes law assessment within a Fitness to Stand Trial assessment?
6. What is the practical impact, if any, for the defendants?
7. How frequently does a person seem to be fit but NOT understand three-strikes law?
8. What are the implications for the defendant?
9. What tensions, if any, arise for you as a Health Assessor in these circumstances?
10. What would be the ideal method of assessing the defendant's understanding of the three-strikes law in Fitness to Stand Trial assessments in the future?
11. How helpful would guidelines be?
12. What would the guidelines contain?
13. Who would draft the guidelines?

Approved by the Auckland University of Technology Ethics Committee on: 15 December 2016

AUTEC Reference number:16/427

APPENDIX F: CONFIDENTIALITY AGREEMENTS

Researcher

Awhina
Waitemata DHB

Waitemata District Health Board
Best Care for Everyone

My responsibility as a Researcher for maintaining Confidentiality, Privacy and Security of Information

Project Title: The Impact of the New Zealand three-strikes law on the assessment of fitness to stand trial by health assessors

WDHB Supervisor: Anne Huddleston

Awhina Registration Number: RM13426 **Project Expiry Date:** 4/12/2017

Areas for which Security Access is requested: Puriri Pod Masa Clinic

- I understand that at all times I must maintain the confidentiality of information that I become aware of during my contractor or visiting researcher status. Information about Waitemata District Health Board (DHB), its patients and employees must not be disclosed to persons not entitled to know.

  I will comply at all times with the Privacy Act 1993, Health Information Privacy Code 1994, privacy policy and procedures of Waitemata DHB plus any policies or procedures I must adhere to as part of a professional body. (The Privacy act and Code can be viewed at www.privacy.org.nz). I am aware that an inappropriate use or disclosure of information could result in disciplinary action, referral to a professional body or complaint to the Privacy Commissioner.

  I will participate fully in any complaint process or investigation that may arise during the currency of the innovation protocol/activity or thereafter.

  Initial

- I understand that I must only access health information directly related to the research protocol specified. I will not use my authorised access inappropriately. I may be called upon to account for my access to information when its justification is not immediately apparent.

  Initial

- Where I have approved access to a security password or other identifier I am personally responsible to not disclose this. i.e. I am responsible for the electronic identity and signature.

  Initial

- I will take all reasonable actions to:
  - Make sure that confidential information is not accessible to unauthorised people, i.e. no discussion of information in a public place; papers and records will be kept secure and not able to be accessed by the public; careful faxing and emailing of information; transporting information securely using formal processes approved by Waitemata DHB; turning screens away from public viewing and using screen lock-out; identifiable patient information will not be photographed or copied by any hand held or other electronic device except by agreement between the parties and within the terms of the innovation protocol.
  - *Immediately* report any breach or compromise, verbally and in writing. Initial

I have read and understand my responsibilities

Name (print please): Lynne Mary Huddleston

Position related to this Project... Research Assistant

Signature: [signature] **Date:** 8/2/17

Transcriber number one

Confidentiality Agreement

For someone transcribing data, e.g. audio-tapes of interviews.

Project title: The impact of the New Zealand Three Strikes Law on the assessment of fitness to stand trial by health assessors.

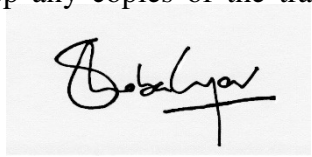
Project Supervisor: Kate Diesfeld

Researcher: Anne Huddleston

✓ I understand that all the material I will be asked to transcribe is confidential.

✓ I understand that the contents of the tapes or recordings can only be discussed with the researchers.

✓ I will not keep any copies of the transcripts nor allow third parties access to them.



Transcriber's signature: ....
.....

Transcriber's name: Dr Shoba Nayar
Transcriber's Contact Details (if appropriate):
Phone +919941410696
snayar19@gmail.com
Date: 4th July 2017

Note: The Transcriber should retain a copy of this form.

Approved by the Auckland University of Technology Ethics Committee on: 15 December 2016

AUTEC Reference number: 16/427

Transcriber number two

AUT
TE WĀNANGA ARONUI O TĀMAKI MAKAU RAU

Confidentiality Agreement

For someone transcribing data, e.g. audio-tapes of interviews.

Project title: The impact of the New Zealand three-strikes law on the assessment of fitness to stand trial by Health Assessors.

Project Supervisor: Kate Diesfeld

Researcher: Anne Huddleston

- ✓ I understand that all the material I will be asked to transcribe is confidential.
- ✓ I understand that the contents of the tapes or recordings can only be discussed with the researchers.
- ✓ I will not keep any copies of the transcripts nor allow third parties access to them.

Transcriber's signature: .....

Transcriber's name: Dr Lynne Huddleston.....

