

THE  
OFFENDER  
ASSESSMENT POLICIES  
REPORT



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ASSESSMENT POLICIES  
REPORT

WAI 1024

WAITANGI TRIBUNAL REPORT 2005



The cover design by Cliff Whiting invokes the signing of the Treaty of Waitangi and the consequent interwoven development of Maori and Pakeha history in New Zealand as it continuously unfolds in a pattern not yet completely known

A Waitangi Tribunal report

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## CONTENTS

Letter of transmittal.....	vii
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Glossary.....	ix
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### CHAPTER 1: INTRODUCTION

1.1 The scope of the report.....	1
1.2 The claim .....	2
1.3 Applications for an urgent Tribunal hearing .....	3
1.4 The hearing process .....	4
1.5 Issues for the Tribunal.....	5
1.6 The principles of the Treaty of Waitangi .....	8
1.7 The parties' Treaty submissions.....	13
1.8 Summary of Tribunal findings .....	16
1.9 The structure of the report.....	17

### CHAPTER 2: THE CONTEXT OF THE CLAIM

2.1 Chapter outline .....	19
2.2 The context surrounding Māori offending .....	19
2.3 The Department of Corrections, its strategic goals, and the IOM system .....	24
2.4 The Department of Corrections' responsiveness to Māori .....	26

### CHAPTER 3: THE ASSESSMENT TOOLS: THEIR CONTEXT AND DEVELOPMENT

3.1 Chapter outline .....	33
3.2 Making 'a real difference' .....	33
3.3 The PCC.....	34
3.4 The IOM system .....	36
3.5 The ROC*ROI model .....	38
3.6 The CNI .....	44
3.7 MaCRNS .....	47

### CHAPTER 4: THE CLAIMS

4.1 Chapter outline .....	61
4.2 The ROC*ROI model .....	61
4.3 MaCRNS .....	68

## CONTENTS

### CHAPTER 5: THE CROWN'S RESPONSE

5.1 Chapter outline .....	89
5.2 The ROC*ROI model .....	89
5.3 MaCRNS .....	97

### CHAPTER 6: THE TRIBUNAL'S ANALYSIS AND FINDINGS

6.1 The Tribunal's task .....	121
6.2 The development, use, and effects of ROC*ROI .....	121
6.3 The development, use, and effects of MaCRNS .....	131
6.4 Treaty breach and prejudicial effect? .....	146

### APPENDIX: RECORD OF INQUIRY

Record of hearings .....	155
Record of proceedings .....	156
Record of documents .....	159
Bibliography .....	165

The Honourable Parekura Horomia  
Minister of Māori Affairs



The Waitangi Tribunal  
141 The Terrace  
WELLINGTON

and

The Honourable Matt Robson  
Minister of Corrections  
Parliament Buildings  
WELLINGTON

7 October 2005

Ka mihi ki te rangi e tū nei, ki te papa e takoto nei

Tēnā korua e nga Minita o te Kawanatanga

Tēnei te manu ka rere, e tuku atu nei i tēnei purongo a Te Rōpū Whakamana i Te Tiriti o Waitangi ki te motu. He purongo tēnei e pa ana ki te kaupapa whakaheke i te tokomaha o te Māori e taka ana ki te raruraru i mua i te ture. E ngana ana te Tari tiaki i nga mauhere ki te mahitahi me te iwi Māori ki te whakaiti ake i te tokomaha o te hunga e mauheretia ana. Kāore i te tika te whakaaro kia kotahi te tikanga whakatikatika mo te katoa. Kua tahuri ke te Tari ki te whakamahi i etahi o nga tikanga Māori hei awhina, hei whakapakari, hei hiki i te wairua o nga mauhere Māori kia kore ai ratou e raruraru anō. Ka kitea i roto i tēnei purongo nga kaupapa whakapakari i nga mauhere Māori e hiahia ana ki te whai i te huarahi Māori. Kei runga Te Tari i te ara tika e haere ana, engari katahi anō ka timata mārika te hīkoi i runga i tēnei huarahi.

Enclosed is our report entitled The Offender Assessment Policies Report. The claimant is Tame Pirika (Tom) Hemopo, who made the claim on behalf of Ngāti Kahungunu.

The claim concerns two complex assessment tools devised and used by the Department of Corrections to assess offenders' risk of reoffending and their treatment needs. The first five chapters of this report describe the tools, the context within which they are applied, and the parties' evidence and arguments. Our findings are outlined in section 1.8 and detailed in chapter 6 of the report.

Applied to this claim, our first task is to determine whether the department's policies and conduct in relation to the two assessment tools are consistent with the principles of the Treaty of Waitangi. If inconsistencies with Treaty principle are found, our next task is to determine whether prejudice has been caused to Ngāti Kahungunu as a result. As you know,

it is only when prejudice has been caused to the claimant by conduct or policies inconsistent with Treaty principle that we can recommend remedial action to the Crown.

As our report explains, we have found inconsistencies with Treaty principle in the Department of Corrections' conduct and policy concerning the two assessment tools. We have been unable to conclude, however, that those inconsistencies have caused prejudice to Ngāti Kahungunu. In the case of the actuarial assessment tool (ROC\*ROI), we are reasonably certain on the evidence provided that it has not caused any prejudice to Ngāti Kahungunu. In the case of the psychological tool (CNI/MaCRNs), however, we simply cannot determine whether or not prejudice has been or is being caused because there is, as yet, no reliable way of gauging the effects of that tool. Ironically, the absence of such measures of the tool's effects is due, in part, to the department's conduct that we have found to be inconsistent with Treaty principle.

