

# Regulatory Impact Statement: Removing taxpayer funding for reports under section 27 of the Sentencing Act 2002

## Coversheet

Purpose of Document	
Decision sought:	Cabinet decision to amend the Legal Services Act 2011 to remove legal aid funding for reports under section 27 of the Sentencing Act 2002.
Advising agencies:	Ministry of Justice
Proposing Ministers:	Minister of Justice, Hon Paul Goldsmith
Date finalised:	7/12/2023
Problem Definition	
<p>The Government has concerns, as set out in the 100-Day commitment plan, with taxpayer funding being spent on section 27 reports.</p> <p>Section 27 of the Sentencing Act 2002 (the Act) permits an offender to request the court hear any person or persons they call on to speak about the personal, family, whānau, community, and cultural background of the offender as well as other matters that may assist the court in sentencing.</p> <p>The original intent of section 27 was that the court may hear from a person called by the offender to speak to the court. However, in practice the information is generally provided in a written report by an individual not personally known by the offender. When an offender is legally aided, the report writers' costs can be claimed under the grant of legal aid.</p> <p>There has been a significant increase in the use of section 27 written reports. In 2017 there were nine section 27 reports funded by legal aid and the Public Defence Service, costing a total of \$17,164. In comparison, in 2022 there were 2,429 reports at a cost of \$6.45 million. Since 2017, approximately 8,231 reports have been funded through legal aid and PDS, at a total cost of approximately \$20.354 million.</p>	
Executive Summary	
<p>The Government's 100-Day commitment plan includes to "defund section 27 reports". This will require an amendment to the Legal Services Act 2011.</p>	
Limitations and Constraints on Analysis	

## Timeframes

The proposal is part of the Government's 100-Day commitment. The proposals in this paper have been assessed in a significantly truncated timeframe. This has limited the ability to:

- test the assumptions underpinning the problem definition and proposed response;
- investigate/understand the intended or unintended consequences;
- undertake consultation with Māori and stakeholders; and
- consider a broad range of options.

A shortened timeframe to undertake the policy analysis was necessitated to allow sufficient time for drafting legislation for introduction before the end of the 100-Day period.

## The scope of options being considered is significantly limited

The Government's 100-Day commitment is to end taxpayer funding for section 27 reports. This significantly limits detailed consideration of alternative options to limit, or otherwise improve, the use of section 27 reports.

## Linkages with other work underway on sentencing

The impact of ending taxpayer funding for section 27 reports on sentencing outcomes for offenders has not been considered in this analysis. The effects on sentences will be considered as part of broader planned analysis of other Sentencing Act reforms. This will include analysis of a 40% cap on sentence discounts. If a 40% cap on sentence discounts is introduced, this may have an effect on some offenders. Those who have already received the maximum 40% discount through other mitigating factors (such as guilty plea, youth, remorse etc), will be unable to obtain the discount they may have otherwise received based on factors set out in the section 27 report. That may have an effect for some offenders, where the maximum 40% discount has already been attained through other mitigating factors (such as guilty plea, youth, remorse etc), so they are then unable to obtain the discount they may have otherwise received based on information in the section 27 report.

## Data

There are gaps in the qualitative and quantitative data addressing the use and effectiveness of the section 27 reports. Analysis relies on the preliminary findings from the Ministry of Justice's research project into section 27 written reports. This research began in April 2023 and is not yet complete, being ongoing at the time of writing. The research looks at criminal proceedings concluded in 2021 and 2022 in which section 27 written reports, funded by Legal Aid and the Public Defence Service, were available at sentencing.

A sample of 201 cases, spanning 12 District Court registries and eight High Court registries, has been drawn. Analysis focusses on understanding the impact of the reports at sentencing, alongside the content and quality of reports. At this time, preliminary findings are based on analysis of 185 District Court cases.

## Constraints on the Ministry's research project:

*There are constraints on the data*

- *Sample size* - the larger a sample is, the more reliable the findings are. The sample size in this project is 201 cases. At this stage, only the cases from the District

Court have been analysed. These cases are from 12 District Court registries across New Zealand.

- *Sample bias* - the sample only includes cases with section 27 reports. The sample is biased towards more serious offences; the higher the level of offending, the more likely it is that a case will have a section 27 report accompanying it.
- The sample also only includes those with final sentences of community detention, intensive supervision, home detention and fixed term imprisonment. It only includes cases where the report cost was between \$1,500 and \$4,500. (Ministry of Justice information shows that the costs of individual section 27 reports range between \$770 and \$4,350 (GST exclusive).)
- *Limitations of data on ethnicity* - Only cases where the defendant's ethnicity was known are included in the sample. The system allows for only one ethnicity to be recorded. Therefore, the data does not reflect where an offender identifies as more than one ethnicity (e.g., Māori-Pakeha).<sup>1</sup>

*There are constraints on the analysis:*

- There are limitations to using sentencing notes to understand the impact of section 27 on sentences. Sentencing notes are a snapshot of a complex process undertaken by a judge when determining a sentence.
- The ability to isolate the impact of section 27 reports on sentences depends on how specific sentencing notes are about the impact on sentence, in terms of discount given, or consideration of different sentence type. Where a discount has been given for factors set out in a section 27 report in combination with other factors, such as remorse and youth, officials have presumed equal weighting to each factor.

**Responsible Manager(s) (completed by relevant manager)**

Fleur Keys  
 Acting General Manager  
 Criminal Justice – Policy Unit  
 Ministry of Justice



PP

7/12/2023

**Quality Assurance (completed by QA panel)**

Reviewing Agency:	Ministry of Justice
Panel Assessment & Comment:	The requirement for formal QA process been suspended for 100 Day Plan proposals taken within the 100 Days.