Transcriber's Contact Details (if appropriate):

57 School Road.....

Mahana

RD 1

Upper Moutere

Nelson

Date: 5 June 2017

Approved by the Auckland University of Technology Ethics Committee on 15 December 2016

AUTEC Reference number 16/427

Note: The Transcriber should retain a copy of this form.

APPENDIX G: SECTION 86A OF THE SENTENCING AND PAROLE REFORM ACT 2010

(b) impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences.

Part 1
Amendments to Sentencing Act 2002

4 Principal Act amended

This Part amends the Sentencing Act 2002.

5 Interpretation

The definition of **minimum period of imprisonment** in section 4(1) is amended by omitting "section 86 or section 89 or section 103" and substituting "section 86, 86D(4), 86E(4)(a), 89, or 103".

6 New sections 86A to 86I and heading inserted

(1) The following heading and sections are inserted after section 86:

"Additional consequences for repeated serious violent offending

"86A Interpretation

In this section and in sections 86B to 86I, unless the context otherwise requires,—

"**record of final warning**, in relation to an offender, means a record of a warning that the offender has under section 86C(3) or 86E(8)

"**record of first warning**, in relation to an offender, means a record of a warning that the offender has under section 86B(3)

"**serious violent offence** means an offence against any of the following provisions of the Crimes Act 1961:

"(1) section 128B (sexual violation):

"(2) section 129 (attempted sexual violation and assault with intent to commit sexual violation):

"(3) section 129A(1) (sexual connection with consent induced by threat):

"(4) section 131(1) (sexual connection with dependent family member under 18 years):

"(5) section 131(2) (attempted sexual connection with dependent family member under 18 years):
"(6) section 132(1) (sexual connection with child):
"(7) section 132(2) (attempted sexual connection with child):
"(8) section 132(3) (indecent act on child):
"(9) section 134(1) (sexual connection with young person):
"(10) section 134(2) (attempted sexual connection with young person):
"(11) section 134(3) (indecent act on young person):
"(12) section 135 (indecent assault):
"(13) section 138(1) (exploitative sexual connection with person with significant impairment):
"(14) section 138(2) (attempted exploitative sexual connection with person with significant impairment):
"(15) section 142A (compelling indecent act with animal):
"(16) section 144A (sexual conduct with children and young people outside New Zealand):
"(17) section 172 (murder):
"(18) section 173 (attempted murder):
"(19) section 174 (counselling or attempting to procure murder):
"(20) section 175 (conspiracy to murder):
"(21) section 177 (manslaughter):
"(22) section 188(1) (wounding with intent to cause grievous bodily harm):
"(23) section 188(2) (wounding with intent to injure):
"(24) section 189(1) (injuring with intent to cause grievous bodily harm):
"(25) section 191(1) (aggravated wounding):
"(26) section 191(2) (aggravated injury):
"(27) section 198(1) (discharging firearm or doing dangerous act with intent to do grievous bodily harm):
"(28) section 198(2) (discharging firearm or doing dangerous act with intent to injure):
"(29) section 198A(1) (using firearm against law enforcement officer, etc):
"(30) section 198A(2) (using firearm with intent to resist arrest or detention):

"(31) section 198B (commission of crime with firearm):
"(32) section 200(1) (poisoning with intent to cause grievous bodily harm):
"(33) section 201 (infecting with disease):
"(34) section 208 (abduction for purposes of marriage or sexual connection):
"(35) section 209 (kidnapping):
"(36) section 232(1) (aggravated burglary):
"(37) section 234 (robbery):
"(38) section 235 (aggravated robbery):
"(39) section 236(1) (causing grievous bodily harm with intent to rob or assault with intent to rob in specified circumstances):
"(40) section 236(2) (assault with intent to rob)