The result is that, while we cannot recommend remedial action, we are confident that urgent action is required to ensure that prejudice does not ensue from the inconsistencies with Treaty principle that we have identified. Further, we believe that the need for such action is recognised by the parties – they have acted in good faith and are committed to reducing the very serious level of over-representation of Māori in the corrections system.

A handwritten signature in black ink, appearing to read 'LR Harvey', with a large, sweeping initial 'L' and a horizontal line extending to the right.

Judge LR Harvey  
Presiding Officer

## GLOSSARY

This glossary draws on and largely reproduces one prepared by the Crown for the hearing (doc A30) and aims to provide a brief description of terms used in this report. It should not be regarded as a substitute for the fuller explication, analysis, or critique of the terms in the evidence. Most of these terms are described in chapters 2 and 3.

*bicultural therapy model*: This model aims to ensure that the psychological treatment provided to offenders by the Department of Correction's Psychological Service (qv) is culturally appropriate and offers interventions with inmates by cultural experts.

*cognitive behavioural therapy*: Cognitive behavioural strategies assume that, in trying to predict or influence any particular human act, it is useful to assess or try to influence one or more of the following variables: attitudes, associates, behavioural history, or personality. Referred to as the 'big four', these variables may be influenced or moderated by conditions in the family at school, at work, at leisure, and in the community. In a corrections context, cognitive behavioural therapy involves assisting offenders to identify situations that increase their susceptibility to offend, to recognise habitual thoughts or habits, and to self-manage these factors using techniques designed to reduce the risk of reoffending.

*Community Probation Service*: Provides information and reports to judges (to assist with sentencing) and provides information to the Parole Board. Contracts with community providers for rehabilitative and reintegrative programmes for offenders.

*construct validity*: Briefly, this concerns whether an instrument measures what its designers think it measures.

*criminogenic needs*: Potentially changeable aspects of an offender's behaviour that, if successfully targeted by rehabilitative treatment, will reduce the offender's risk of reoffending

*criminogenic needs inventory*: This assessment tool details the features of an offender's personality, lifestyle, and social circumstances that have been linked with risks of reoffending. It is used to determine the presence of dynamic risk factors that should be targeted to reduce reoffending, the severity of these needs, and the offender's level of readiness for change.

*Cultural Perspectives Unit (now Māori and Pacific Policy)*: Provides strategic and operational policy advice relating to particular needs of Māori and Pacific peoples.

*cultural supervision*: Aims to enhance employees' interactions with Māori offenders by providing employees with cultural training and support (often from other staff).

*Department of Corrections*: Responsible for the safe, effective, and humane treatment of offenders. Manages about 19,000 non-custodial sentences and orders, and about 6000 prison inmates.

## GLOSSARY

Provides policy advice to the Minister of Corrections, support services to the Parole Board, and information to the judiciary. Employs about 5000 staff. Annual budget about \$458 million.

*face validity*: The simplest form of construct validity (qv), which involves looking at an instrument to see if it seems reasonable.

*framework for reducing Māori offending*: Provides an analytical framework to guide the formalising, monitoring, and testing of Māori participation in the design and delivery of new interventions.

*general management team*: Senior Department of Corrections team. Approves major initiatives.

*integrated offender management*: Coordinates and provides consistency across an offender's entire sentence. Targets programmes and interventions to those at highest risk of reoffending.

*integrated offender management system*: Department of Corrections' computer system that supports operational delivery of integrated offender management.

*Intervention Services*: Manages the delivery of selected interventions (such as rehabilitative programmes) to offenders.

*kaiwhakamana visitor policy*: Gives kaumatua more access to Māori inmates, aims to help meet the cultural, spiritual, and social needs of Māori offenders in order to reduce reoffending.

*law enforcement system*: Formerly the Wanganui Computer System. Holds criminal histories of offenders.

*levels of service inventory – revised*: A Canadian criminogenic needs assessment tool. Used in a number of overseas jurisdictions.

*Māori culture related need*: According to the Department of Corrections, the assessed Māori cultural dimension of a criminogenic need, which, if ignored by rehabilitative treatment, could reduce a Māori offender's ability to benefit from such treatment.

*Māori focus units*: A rehabilitative intervention where tikanga learnt in tikanga Māori programmes (qv) and Māori therapeutic programmes (qv) is maintained and promoted. Available during the sentence planning stage. The units are the only place where Māori therapeutic programmes are delivered.

*Māori therapeutic programmes*: Intensive rehabilitative programmes available during the sentence planning stage that integrate tikanga Māori concepts and cognitive behavioural therapy in addressing various offender needs.

*need principle*: Put simply, concerns what to treat; the successful targeting of an offender's criminogenic needs will reduce the risk of reoffending.

*offender*: A person convicted of an offence.

*offending period criminogenic needs*: Those criminogenic needs for which assessment is carried out prior to sentencing. The assessment looks at the factors that were important in the day before (and inclusive of) the (first) offence.

*Parole Board*: Established under the Parole Act 2002, the board determines the release of offenders on parole when the offender is serving a prison term of more than two years. The board also

## GLOSSARY

considers home detention applications from offenders sentenced to imprisonment of fewer than two years.