<sup>1</sup> It is unknown if there have been any non-legally aided section 27 written reports.

## Section 1: Diagnosing the policy problem

### What is the context behind the policy problem and how is the status quo expected to develop?

#### Section 27 reports are one of the sources of information informing sentencing decisions

1. Sentencing is the process by which a court decides the consequences an offender must face for committing an offence. The Act sets out the purposes and principles of sentencing. These cover a wide range of factors, including the gravity of the offending in the particular case, the degree of culpability of the offender, the seriousness of the offence, providing for the interests of the victim, and assisting in the offender's rehabilitation and reintegration.
2. There is no priority of purposes established in the Act. The combination of purposes or weight to be given to each will depend on the circumstances of the offence and the offender and may change over time according to shifting perceptions of society.
3. To help achieve these purposes the Act requires the court to take into account the gravity of the offending in the particular case, as well as other factors, including:
  - “any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe”,<sup>2</sup> and
  - “the offender's personal, family, whānau, community, and cultural background when imposing a sentence which has a partly or wholly rehabilitative purpose.”<sup>3</sup>
4. The court can use information from various sources to inform its sentencing decision. This can include written submissions from lawyers, specialist or expert reports, forensic assessment reports under the Criminal Procedure (Mentally Impaired Persons) Act 2003, restorative justice reports, alcohol and drug reports, and any other court-ordered reports such as pre-sentence reports prepared by probation officers under section 26 of the Act.
5. Under section 27 of the Act, an offender may also request that the court hears any person or persons speak about the offender's background and the way that background may have related to the offence. Information provided under section 27 may also provide insight into how support from within the community may help prevent further offending or be relevant in respect of possible sentences. Information may also be provided on any restorative processes that have been tried between the offender and their family, whānau or community and victims.
6. Although available to any offender, section 27 - and its predecessor section 16 of the Criminal Justice Act 1985 – originated in Parliamentary concern about the over-representation of Māori as offenders. Section 16 was specifically enacted to address what was then considered to be a crisis in Māori offending and imprisonment. However, the section is not specific to Māori offenders. All offenders appearing before the court for sentencing can provide the court with information under section 27, regardless of their ethnicity.

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<sup>2</sup> Sentencing Act 2002, s 8(h)

<sup>3</sup> Sentencing Act 2002, s 8(i)

7. The information provided to the court in a section 27 report may assist the judge in identifying the appropriate sentence type or, where background factors of an offender have contributed causatively to the offending, may mitigate the sentence length in the form of a discount.
8. Discounts can be applied to any type of sentence including imprisonment, home detention, community detention or intensive supervision. The legislation does not include any requirements as to how discounts on sentences are calculated, rather the judge has discretion when applying discounts but will adhere to broad legislative principles and higher court judgments that provide guidance on how judges should approach sentencing in similar cases.

### **Section 27 reports can influence sentencing decisions**

9. Provisional findings from a Ministry of Justice research project (currently underway) showed that the average and median estimated discount received specifically for information provided in a section 27 report was 10%. Of the research sample, 70% had a starting sentence of imprisonment of over two years.

### **Taxpayer funding may cover the cost of section 27 reports in some circumstances**

10. The Legal Services Act 2011 provides funding for lawyers to represent people of insufficient means to obtain legal assistance, where the offence is punishable by a maximum term of imprisonment of 6 months or more, or it is in the interests of justice.<sup>4</sup> Defendants represented by lawyers employed by the Public Defence Service (PDS), (a unit that operates independently within the Ministry of Justice) are also funded, through the PDS legal aid appropriation.
11. On application, the Legal Services Commissioner (the Commissioner) and staff who have delegated powers, have discretion to approve funding for a report writer to prepare a section 27 report. When considering funding for a section 27 report the seriousness of the offence and the likely severity of the sentence to be imposed will be considered. Legal aid would not generally be approved for a section 27 report disbursement for a minor offence that is likely to attract a non-custodial sentence, or a relatively short custodial sentence.
12. While the original intent of section 27 was that the court may hear from any person or persons called by the offender to speak, in practice the information is more generally provided in a written report by an individual not personally known to the offender. Legislation does not require that section 27 report writers have any specific qualifications or specialist knowledge. Generally, section 27 report writers will have the ability to access and provide appropriate information about the offender and their circumstances.
13. In the last seven years, there has been a significant increase in the use of section 27 written reports. This can be seen in the number and cost of section 27 written reports funded through legal aid and PDS. In 2017, there were 9 section 27 reports funded by legal aid and PDS, totalling \$17,164, compared to 2,429 reports in 2022, at a total cost of \$6.45 million. Since 2017, approximately 8,231 reports have been funded through legal aid and PDS, at a total cost of approximately \$20.354 million. The costs are reported to range between \$770 and \$4,350 (GST exclusive) for individual reports.

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<sup>4</sup> Legal Services Act 2011, s 8

## What is the policy problem or opportunity?

The Government's 100-Day commitment plan reflects a concern with taxpayer dollars being used to fund section 27 reports.

14. Although section 27 refers to being 'heard' in the sentencing hearings, the information is commonly provided in writing. It was not originally envisaged that there would be written reports provided under section 27 or that they would be provided by someone not known to the offender personally. Neither was it anticipated that written reports would be paid for by legal aid. An unexpected result of written reports rather than oral statements being presented to the court is the increasing costs associated with the writing of such reports as set out above.
15. From the 100-Day commitment we understand that the reasons behind the concern are multi-faceted, but centre on the growing amount spent by Government on section 27 reports. Particular concerns are:
  - that taxpayer funds are being used to help reduce sentences
  - that section 27 is not operating as originally intended as written reports rather than oral statements are being presented to the court and these are taxpayer funded
  - that the creation of an unregulated report writing industry providing variable section 27 reports; and
  - the sudden increase in legal aid funding for section 27 reports over last few years.