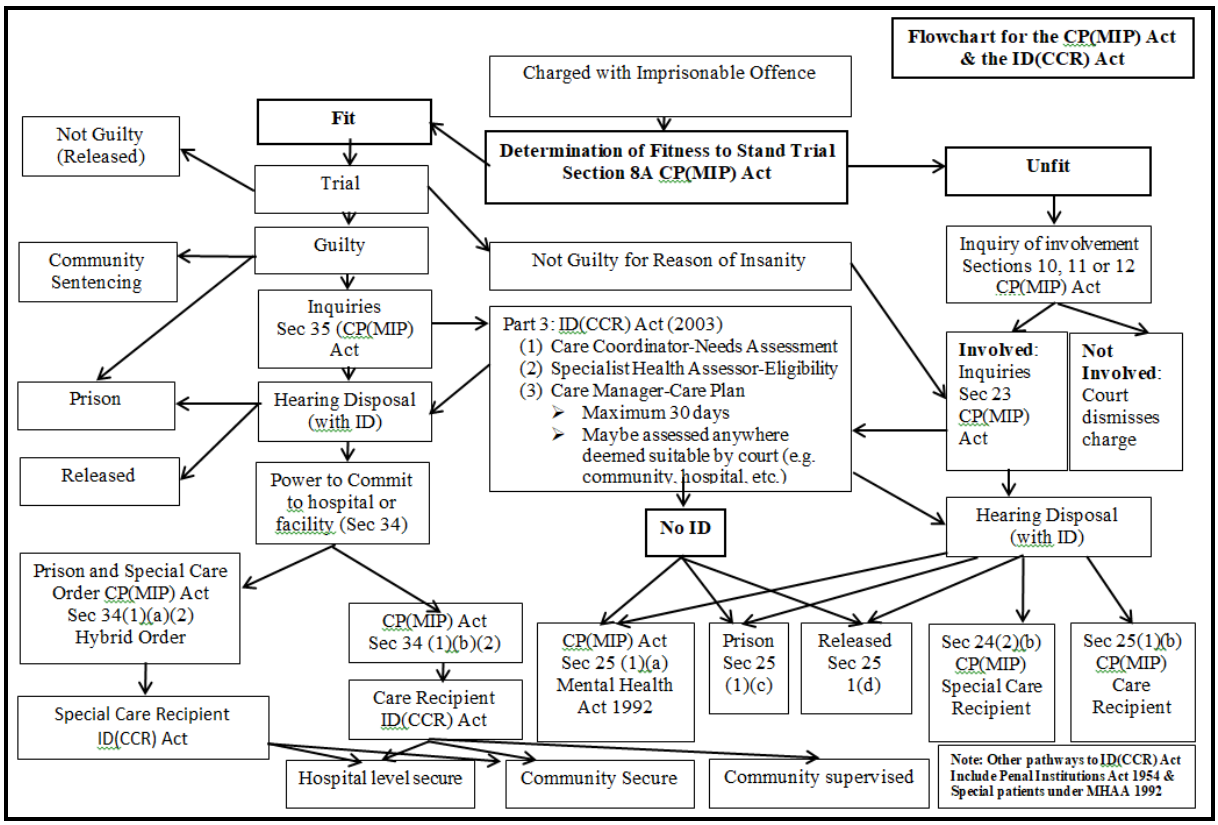
"**stage-1 offence** means an offence that—
"(a) is a serious violent offence; and
"(b) was committed by an offender at a time when the offender—
"(i) did not have a record of first warning given under section 86B; and
"(ii) was 18 years of age or over

"**stage-2 offence** means an offence that—
"(a) is a serious violent offence; and
"(b) was committed by an offender at a time when the offender had a record of first warning (in relation to 1 or more offences) but did not have a record of final warning

"**stage-3 offence** means an offence that—
"(a) is a serious violent offence; and
"(b) was committed by an offender at a time when the offender had a record of final warning (in relation to 1 or more offences)."

APPENDIX H: FST PROCESS

Intellectual Disability Offender Liaison Service (2019)



APPENDIX I: HAND-OUT OF THREE STRIKES LAW

Three strikes statistics

The Sentencing and Parole Reform Act 2010 creates a three stage system of increasing consequences for repeat serious violent offenders.

There are 40 qualifying offences comprising all major violent and sexual offences with a maximum penalty of seven years or greater imprisonment, including murder, attempted murder, manslaughter, wounding with intent to cause grievous bodily harm, sexual violation, abduction, kidnapping, and aggravated robbery.

The full list can be found in section 86A of the Sentencing Act 2002.

Sentencing Act 2002

A first warning is issued when an offender aged 18 or over at the time of a qualifying offence, and who does not have any previous warnings, is convicted of that offence. Once an offender has received a first 'strike' warning, it stays on their record for good unless their conviction is overturned.

If that offender is subsequently convicted of another qualifying offence they receive a final warning and, if sentenced to imprisonment, will serve that sentence in full without the possibility of parole. The first and final warnings will stay on the offender's record.

On conviction of a third qualifying offence the court must impose the maximum penalty for the offence. The court must also order that the sentence be served without parole, unless the court considers that would be manifestly unjust.

APPENDIX J: GLOSSARY OF MĀORI WORDS

Māori Words	English Translation
Hapū	Collection of Whānau groupings who descend from a common ancestor
Iwi	Extended kinship groups. Often refers to a large group of people descended from a common ancestor
Koha	A gift to acknowledge and reciprocate something that has been given to an individual or group
Māori	Indigenous New Zealander
Te Kōti Rangatahi	The Māori Youth Court
Whānau	Extended family group. Teo be born/give birth

*Translation provided by Tipene Paul, Māori Cultural Advisor, Regional Forensic Psychiatry Service.