*police record number*: An identifying number that tags each entry in the law enforcement system (qv).

*Policy Development*: Provides policy advice and strategic and trend analysis, develops correctional policy, contributes to legislative reviews, and coordinates policy with other Government agencies.

*post-sentence assessment*: Offenders who are identified as having offending period Māori culture related needs undertake the second part of the Māori culture related needs assessment, the predisposing period criminogenic needs assessment.

*predictive validity*: Put simply, the ability of a measure to predict the actual occurrence of an event.

*predisposing period criminogenic needs*: Those factors that are assessed as important to the offending in the six months prior to the offending.

*pre-sentence assessment*: Offenders are screened to determine who has Māori ancestry and identifies as Māori to determine whether the first part of the Māori culture related needs assessment, the offending period criminogenic needs assessment, is conducted.

*probation officer*: When requested, reports to the judge on an offender's background, offending, and social circumstances, and makes recommendations as to sentencing. Also manages offenders on community-based sentences, home detention, and parole.

*Psychological Service*: Provides specialist clinical treatment and assessment advice for offenders, and training and education for Department of Corrections staff and approved community groups. Undertakes research. Responsible for integrity of assessments and programmes delivered within the department.

*psychology of criminal conduct*: A theoretical framework used to guide the management, assessment, and treatment of offenders.

*Public Prisons Service*: Responsible for the safe, secure, and humane containment of sentenced and remand inmates. Also responsible for managing the sentence needs of each offender, including his or her rehabilitation and reintegration.

*responsivity principle*: Put simply, concerns how to treat. Treatment should be matched to an offender's individual characteristics.

*risk factors*: Within the psychology of criminal conduct (qv), simple static (or unchangeable) predictor variables of crime are often called 'risk factors'. Dynamic (or changeable) risk factors or predictor variables are called 'criminogenic needs'.

*risk of reconviction and risk of imprisonment*: A statistical indicator of the likelihood or risk that in the next five years an offender will be convicted of a crime that will result in imprisonment.

*risk principle*: Put simply, concerns who to treat. Rehabilitation is more effective when targeted at those with the greatest risk of reoffending.

## GLOSSARY

*senior management team*: Comprises the Department of Corrections' chief executive and the general managers of the department's services and groups.

*sentence planning*: Planning done to meet offender needs, decide what interventions will be undertaken, and ascertain what the offender's and probation officer's expectations are throughout the sentence.

*sentence planning indicator report*: Shows the criminogenic needs that were identified, prioritises which needs should be addressed first, and records information about an offender's motivation to change and any additional information that may assist in sentence management decisions. This informs the development of a sentence plan.

*specialist Māori cultural assessments*: These assessments are available in the Auckland and Waikato regions, pending national implementation. Their aim is to address responsivity and motivational barriers identified during or after a Māori culture related needs assessment and to assist sentence planners and probation officers in selecting the most appropriate interventions for Māori offenders.

*tikanga Māori programmes*: These programmes, which are available during the sentence planning stage, provide male and female offenders with a basic understanding of tikanga concepts. They aim to motivate offenders to address the underlying causes of their offending and to develop positive goals for the future. For men, these programmes are a prerequisite for progression to other Māori rehabilitative programmes.

*whānau liaison worker intervention*: This intervention, which is available during the preparation for release stage, is both rehabilitative and reintegrative. Specialists based in the Māori focus units (qv) support offenders to establish links with their whānau, hapū, iwi, and local Māori community.

## ABBREVIATIONS

app	appendix
c	circa
CA	Court of Appeal
ch	chapter
CNI	criminogenic needs inventory
CPS	Community Probation Service
doc	document
ed	edition, editor
fn	footnote
FREMO	framework for reducing Māori offending
inc	incorporated
IOM	integrated offender management
LSI-R	levels of service inventory – revised
ltd	limited
MaCRN	Māori culture related need
MFU	Māori focus unit
MS	manuscript
MTP	Māori therapeutic programme
NZLR	<i>New Zealand Law Reports</i>
OCN	offending period criminogenic need
OP MaCRN	offending period Māori culture related need
p, pp	page, pages
para	paragraph
PCC	psychology of criminal conduct
PCN	predisposing period criminogenic need
PP MaCRN	predisposing period Māori culture related need
PPS	Public Prisons Service
ROC*ROI	risk of reconviction and risk of imprisonment
s, ss	section, sections
SMCA	specialist Māori cultural assessment
TMP	tikanga Māori programme
vol	volume
WLW	whānau liaison worker

‘Wai’ is a prefix used with Waitangi Tribunal claim numbers

Unless otherwise stated, footnote references to claims, papers, and documents are to the record of inquiry, the index to which is reproduced in the appendix.



## CHAPTER 1

### INTRODUCTION

#### 1.1 THE SCOPE OF THE REPORT

This report examines the development, implementation, and outcomes of two assessment tools (or tests) that the Department of Corrections applies to offenders. The tools and their associated policies are complex and are beset by acronyms and abbreviations. For these reasons, we have included a glossary of key terms on pages ix–xii.