## Who are the stakeholders in this issue, what is the nature of their interest, and how are they affected?

16. We have identified a range of stakeholders with an interest in this issue. However, we have not been able to consult them in the timeframes for this work. Instead, information has been drawn from other sources, as noted below:

- *The court* – when sentencing an offender, the court must hear a person or persons called by the offender on any matters specified in section 27, unless the court is satisfied that for some special reason it is unreasonable or inappropriate. When a written report is prepared the report writer is not usually expected to attend the hearing. As noted, the provisional research findings suggest the reports provide the courts with information that influences courts' decision making.
- *The offender* - the offender may call a person or persons to speak on their behalf in accordance with the matters set out in section 27. That information can be taken into account by the judge in sentencing the offender. The demand for funded reports is increasing. Data shows that in 2017, there were 9 section 27 reports funded by legal aid and PDS, costing a total of \$17,164, compared to 2,429 reports in 2022 totalling \$6.45 million.

As outlined in paragraph 5 above, the provision "was introduced largely because of the disproportionately high rate of imprisonment of Māori, and it was envisaged that the section would assist in addressing the problem by encouraging the use of the

availability of alternatives to imprisonment for Māori offenders”.<sup>5</sup> Fourteen per cent of Māori and 11% of Pacific Peoples offenders sentenced in 2021 and 2022 to sentences of imprisonment, home detention, community detention, and intensive supervision had a section 27 report compared to 7% of European/Other offenders.

The issues of alleged discrimination and institutional racism in the sentencing process and legislative provisions is included in live claims filed with the Waitangi Tribunal in Te Rau o te Tika - the Justice System Kaupapa Inquiry (Wai 3060). This includes claims specifically about funding of section 27 reports, such as hardship caused by a failure to fund or delay in funding section 27 reports.<sup>6</sup>

- *The legal aid provider* – a lawyer who provides legal representation for the offender under the legal aid scheme. The lawyer may locate and instruct a suitable report writer to prepare a section 27 report for their client. A section 27 report can include information about the offender including about their family, whānau, community, cultural background and how those matters may be relevant in possible sentences, which could be used by lawyers in preparing sentencing submissions. In the absence of such reports, those submissions may not be as persuasive as they could be. This risk could be mitigated by the provision of privately funded oral statements, letters of support or other specialist reports.
- *The section 27 report provider* - section 27 reports can be provided by any person, and there are several businesses that provide these, as well as individuals. Alternatively, members of the offender’s family or a community member may attend court to speak. As the use of section 27 has evolved, the courts now regularly receive written reports from people who have no previous connection with the defendant. Anecdotally, it is understood that the content and quality of reports is variable, but the most value is in reports that provide relevant personal information regarding the offender.<sup>7</sup>
- *Victims* – the victims of crimes have an interest in the issue, including in the impact of section 27 reports on sentencing. Victims will continue to have the ability to have their views heard by the court through victim impact statements. We do not have any information on the views of victims.

## What objectives are sought in relation to the policy problem?

Based on the Government’s 100-Day commitment we understand the intention is to end taxpayer funding for section 27 reports. Taxpayer funding for section 27 reports is provided through the legal aid system.<sup>8</sup>

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<sup>5</sup> Judge O’Driscoll “A powerful mitigating tool?” on s27 of the Sentencing Act 2002 (2012) NZLJ., pp 358 -360 at 359

<sup>6</sup> [Wai 2960, 1.1.001\(a\).pdf \(justice.govt.nz\)](#)

<sup>7</sup> *Kisiogo v R* 5 July 2021 [2021] NZHC 1648 [16]

<sup>8</sup> There are two sources for Government funding of section 27 reports: Legal Aid appropriation and the Ministry of Justice’s departmental appropriation fund, which is the appropriation the PDS uses. Although they are separate appropriations, both derive from the Legal Services appropriation and are governed by the Legal Services Act 2011.

## Section 2: Deciding upon an option to address the policy problem

### What criteria will be used to compare options to the status quo?

17. The analysis below assesses the options against the following criteria:

- **Effective** – achieves the policy objective of ending taxpayer funding for section 27 reports.
- **Consistent with good regulatory practice** - aligns with the Government Expectations for Good Regulatory Practice,<sup>9</sup> in particular:
  - **Has processes that produce consistent and fair outcomes for regulated parties.** This encompasses considerations such as whether information is available to the court to help it determine a sentence and impacts of options on offenders who do not have the means or networks to provide information to the court. This includes consideration of impacts on Māori in the context of Article 3 of te Tiriti o Waitangi, with regard to protection and equal rights, also addressed below.
  - **Is well-aligned with existing regulatory systems.** This considers the options' consistency with the purpose and design of legislation such as the Legal Services Act 2011 and the Sentencing Act 2002.
  - **Conforms to Treaty of Waitangi obligations.** Considers the Crown's obligations under Article 1 of te Tiriti o Waitangi to enable Māori led solutions and the exercise of rangatiratanga under Article 2 of te Tiriti. Impacts relevant to Article 3 are considered in criteria 2 above– consistent and fair outcomes for regulated parties.
  - **Easy to implement** – change can be implemented in a timely, low-cost manner.

### What scope will options be considered within?

18. The scope of the options considered was limited to legislative options. Determining legal aid grants is an independent function of the Commissioner under the Act, meaning an amendment to the Act is needed to limit the Commissioner's authority to grant legal aid for section 27 reports.