The first of the tools, known as the risk of reconviction and risk of imprisonment (ROC\*ROI) tool, has been developed from statistical information about many thousands of New Zealand offenders. It uses mathematical formulae to calculate from a number of static, or unchangeable, facts about an offender (eg, age at first conviction) and each offence they have committed (eg, type of sentence imposed), the likelihood that he or she will, in the next five years, be reconvicted of a crime and imprisoned. The resulting risk prediction score is used to help the Department of Corrections identify higher risk offenders to be prioritised for rehabilitative programmes.

The other tool, the Māori culture related needs (MACRNS) tool, is part of a psychologically based assessment known as the criminogenic needs inventory (CNI). The CNI is applied to offenders who are considered to have a medium or higher risk of reoffending and is designed to identify causative factors that should be targeted to reduce that risk. It assesses the offender's behaviour in a certain period (either one day or six months) leading up to the offence and covers a range of factors that have been linked with reoffending, such as alcohol or drug use, gambling, violence, relationships, and criminal associates. The MACRNS part of the CNI assessment is applied only to offenders who identify as Māori. Its purpose is to improve the department's understanding of the context in which Māori offending occurs and to identify interventions most likely to be effective in promoting behavioural change among Māori offenders.

The Waitangi Tribunal's task is to assess the Department of Corrections' policies and conduct in respect of the ROC\*ROI and MACRNS tools for their consistency with the principles of the Treaty of Waitangi. If, as the claimant has alleged, any Treaty breaches have occurred and prejudice has been caused to a group of Māori to which the claimant belongs, the Tribunal may make recommendations to the Crown concerning redress.<sup>1</sup>

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1. Treaty of Waitangi Act 1975, s 6(1),(3)

**1.2 THE CLAIM**

The claim was brought late in 2002 by Pirika Tame (Tom) Hemopo, a probation officer for the Community Probation Service (CPS), on behalf of himself and Ngāti Kahungunu. It was registered by the Waitangi Tribunal on 18 December 2002 and allocated the claim number Wai 1024.<sup>2</sup>

The claim focused on ROC\*ROI and CNI/MACRNS, being two aspects of what is known as the integrated offender management (IOM) system, which was implemented by the Department of Corrections in 1999. The department describes IOM as ‘a coordinated consistent system to managing offenders across their sentences’. It identifies and assesses offenders who are at high risk of reoffending and, in order to address the factors that are linked to their offending, targets programmes and interventions for them.<sup>3</sup>

Mr Hemopo claimed that the ROC\*ROI and MACRNS tools disadvantaged Māori offenders in terms of the type and length of sentences they received. With regard to ROC\*ROI, it was alleged that this disadvantage occurred because:

- ▶ the tool used offender ethnicity as a relevant variable;
- ▶ the tool accorded a greater weighting to Māori ethnicity than to any other ethnicity; and
- ▶ the outcome of a ROC\*ROI assessment, particularly when it led to a CNI assessment, influenced the sentencing, sentence management, and sentence termination processes.<sup>4</sup>

In the time between the filing and the hearing of Mr Hemopo’s claim, the ROC\*ROI tool was reviewed and the ethnicity variable altered so that it no longer contributed to the predictive power of the tool. As a result, at the hearing, the claimant gave less emphasis to the ROC\*ROI aspect of his claim.

With regard to the MACRNS tool, Mr Hemopo claimed that disadvantage flowed to Māori offenders because:

- ▶ the tool classified positive aspects of Māori culture and family as causing crime or as aggravating factors for sentencing;
- ▶ it failed to acknowledge that the cultural criteria it used were equally applicable to other cultures and ethnic groups in New Zealand; and
- ▶ the outcome of a MACRNS assessment influenced the sentencing, sentence management, and sentence termination processes.<sup>5</sup>

Mr Hemopo alleged that, by its conduct in relation to the two assessment tools, the department had breached its Treaty obligations:

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2. Every document filed in connection with the claim was numbered (eg, claim 1.1, document A26) and entered on a register called the record of inquiry. That record is reproduced in the appendix so that readers can identify the documents that are referred to throughout this report.

3. Ibid

4. Claim 1.1, paras 14, 16.1, 16.2, 16.8; doc A1, paras 10–11

5. Claim 1.1, paras 14, 16.3–16.8; doc A1, paras 23–26

- ▶ to act with utmost good faith towards Māori;
- ▶ actively to protect the interests of Māori;
- ▶ to consult with Māori on policies that affect them;
- ▶ to treat Māori equally with non-Māori; and
- ▶ to remedy breaches of the Treaty when these are identified.<sup>6</sup>

The exact nature of the Crown conduct that was said to have breached these obligations was traversed in the written and oral evidence presented to the Tribunal, which is summarised later in this report. In brief, there were alleged deficiencies in:

- ▶ the consultation engaged in by the Department of Corrections during the tools' development;
- ▶ the conceptual bases of the tools;
- ▶ the training provided in respect of MACRNS;
- ▶ the use of the tools; and
- ▶ the monitoring of the effects of the tools' use.

### 1.3 APPLICATIONS FOR AN URGENT TRIBUNAL HEARING

With his statement of claim, Mr Hemopo filed an application for an urgent Tribunal hearing.<sup>7</sup> The Crown, which opposed the substance of Mr Hemopo's claim, nevertheless supported the urgency application because it wanted the relevant policies examined for their Treaty consistency.<sup>8</sup> The application was considered early in 2003 but was declined on the ground that the claimant had other avenues available for the resolution of his grievances. At the time, the Human Rights Commission had begun an investigation into a complaint from Mr Hemopo about the same matters as were covered in his claim to the Waitangi Tribunal. As well, the Department of Corrections planned to review the ROC\*ROI and MACRNS tools, and counsel for Mr Hemopo and for the Crown agreed that those reviews, due to be completed by mid-2003, should take place before the Tribunal conducted an inquiry. In those circumstances, the Tribunal determined that its strict criteria for the granting of an urgent inquiry were not met because the Human Rights Commission process or the review process might resolve the issues between Mr Hemopo and the department and render a Tribunal inquiry unnecessary.<sup>9</sup>

In June 2004, the claimant again applied for an urgent hearing, stating that neither the Human Rights Commission nor the departmental review had resolved the issues.<sup>10</sup> Once

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6. Claim 1.1, para 15

7. Paper 2.1

8. Paper 2.6, para 15.3

9. Paper 2.8

10. Paper 2.9

more, the Crown supported the application.<sup>11</sup> This time, being satisfied that its previous reasons for denying urgency no longer existed, the Tribunal granted the application.<sup>12</sup>

#### 1.4 THE HEARING PROCESS

##### 1.4.1 The Tribunal

On 19 August 2004, Judge Layne Harvey, a judge of the Māori Land Court, was appointed presiding officer of the Wai 1024 Tribunal, and John Baird, Professor Hirini Moko Mead, and Joanne Morris were subsequently appointed members.<sup>13</sup> However, owing to prior work commitments, Mr Baird was to withdraw once a hearing date was set.<sup>14</sup>

The hearing into the claim was held from 14 to 16 December 2004 at the Tribunal's offices in Wellington, with counsel's closing submissions being heard on 14 January 2005. Grant Powell and Sarah Eyre appeared for the claimant, Craig Linkhorn and Veronica Chalmers for the Crown.

##### 1.4.2 Witnesses at the hearing

Throughout this report, we refer to the evidence of the witnesses who took part in the Tribunal's inquiry. All witnesses provided a written brief of evidence in advance of the hearing, and, in all but two cases, they also attended the hearing to give supplemental oral evidence and to answer questions from counsel and the Tribunal.

The following lists identify the witnesses for the claimant and for the Crown and include their occupations. They are included so that readers can readily discover or remind themselves of any named witness's role in the inquiry.

##### (1) *Claimant witnesses*

The witnesses for the claimant, Mr Hemopo, were:

**David Balfour:** a former probation officer for the CPS who attended the MACRNS training with Mr Hemopo.

**Dr Fiona Cram:** a research manager for Katoa Limited and an expert in research methods and kaupapa Māori research.

**Associate Professor Geoffrey Hall:** an associate professor of law at the University of Otago and a sentencing expert. He provided written evidence only.

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11. Paper 2.11

12. Paper 2.11(a)

13. Papers 2.12, 2.14

14. Paper 2.16

**Dr Catherine Love:** a member of the MACRNS review team and a senior research and Māori development fellow at the School of Psychology, Victoria University.

**Ngahiwi Tomoana:** the chairperson of Ngāti Kahungunu Iwi Incorporated. He provided written evidence only.

**Tangihaere Walker:** a member of the MACRNS review team and a social policy researcher at the Lower Hutt Family Centre.

## **(2) Crown witnesses**

The witnesses for the Crown were:

**Dr Leon Bakker:** a former senior psychologist with the Department of Corrections' Psychological Service, a former manager strategic analysis, a co-developer of ROC\*ROI, and a CNI project manager.

**Dr Branko Coebergh:** a senior adviser research with the Psychological Service who was primarily responsible for designing the CNI and training the CNI trainers.

**Dr Te Kani Kingi:** a Health Research Council post-doctoral research fellow specialising in Māori mental health and an expert in research design and evaluation.

**Heather Mackie:** a regional manager for the central region of the CPS who led work on the design of sentence planning for the CPS.

**Kristen Maynard:** formerly (from June 1997 to May 2000) a senior policy adviser in the Department of Corrections' Policy Development Group who was primarily responsible for developing MACRNS.

**Malcolm Robson:** a former probation officer, prison manager, and specialist Māori cultural trainer who trained Department of Corrections staff in administering the CNI and MACRNS assessment tools.

**David Riley:** the director of the Psychological Service, who was primarily responsible for developing ROC\*ROI.

**Charlie Tawhiao:** the manager of the Treaty Relationships Unit in the Policy Development Group.

The Tribunal records its appreciation to all those who took part in the inquiry – the claimant, the lawyers, and the witnesses – for the comprehensive material they placed before us and for their cooperative approach.

## **1.5 ISSUES FOR THE TRIBUNAL**

We acknowledge at the outset that there are important areas of common ground between the claimant and the Crown witnesses. These include their shared desire that the Department of Corrections do the best for all communities, Māori and non-Māori, by reducing reoffending,

and that it continue working in good faith to improve the corrections system's responsiveness to Māori.