To align with the aims of the Government's 100-Day commitment the options considered were:

- The status quo – legal aid funding is provided for section 27 reports;
- Amending the Legal Services Act 2011 to remove the ability for legal aid to be used to fund section 27 written reports and oral statements;
- Amending the Legal Services Act 2011 to place a monetary cap on fees for providing section 27 reports;
- Amending the Legal Services Act 2011 to require providers of section 27 reports to

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<sup>9</sup> [Government Expectations for Good Regulatory Practice \(treasury.govt.nz\)](https://www.treasury.govt.nz/government/good-regulatory-practice)



be accredited or regulated in order for their reports to qualify for funding under the Legal Services Act 2011; or

- Amending the Sentencing Act 2002 to limit use of section 27 reports to the more serious offences.

19. In addition, consideration was given to two other options, which were subsequently rejected:

- Amending the Sentencing Act 2002 to repeal section 27. No analysis was undertaken on this option, as it would not align with the manifesto commitments; and
- Amending the Legal Services Act 2011 to remove the ability for legal aid to be used to fund written section 27 reports. This option was analysed but rejected as it is considered highly likely that if written reports are not funded, legal aid will be sought instead for the costs of preparing someone to give an oral statement, their appearance in court and for related expenses such as travel costs. This option would not achieve the objective and would not have the protections that an accreditation system would bring.

## What options are being considered?

### Option One – Status Quo

20. Under this option, providers of reports under section 27 of the Act would continue to be paid through legal aid. The costs would be a disbursement included in the grant of legal aid. Most offenders would not be required to repay the legal aid debt.
21. This option would not meet the policy objective. If no action is taken, legal aid providers and the PDS will continue to seek funding for the provision of section 27 reports through the legal aid system. Decisions about payment of the cost will continue to be a decision made by the Commissioner.
22. The principles of sentencing, set out at section 8 of the Act, require judges to take into account several factors including any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise have been appropriate, would, in the particular instance, be disproportionately severe; and the offender's personal, family, whānau, community, and cultural background. Section 27 reports are one way this information is provided to the judge.
23. The sentencing discounts will continue where the judge has received a section 27 report and considers a discount for material canvassed in the section 27 report is justified, taking into account the particular circumstances of the offender, and the principle to impose the least restrictive outcome that is appropriate in the circumstances. The ongoing research indicates the average and median estimated discount received for a section 27 report was 10%.

### Option Two – Remove taxpayer funding for all section 27 reports

24. The Legal Services Act 2011 could be amended to specifically prevent legal aid funding being approved for the provision of any section 27 reports. Determining legal aid grants is an independent function of the Commissioner under the Act, meaning an amendment to the Act is needed to limit the Commissioner's authority to grant legal aid for section 27 reports.

25. This option would achieve the objective of removing legal aid funding for all section 27 reports. It is expected that the removal of taxpayer funding would reduce the number of reports provided to the courts.
26. This option would have a particular impact on those who cannot afford reports. Māori and Pacific Peoples are overrepresented in the criminal justice system and this option would exacerbate this disparity. As noted above, 14% of Māori and 11% of Pacific Peoples offenders sentenced in 2021 and 2022 to sentences of imprisonment, home detention, community detention and intensive supervision had a section 27 report compared to 7% of European/Other offenders.
27. Similar information could be provided to the court through other mechanisms (for example, in a pre-sentence report from probation, a letter to Judge, or an oral statement from a family member. If that is not available, this could result in some offenders receiving a more severe sentence than they would have if legal aid was available for the reports.
28. The disproportionate impacts of option two on Māori and their whānau are likely to perpetuate current inequities experienced by Māori and may not be consistent with the rights of Māori in Article 3 of te Tiriti o Waitangi. In addition, this option fails to uphold the Crown's obligations under Article 1 of the te Tiriti to enable Māori led solutions and limits the exercise of rangatiratanga under Article 2 of te Tiriti. The removal of legal aid funding limits those Māori led initiatives by iwi and other providers who could speak about the background of offenders in court.
29. Where an offender cannot provide a section 27 report, it may affect the judges' ability to apply the principles of sentencing set out in section 8 of the Act that require judges to take into account any circumstances relating to the offender that make imposing the maximum or near to maximum penalty inappropriate.
30. Judges may not receive relevant information about the offender including their personal, family, whānau, community, and cultural background; the way that background may have related to the commission of the offence; restorative processes that may have been tried (between the offender and their family, whānau or community and victims); and what support from their family, whānau or community may help prevent offending or may be relevant to possible sentences.

### **Option Three – Impose a cap on reports writers' fees**

31. The legal aid funding for section 27 reports would continue, but changes could be introduced to limit funding by imposing a financial cap on the report fees. This would require an amendment to the Legal Services Act to set parameters on the Commissioner's authority to grant legal aid for section 27 reports.
32. This would partially achieve the policy objective by capping, but not ending, legal aid funding for section 27 reports.
33. Possible impacts could be fewer report writers willing to produce reports and less comprehensive reports. It is unclear if this would have consequential impacts on the quality or availability of reports. If these types of impacts eventuated, they are likely to have a more pronounced effect on those who cannot afford reports, and on Māori and Pacific Peoples (noting the overlap between these groups), who are overrepresented in the criminal justice system. If similar information is not able to be provided to the court through other means, this could result in some offenders spending longer in prison than they would have if legal aid was available for the reports.