Despite that, the parties are at odds on a number of matters relating to the department's ability to achieve its larger goals. Before the hearing, the parties formulated the following set of questions, covering issues of fact and of Treaty application, for the Tribunal's determination:

1. Whether the design and application of the MACRNS assessment, used by the Department of Corrections, is consistent with the principles of the Treaty of Waitangi; in particular:
  - (a) What is the theoretical basis for the inclusion of MACRNS in the CNI assessment?
  - (b) How is the information used in the assessment of the MACRNS gathered?
  - (c) How are the results of MACRNS used?
  - (d) What prejudice (if any) does the gathering and/or use of the MACRNS cause to Māori offenders?
2. Whether the design and application of the ROC\*ROI assessment used by the Department of Corrections is consistent with the principles of the Treaty of Waitangi; in particular:
  - (a) What is the theoretical basis for the inclusion of ethnicity in the ROC\*ROI assessment?
  - (b) How is the information used in the calculation of the ROC\*ROI gathered?
  - (c) How are the results of the ROC\*ROI used?
  - (d) What prejudice (if any) does the gathering and/or use of the ROC\*ROI cause to Māori offenders?
3. If MACRNS and/or ROC\*ROI breach or have breached the principles of the Treaty of Waitangi, so as to cause prejudice to Māori, what changes or other relief is necessary to remedy such breaches?<sup>15</sup>

Having had the benefit of hearing and considering the evidence, the Tribunal has compiled the following lists of questions in order to convey quickly to readers the essence of the parties' dispute over the facts about ROC\*ROI and MACRNS.

#### 1.5.1 Questions on ROC\*ROI

With regard to ROC\*ROI:

- Is the risk principle that underpins ROC\*ROI relevant to indigenous populations?
- Was the Department of Corrections justified in not consulting Māori in the development of ROC\*ROI?
- Is the data from which ROC\*ROI has been derived sufficiently accurate for its important predictive purpose?

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15. Paper 2.13

- ▶ Was the effect of the ethnicity variable, which was part of the ROC\*ROI tool until 2004, that Māori offenders were classified as being at higher risk of reoffending and future imprisonment than non-Māori offenders?
- ▶ Was the predictive contribution of the ethnicity variable reduced to zero in 2004 for statistical reasons or as a public relations measure to allay staff concerns that it discriminated against Māori offenders?
- ▶ Is there a continuing effect of the ethnicity variable in the ROC\*ROI tool that is likely to prejudice Māori offenders?
- ▶ Was the department justified in not consulting Māori in the reviews of ROC\*ROI undertaken since its introduction?
- ▶ Should those reviews have involved independent evaluation of ROC\*ROI's design, independent monitoring of the review process, or both?
- ▶ Is the use made of ROC\*ROI in the sentencing process likely to cause prejudice to Māori offenders?

### 1.5.2 Questions on MACRNS

With regard to MACRNS:

- ▶ Aside from consultation, did the MACRNS' developers undertake sufficient preliminary work to support and inform the decisions to proceed with the design of MACRNS and to integrate them in the CNI?
- ▶ Was the consultation with Māori that was undertaken by the department during the development of MACRNS sufficiently extensive?
- ▶ Was that consultation constrained by limitations of time and resources that should not have been imposed on it?
- ▶ Were MACRNS developed according to a 'kaupapa Māori approach' and does such an approach entail the incorporation of both cultural strengths and cultural deficits (weaknesses) in the resulting assessment tool?
- ▶ Was it a sound policy decision to integrate the MACRNS into the CNI and, if so, was the integration conducted in a sound manner?
- ▶ Was the validity of MACRNS tested sufficiently before their nationwide implementation?
- ▶ Did the benefits of the nationwide implementation of MACRNS outweigh any foreseeable disadvantages?
- ▶ Did the department properly manage the unfinished review of MACRNS that was conducted by a specialist team of contractors?
- ▶ Has the department properly managed all other means of evaluating MACRNS' validity and effects?

## 1.6

- ▶ Has the department implemented proper training and supervision of probation officers responsible for administering the macrns tool?
- ▶ Is any confusion among probation officers about whether macrns are criminogenic needs due to confusion in macrns' conceptualisation or in the training provided by the department?
- ▶ Do the macrns constructs properly reflect Māori culture or do they somehow distort Māori concepts?
- ▶ Are macrns assessed consistently by different probation officers?
- ▶ Do the screening questions that must be asked before macrns can be assessed require probation officers to mislead offenders about the fact or nature of the assessment?
- ▶ In light of the fact that macrns are regarded as being very important by the department but no new programmes or interventions for Māori offenders have been introduced as a result of macrns since assessments began, what is the purpose and value of the assessments?
- ▶ Could an offender assessed with macrns be prejudiced by that assessment in the sentencing process?

In light of the parties' contrary positions on those questions of fact central to the claim, it is inevitable that they hold different views on the result of applying the principles of the Treaty to the claim. In the next section, we outline the Treaty principles we consider most relevant to our analysis of the claim. We then summarise the parties' arguments about the application of those principles.