#### **Option Four – Introduce an accreditation system for section 27 report writers**

34. The legal aid funding for section 27 reports would continue, but changes could be introduced to restrict funding to report writers who had been accepted under an accreditation scheme. The scheme would ensure writers met agreed criteria, including qualities such as relevant experience and knowledge of the personal, family, whānau, community, and cultural background of the offender.
35. Alternatively, a simpler option is to introduce a set of guidelines that need to be met each time funding is sought for a particular writer to prepare a report. The guidelines would need to be met to ensure the writer has the required knowledge and expertise. This option may improve the quality of the information provided to the court in section 27 reports.
36. Although the impacts of this option require further exploration, it would fit the original intent of the Act, if those who present section 27 reports are personally known to the offender.
37. It is uncertain whether this option would achieve the policy objective of reducing taxpayer funding. This option could potentially reduce the cost of reports, if there was a more closely managed cohort of writers approved whose fees could be more easily monitored and assessed for value. However, this would be dependent on the design and implementation of the accreditation system.
38. There has not been an opportunity to carry out any research on this option. However, it is noted that there are precedents with reference to other reports funded by legal aid where the writers must prove that they have required professional qualifications. Appropriate accreditation requirements could be developed in consultation with stakeholders.
39. This option would not prevent the provision of section 27 reports from non-accredited providers if they are not taxpayer funded.

#### **Option Five – Amend the Sentencing Act 2002 to Introduce a Threshold for Provision of a Section 27 Report**

40. This option involves amending the Sentencing Act 2002 so that offenders could only request a section 27 report for the most serious offences. No research has been undertaken on the option or where the threshold might lie. Currently section 27 reports are generally presented for more serious cases. In finalised cases from 2021/2022 for those sentenced to a term of imprisonment over two years, 38% had a section 27 report; for those sentenced to home detention, 15% had a section 27 report; for those sentenced to community detention and intensive supervision, just 4% and 5% had a section 27 report respectively.
41. This option would partially achieve the 100-Day objective as legal aid would still be available, but it would limit expenditure. At present section 27 applies to any offender who appears before a court for sentencing. This potentially allows for section 27 reports to be commissioned by lawyers, and paid for by legal aid, in cases regardless of likely sentence or severity of offence.
42. Whilst the Commissioner may already use their discretion to limit funding on a case-by-case basis, this option would provide a statutory limitation on funding section 27 reports in anything but the most serious matters and, would accordingly reduce expenditure.

## How do the options compare to the status quo/counterfactual?

	Option One – Status quo	Option Two – Remove legal aid funding for section 27 reports	Option Three - Impose a cap on the amount of legal aid funding available for s27 reports	Option Four – Introduce an accreditation system for section 27 report writers	Option Five – Amend the Sentencing Act 2002 to Introduce a Threshold for Provision of Section 27 Report based on the seriousness of the offence
<b>Effective</b>	<p>Would not achieve objective. Number and cost of section 27 reports is likely to continue</p> <p>0</p>	<p>Taxpayer funding of section 27 reports would be removed entirely, and the number of reports expected to reduce. But note wider taxpayer costs (particularly for Corrections) discussed in implementation criteria.</p> <p>++</p>	<p>The taxpayer funding for reports and number of reports may reduce. There would still be some legal aid funding for reports which would not achieve, in full, the objective of the 100-Day plan.</p> <p>+</p>	<p>It is uncertain whether this option would reduce taxpayer funding. This option could potentially reduce the cost of reports if there was a more closely managed cohort of writers approved whose fees could be more easily monitored and assessed for value, but this is dependent on the design and implementation of the accreditation system.</p> <p>0</p>	<p>Would partially achieve the objective if a proportion of offenders (whose offences do not reach the seriousness threshold) requesting funded section 27 reports would no longer qualify.</p> <p>+</p>
<b>Has processes that produce consistent and fair outcomes for regulated parties</b>	<p>Under the status quo all offenders have the ability to request a section 27 report. It can only be refused by the judge if there is some special reason that makes it</p>	<p>Risk of inequitable access to justice for those who cannot afford written reports and do not have someone suitable, or available, to speak for them. This means courts may not have information that is relevant to their sentencing decision. Māori and Pacific</p>	<p>Placing a cap on report providers' fees that funded through legal aid may result in fewer s27 reports being provided and/or lower the quality of those reports. This would affect access to justice for those unable to access sufficient legal aid funding for a written report, and who do not have someone able speak for them.</p>	<p>Would provide reports from limited pool of accredited report providers which should result in more consistent and informative reporting and therefore fairer outcomes.</p> <p>+</p>	<p>Would provide taxpayer funded reports for only some offenders which may be considered inconsistent and unfair to those not funded who requested a written report.</p> <p>-</p>

	<b>Option One – Status quo</b>	<b>Option Two – Remove legal aid funding for section 27 reports</b>	<b>Option Three - Impose a cap on the amount of legal aid funding available for s27 reports</b>	<b>Option Four – Introduce an accreditation system for section 27 report writers</b>	<b>Option Five – Amend the Sentencing Act 2002 to Introduce a Threshold for Provision of Section 27 Report based on the seriousness of the offence</b>
	<p>unnecessary or inappropriate. All legally aided persons can, through their lawyer, request legal aid to fund a section 27 report. The Commissioner of legal aid has discretion as to funding and will apply that consistently and fairly under the existing guidelines.</p> <p>0</p>	<p>peoples are overrepresented in the criminal justice system and the funding change would exacerbate this disparity, as a higher proportion of Māori and Pacific Peoples offenders receive reports funded by legal aid.</p> <p>It is unclear the extent to which this risk may be mitigated by the the potential for the necessary information to still be provided to the court in privately funded section 27 written or oral reports, or through another avenue such as probation reports ordered by the court under section 26 of the Sentencing Act.</p> <p>--</p>	<p>Māori and Pacific peoples are overrepresented in the criminal justice system and the funding change would exacerbate this disparity, as a higher proportion of Māori and Pacific peoples offenders receive a report funded by legal aid.</p> <p>-</p>		