## 1.6 THE PRINCIPLES OF THE TREATY OF WAITANGI

### 1.6.1 Introduction

The essential characteristics of the Treaty relationship between the Crown and Māori were summarised in the Tribunal's *Napier Hospital and Health Services Report* in this way:

Whatever the ultimate political objectives of the parties, the relationship was to be enduring and was pegged to high ideals. The Treaty framework established three main dimensions:

- ▶ a fiduciary relationship of protection, in which the Crown tempered its exercise of sovereignty through the right to govern in the interests of all by protecting the rangatiratanga of Māori leaders and communities;
- ▶ a relationship 'akin to a partnership', in which the Crown cooperated with Māori in fields of common interest; and
- ▶ a relationship of citizenship, in which the Crown assured equal rights and standards to all Māori as individual British subjects.<sup>16</sup>

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16. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 58

The Tribunal's jurisdiction requires it to inquire into claims that Crown conduct or policy is inconsistent with the principles of the Treaty.<sup>17</sup> In so doing, it must have regard to both the English and the Māori texts of the Treaty, and it has exclusive authority to determine the meaning and effect of the Treaty as embodied in those two texts and to decide issues raised by the differences between them.<sup>18</sup> The relationship between the principles of the Treaty and the Treaty's actual terms has been explained in this way by the Privy Council:

The 'principles' are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. . . . With the passage of time, the 'principles' which underlie the Treaty have become much more important than its precise terms.<sup>19</sup>

The *Muriwhenua Land Report* upheld the importance of both the principles and the terms of the Treaty; the terms could not be 'negated or reduced' because the principles 'enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time'.<sup>20</sup> In 1990, the then president of the Court of Appeal stated that the Treaty obligations were 'ongoing': 'They will evolve from generation to generation as conditions change'.<sup>21</sup>

### 1.6.2 Reciprocal nature of the Crown–Māori Treaty relationship

Article 1 of the Treaty of Waitangi records the cession to the Crown by the Māori chiefs of their rights and powers of 'kawanatanga' (in the Māori version) or 'sovereignty' (in the English version).<sup>22</sup> Articles 2 and 3 of the Treaty record the two guarantees made by the Crown to Māori as the quid pro quo for that cession. Article 2 guarantees Māori 'tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa'<sup>23</sup> (or, in the English version, 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties'). Article 3 guarantees 'Ka tiakina e te Kuini o Ingarani nga tangata katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani' (or 'the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects').

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17. Treaty of Waitangi Act 1975, s 6(1)

18. Ibid, s 5(2)

19. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)

20. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 387. Te Puni Kōkiri's book *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Wellington: Te Puni Kōkiri, 2001) provides further helpful context and detail. It can be found online at [www.tpk.govt.nz/publications/docs/tpk\\_treaty/treaty\\_principles.pdf](http://www.tpk.govt.nz/publications/docs/tpk_treaty/treaty_principles.pdf).

21. *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641, 656, per Cooke P (CA)

22. 'Kawanatanga' translates as 'government' or 'governance', being a transliteration of the word 'governor'.

23. Translated by Sir Hugh Kawharu as 'the unqualified exercise of their chieftainship over their lands, villages and all their treasures' (IH Kawharu (ed), *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989), p 321)

Therefore, it is fundamental that the powers of sovereignty/kawanatanga conferred on the Crown by the Treaty are not absolute but are tempered by the very fact and purpose of the relationship between the Crown and the Māori people that was cemented by the Treaty. This means that the Crown's authority to govern can be understood only in light of the set of principles that elaborate the spirit and nature of the Treaty relationship. In the *Mokai School Report*, the Tribunal put it this way:

the effect of the other Treaty principles on the Crown's right of governance may be said to require the Crown to exercise 'quality kawanatanga' or, more familiarly, 'good governance', where the meaning of 'quality' and 'good' is determined by the consistency of the Crown's governance with the entirety of the Treaty's principles.<sup>24</sup>

### 1.6.3 The principle of partnership

The concept of a partnership between the Crown and Māori is central to the Treaty relationship and is founded in large part on the exchange that was effected by means of the Treaty. As was explained in the Tribunal's 1998 report on a claim by Te Whanau o Waipareira, the Crown's sovereignty or governance powers are not in conflict with Māori tino rangatiratanga. Rather, the two kinds of authority are 'indicative of the undertaking of mutual support, at the time and in the future'.<sup>25</sup> Thus, the term 'partnership' serves to describe 'a relationship where one party is not subordinate to the other but where each must respect the other's status and authority in all walks of life'.<sup>26</sup>

The Treaty principle of partnership is grounded in the mutual obligation upon the Crown and Māori to act reasonably, honourably, and in the utmost good faith towards each other. But it has been emphasised by the Court of Appeal that the standard of 'reasonableness' is not one of 'perfection'.<sup>27</sup> One element of the Crown's obligations is that it must make informed decisions. Where Crown policies affect Māori, a vital element of the partnership relationship is the Crown's duty to consult with Māori:

In essence the Treaty signifies a partnership requiring each partner to act reasonably and with the utmost good faith towards the other partner, and that in turn involves the obligation to consult.<sup>28</sup>

Previous Tribunals have emphasised the value of consultation in policy formation. The *Report on the Mangonui Sewerage Claim* recognised that:

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24. Waitangi Tribunal, *The Mokai School Report* (Wellington: Legislation Direct, 2001), p 10

25. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: Legislation Direct, 1998), p 29

26. Ibid, pp 27–28

27. *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA)

28. Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wellington: Brooker and Friend Ltd, 1990), p 42

Early discussions build better understandings in an area of cultural contact where the potential for conflict is high. Agreements may not be reached but new insights may be obtained and the subsequent debate may at least be better informed.<sup>29</sup>

It has also been observed that the Crown's responsibility to protect tino rangatiratanga: inevitably involves taking more time over the consultation process, but this may provide a refreshing experience and an opportunity to get it right the first time, in pragmatic terms. We would be surprised if the general New Zealand population considered this would be detrimental.<sup>30</sup>