	<b>Option One – Status quo</b>	<b>Option Two – Remove legal aid funding for section 27 reports</b>	<b>Option Three - Impose a cap on the amount of legal aid funding available for s27 reports</b>	<b>Option Four – Introduce an accreditation system for section 27 report writers</b>	<b>Option Five – Amend the Sentencing Act 2002 to Introduce a Threshold for Provision of Section 27 Report based on the seriousness of the offence</b>
<b>Is well-aligned with existing regulatory systems</b>	<p>The status quo would not require any changes to the existing regulatory system.</p> <p>0</p>	<p>The Legal Services Act provides broad discretion to the Legal Services Commissioner to determine what costs are paid under the Legal Services Act. The Legal Services Commissioner provides guidance on what payments will be approved.</p> <p>Option 2 requires a specific exclusion in the Act stating that the costs of a section 27 report cannot be paid under a grant of legal aid. This would be the only exclusion specified in the Act. All other decisions about the extent of legal aid grants, including where there is an application to increase the grant in excess of any fixed fees,</p>	<p>The Legal Services Act provides broad discretion to the Legal Services Commissioner to determine what costs are paid under the Legal Services Act. The Legal Services Commissioner provides guidance on what payments will be approved.</p> <p>Option 3 requires a specific provision in the Act stating that the costs of a section 27 report are capped at a specific sum. This would be the only limitation of this type specified in the Act.</p> <p>-</p>	<p>The Legal Services Act provides broad discretion to the Legal Services Commissioner to determine what costs are paid. The Legal Services Commissioner provides guidance on what payments will be approved. However, option 4 requires a specific provision in the Act stating that the costs of section 27 reports can only be funded if the writer is accredited.</p> <p>There are already similar provisions for lawyers who must be approved by the Secretary for Justice before they can provide legal services under the Legal Services Act 2011</p> <p>+</p>	<p>Section 27 of the Sentencing Act 2002 could be amended to restrict the ability of the court to permit oral or written reports to, for example, cases where the court is considering a sentence of imprisonment.</p> <p>Other changes to the Sentencing Act are likely to be included in future in wider reform of the Act so would not be recommended before then.</p> <p>-</p>

	<b>Option One – Status quo</b>	<b>Option Two – Remove legal aid funding for section 27 reports</b>	<b>Option Three - Impose a cap on the amount of legal aid funding available for s27 reports</b>	<b>Option Four – Introduce an accreditation system for section 27 report writers</b>	<b>Option Five – Amend the Sentencing Act 2002 to Introduce a Threshold for Provision of Section 27 Report based on the seriousness of the offence</b>
		is at the Commissioner's discretion. -			
<b>Conforms to Treaty of Waitangi obligations</b>	The section was specifically designed to address Parliamentary concern about the over-representation of Māori as offenders.	The disproportionate impacts of option 2 on Māori and their whānau are likely to perpetuate current inequities experienced by Māori. In addition, this option fails to uphold the Crown's obligations under Article 1 of the te Tiriti o Waitangi to enable Māori led solutions, including those Māori led initiatives by iwi and other providers who could not provide information about the background of offenders in court without specific funding.  S16 of the Criminal Justice Act 1985 (the predecessor of s27) was enacted to address	The disproportionate impacts of option 3 on Māori and their whānau are likely to be similar to the impact of option 2 and, to some extent, could perpetuate current inequities experienced by Māori.  Option 3 is beneficial to offenders and will still provide for reports but will be limited by the cap on funding. -	The accreditation system would help ensure all providers of section 27 reports who seek funding have appropriate knowledge to inform the judge's application of the sentencing principles.  Drawing writers from Māori led initiatives by iwi and other providers who could speak about the background of offenders in court would be consistent with the Crown's obligations under Article 1 of the te Tiriti o Waitangi to enable Māori led solutions and the exercise of rangatiratanga under Article 2 of te Tiriti.  0	There would be disproportionate impacts on Māori if the range of offences for which reports can be obtained is reduced but the options will be more favourable for Māori than option 2 - removal of all funding. -

	<b>Option One – Status quo</b>	<b>Option Two – Remove legal aid funding for section 27 reports</b>	<b>Option Three - Impose a cap on the amount of legal aid funding available for s27 reports</b>	<b>Option Four – Introduce an accreditation system for section 27 report writers</b>	<b>Option Five – Amend the Sentencing Act 2002 to Introduce a Threshold for Provision of Section 27 Report based on the seriousness of the offence</b>
		concern about the over-representation of Māori as offenders.			
<b>Easy to implement</b>	The status quo would not require any implementation 0	<p>Would require a change to primary legislation; Administration costs would be less than the status quo;</p> <p>There may be new costs resulting from increases in judicial requests for taxpayer-funded reports addressing matters that would have been provided in a section 27 report, e.g., expanded probation reports ordered by the court under section 26 of the Sentencing Act.</p> <p>Data analysis has been carried out to demonstrate the costs on Corrections if discounts granted for section 27 reports were</p>	<p>Would require a change to primary legislation to introduce a cap and set its parameters. Designing the cap could take some time and require consultation with stakeholders including lawyers and current section 27 report writers.</p> <p>Administration likely to involve similar levels of compliance and oversight as status quo.</p> <p>Would be necessary to adjust cap over time in line with inflation.</p> <p>There is likely to be some new costs resulting from increases in judicial requests for taxpayer-funded reports addressing matters that would have been provided in a section 27 report e.g. expanded probation reports ordered by the court under</p>	<p>Would require a change to the primary legislation to introduce an accreditation system, potentially including monitoring and/or auditing.</p> <p>These changes would involve consultation with stakeholders, development of criteria and standards, and monitoring/auditing plus the ongoing costs of maintaining the system.</p> <p>Once legislation is amended implementation/administration of legal aid costs would not change greatly as each request for funding is already administered by Legal Aid Services.</p> <p>--</p>	<p>Would require changes to primary legislation.</p> <p>There may be new costs resulting from increases in judicial requests for taxpayer-funded reports addressing matters that would have been provided in a section 27 report, e.g. expanded probation reports ordered by the court under section 26 of the Sentencing Act; Data analysis has been carried out to demonstrate the costs on Corrections if discounts granted for section 27 reports were removed (see option 2). There are likely to be costs for Corrections under option 5 but less than option 2. Work would be required to identify the level of costs.</p> <p>However, these costs could be offset by potential increases in privately funded section 27 written reports and oral statements by a</p>



	Option One – Status quo	Option Two – Remove legal aid funding for section 27 reports	Option Three - Impose a cap on the amount of legal aid funding available for s27 reports	Option Four – Introduce an accreditation system for section 27 report writers	Option Five – Amend the Sentencing Act 2002 to Introduce a Threshold for Provision of Section 27 Report based on the seriousness of the offence
		<p>removed. These are estimated to be:</p> <ul style="list-style-type: none"> <li>- for those currently serving a sentence of over two years' imprisonment, an additional 136 prison beds would be required.</li> <li>- for those currently serving a sentence of two years' imprisonment or less, an additional 120 beds would be required.</li> <li>- for those currently serving a sentence of</li> </ul>	<p>section 26 of the Sentencing Act</p> <p>Alternatively, if sentencing discounts reduce, new Corrections costs would arise. The precise scale is hard to estimate as privately funded reports could replace taxpayer funded reports.</p> <p>Data analysis has been carried out to demonstrate the costs on Corrections if discounts granted for section 27 reports were removed. These are estimated to be:</p> <ul style="list-style-type: none"> <li>- for those currently serving a sentence of over two years' imprisonment, an additional 136 prison beds would be required.</li> <li>- for those currently serving a sentence of two years' imprisonment or less, an additional</li> </ul>		<p>person known to the offender, as originally envisaged when section 27 was first introduced.</p> <p>0</p>

	Option One – Status quo	Option Two – Remove legal aid funding for section 27 reports	Option Three - Impose a cap on the amount of legal aid funding available for s27 reports	Option Four – Introduce an accreditation system for section 27 report writers	Option Five – Amend the Sentencing Act 2002 to Introduce a Threshold for Provision of Section 27 Report based on the seriousness of the offence
		<p>home detention, 124 beds would be required.</p> <p>Section 9(2)(f)(iv) [REDACTED]</p> <p>However, these costs could be offset by potential increases in privately funded section 27 written and oral statements by a person known to the offender, as originally envisaged when section 27 was first introduced-</p> <p>-</p>	<p>120 beds would be required.</p> <p>- for those currently serving a sentence of home detention, 124 beds would be required.</p> <p>Section 9(2)(f)(iv) [REDACTED]</p> <p>However, these costs would be less if the change was the introduction of a funding cap instead of complete removal of funding. The possible effect on costs of that has not yet been modelled.</p> <p>The costs of this option could be offset by potential increases in privately funded section 27</p>		

	Option One – Status quo	Option Two – Remove legal aid funding for section 27 reports	Option Three - Impose a cap on the amount of legal aid funding available for s27 reports	Option Four – Introduce an accreditation system for section 27 report writers	Option Five – Amend the Sentencing Act 2002 to Introduce a Threshold for Provision of Section 27 Report based on the seriousness of the offence
			written reports and oral statements given by a person known to the offender, as originally envisaged when section 27 was first introduced -		
<b>Overall assessment</b>	0	-	-	0	-

**Example key for qualitative judgements:**

- ++** much better than doing nothing/the status quo/counterfactual
- +** better than doing nothing/the status quo/counterfactual
- 0** about the same as doing nothing/the status quo/counterfactual
- worse than doing nothing/the status quo/counterfactual
- much worse than doing nothing/the status quo/counterfactual

**What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?**

**Option Four – Introduce an accreditation system for section 27 report writers**

- 43. We consider option four - introducing an accreditation system for section 27 report writers – to be the preferred option. Option four will not remove taxpayer funding of section 27 reports. However, it may partially achieve the policy objective by potentially reducing the cost of reports if there was a more closely managed system of report writers.
- 44. Whilst implementation costs would be greater, this option best satisfies the criteria of producing consistent and fair outcomes for regulated parties and of consistency with the existing regulatory framework. A system of accredited report writers would improve the quality of reports. This, in turn, would be of greater benefit to judges using the reports, and would be fairer to offenders who rely on the reports to present their circumstances to the court.

**Alternatively- Option Two – Remove taxpayer funding for all section 27 reports**

- 45. However, if the intention is to place greater weight on the criterion of ‘effectiveness’, then option four does not rate as highly as option two – the removal of taxpayer funding for section 27 reports will clearly achieve the objective and is the strongest option on the criterion of effectiveness.
- 46. If greater weighting is given to ‘ease of implementation’ criterion, then option two will rank more highly than option four.

**What are the marginal costs and benefits of the option?**

**Option Four – Introduce an accreditation system for section 27 report writers**

<b>Affected groups</b> <i>(identify)</i>	<b>Comment</b> <i>nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.</i>	<b>Impact</b> <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	<b>Evidence Certainty</b> <i>High, medium, or low, and explain reasoning in comment column.</i>
<b>Additional costs of the preferred option compared to taking no action</b>			
Court	The court will receive written reports that are consistently of higher quality	Low Due to fewer s27 report writers, a longer timeframe may be required to produce these reports, which could lead to longer Court disposition times with adjournments called for if report not yet completed.	Medium
Offender	Offenders will continue to receive written reports funded by legal aid, but are consistent in content and quality	Low. There would be the ability to ensure value for money.	Medium
Report writer	Report writers will need to show a level of ability	Medium.	Low

	to qualify for legal aid funding, including knowledge of the offender's personal, family, whānau, community, and cultural background to qualify for legal aid funding. Some may not meet this level and may experience loss of income.	Potentially prior approval of report writers would achieve more consistent level of invoicing across all writers as well as improved content in reports.	
Government	Ongoing costs.  If a formal scheme for accreditation for particular writers is imposed, there would be implementation and ongoing costs. There is an existing similar scheme for lawyers who apply to be approved for legal aid funding.  If the scheme is more in the nature of a set of guidelines to be applied in each case, the costs would be lower.	Medium  The impacts of a formal accreditation scheme for particular writers would be higher than introduction of a set of guidelines for each application for legal aid funding	Low
<b>Total monetised costs</b>			
<b>Non-monetised costs</b>		<i>Medium</i>	
<b>Additional benefits of the preferred option compared to taking no action</b>			
Government			
<b>Total monetised benefits</b>			
<b>Non-monetised benefits</b>			

### Option Two - Remove taxpayer funding for all section 27 reports

<b>Affected groups</b> <i>(identify)</i>	<b>Comment</b> <i>nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.</i>	<b>Impact</b> <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	<b>Evidence Certainty</b> <i>High, medium, or low, and explain reasoning in comment column.</i>
<b>Additional costs of the preferred option compared to taking no action</b>			
Court	Highly likely to reduce information available to the court.  Privately funded reports or statements or other government-funded	Low	Low  Unknown cost if information sought through other avenues.

	reports might increase, partly offsetting this effect		
Offender	<p>Potential for increased sentence where an offender cannot afford a written report and does not have someone able to speak for them.</p> <p>Status quo remains for those offenders who can privately pay for a written or oral (most likely with third party assistance</p>	<p>High, where an offender receives a longer sentence than they would have if a legally aided report was available.</p> <p>A few offenders may themselves, or with assistance, privately fund written or oral reports.</p> <p>Costs of individual legally aided reports are reported to range between \$770 and \$4,350 (GST exclusive).<sup>10</sup></p>	Medium
Report writer	Ongoing loss of income for report writers unless the offender, or someone on their behalf, pays privately	<p>High impact, noting a few offenders may themselves, or with assistance, privately fund written or oral reports.</p> <p>Costs of individual legally aided reports are reported to range between \$770 and \$4,350 (GST exclusive)</p>	Medium
Government	<p>Ongoing costs.</p> <p>There may be increased costs for probation reports directed under section 26 of the Act where the court asks for additional information.</p> <p>There is likely to be an increase in legal aid costs where the legal aid provider requests legal aid for other reports, for example, psychologist reports. There is currently a limited number of psychiatrists and psychologists providing these reports, which has resulted in court delays.</p>	<p>An estimate of the costs of section 27 reports funded by legal aid and PDS comes to a total of \$30.252m over four years and an additional \$7.563m in out years. This assumes the costs would remain consistent but in practice they have grown each year.</p> <p>Section 9(2)(f)(iv) [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>	Low The precise scale is hard to estimate as privately funded or oral submissions could replace taxpayer funded reports

<sup>10</sup> MOJ figures

	<p>The proposal may increase the use of alternative reports, which may lead to court adjournments.</p> <p>There may be an increase in legal aid costs when lawyers require additional time to prepare and brief any person who gives an oral section 27 report and seek additional legal aid funding.</p> <p>If sentencing discounts for section 27 reports decrease, new Corrections costs would rise.</p>	Section 9(2)(f)(iv)	
<b>Total monetised costs</b>			
<b>Non-monetised costs</b>		<i>Medium</i>	
<b>Additional benefits of the preferred option compared to taking no action</b>			
Government			
<b>Total monetised benefits</b>			
<b>Non-monetised benefits</b>			

## Section 3: Delivering an option

### How will the new arrangements be implemented?

#### Option Four – Introduce an accreditation system for section 27 report writers

47. The preferred option four – of introducing an accreditation system for report writers through the Legal Services Act 2011 - could be implemented by amending the Legal Services Act 2011 to include the requirements of the accreditation system. These could be formal accreditation of each writer, or guidelines to be applied when considering a request for legal aid to fund a particular report.
48. The Government directed option two - of removing the ability to fund the cost of section 27 reports through the Legal Services Act 2011 would be implemented by amending the Legal Services Act 2011 to remove the discretion of the Commissioner to approve funding for this purpose.
49. In both cases, if the amendment could be progressed under urgency, and potentially come into effect by early to mid-2024.
50. The Ministry will keep legal aid providers and professional bodies informed of the change.
51. Legal Aid Services' operational policies and manuals for legal aid providers will be updated with the changes.

### **How will the new arrangements be monitored, evaluated, and reviewed?**

52. The Ministry monitors legal aid spending on other written reports (for example psychiatric and psychological reports) and could measure any associated increase.
53. The Ministry will carry out a post implementation assessment one year after enactment of the relevant legislation as required by the Treasury.