It is plain that the Crown's Treaty duty to consult is not absolute.<sup>31</sup> This means that the particular circumstances must be considered to assess whether consultation with Māori is needed and, if it is, how that should be conducted. Over time, it may be expected that there will be an increasing range of situations in which the information available (eg, from research and evaluation or from previous consultative efforts) about Māori attitudes to particular matters is sufficient for Crown decisions to be made without widespread consultation. The onus is on the Crown to assess whether its policy processes are sufficiently informed by Māori knowledge and opinions to render further consultation unnecessary. It must also be mindful that some subjects are of such importance to Māori that consultation will be required by the good faith element of the Crown–Māori Treaty partnership.<sup>32</sup>

In the *Napier Hospital and Health Services Report*, the Tribunal provided a helpful summary of what it saw as the four stages of consultation and the key criteria for the Crown to consider at each stage. The four stages are:

- ▶ determining whether to consult Māori;
- ▶ stating a proposal not yet finally decided upon;
- ▶ listening to what others have to say; and
- ▶ considering their responses and deciding what will be done.<sup>33</sup>

In the present claim, the claimant alleged that the Crown failed to consult Māori at all with regard to ROC\*ROI, and, with regard to MACRNS, that it failed to consult Māori beyond a select few, mainly on its own staff. The first stage of the consultation process outlined above is, therefore, of particular relevance and we have found helpful the criteria that the Napier Hospital Tribunal identified for consideration at that stage. Those criteria are:

- ▶ the importance to Maori of the issue to be decided, and in particular whether it is sufficiently important to require consultation regardless of discretionary considerations;

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29. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim* (Wellington: Waitangi Tribunal, 1988), p 4

30. Waitangi Tribunal, *Report on Claims Concerning the Allocation of Radio Frequencies*, p 44

31. See, for example, Waitangi Tribunal, *Maori Electoral Option Report* (Wellington: Brooker's Ltd, 1994), pp 12–14

32. See, for example, *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, 152, per Cooke P (CA)

33. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 73

## 1.6.4

- ▶ whether statutory obligations require or strongly imply the need for consultation;
- ▶ whether and to what extent the issue has been the subject of previous consultation;
- ▶ what, if any, Treaty implications exist;
- ▶ the sufficiency of information already possessed or gathered by other means on Maori opinion and on the impact of the decision on affected Maori; and
- ▶ the existence of exceptional factors justifying proceeding without consultation in the interests of timely action and good government.<sup>34</sup>

A final point of note about the relationship signified by the Treaty principle of partnership is that it is often likened to a fiduciary relationship, such as exists between a trustee and a beneficiary. In the *Te Maunga Railways Land Report*, the Tribunal described such a relationship as being:

founded on trust and confidence in another, when one side is in a position of power or domination or influence over the other. One side is thus in a position of vulnerability and must rely on the integrity and good faith of the other.<sup>35</sup>

The special quality of the Crown's responsibility in relation to Māori interests is elaborated further by the Treaty principle of active protection.

#### 1.6.4 The principle of active protection

The principle of active protection derives from the Crown's guarantees of Māori tino rangatiratanga and equal citizenship rights in exchange for the Māori cession of sovereignty or kawanatanga. Relying on the purpose and forward-looking nature of the Treaty relationship, the Tribunal has determined that the range of Māori interests to be protected actively by the Crown extends beyond property interests to tribal authority, Māori cultural practices, and Māori themselves, as groups and individuals.<sup>36</sup>

The standard of Crown conduct required by the principle has been variously described but the emphasis is upon active protection, within the limits of reasonableness, as opposed to some less positive stance. In the *Muriwhenua Land Report*, the Tribunal made plain the significance of the principle of active protection. It described four Treaty principles as being important to the situation before it – namely, protection, honourable conduct, fair process,

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34. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, pp 73–74. The first criterion is a reference to circumstances in which the topic is of such vital interest to Māori that consultation is required, regardless of the Crown's estimation of its own prior knowledge of relevant Māori views about that topic.

35. Waitangi Tribunal, *Te Maunga Railways Land Report* (Wellington: Brooker's Ltd, 1994), p 68

36. Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995* (Wellington: Brooker's Ltd, 1995), p 197; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Waitangi Tribunal, 1987), p 188; Waitangi Tribunal, *Te Whanau o Waipareira Report*, pp 20–22, 215–220; Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), pp 100–102, 152–154

and recognition – then it added that the principle of protection could be seen to encompass the other three principles.<sup>37</sup>

### 1.6.5 The principle of equity

The principle of equity (or citizenship, or participation) can be derived most directly from the Crown's article 3 guarantee to Māori of 'the rights and privileges of British subjects'. Its 'essential point', as stated by the Napier Hospital Tribunal, is that, at the time the Treaty was signed, none of the basic rights and privileges of British subjects was limited by race.<sup>38</sup> Accordingly, any curtailment of citizens' rights on the basis of race would be contrary to the principle.

There is a substantial degree of common ground between the Treaty principle of equity and the New Zealand law's protection of human rights. Counsel for the claimant argued, for example, that a Crown policy that caused disadvantage to Māori citizens on the basis of their race would be contrary to both the Treaty and the law. Crown counsel argued that, just as human rights law allowed positive discrimination to redress social disparities, so too did the Treaty principle of equity.

### 1.6.6 The principle of redress

The principle of redress derives from the Crown's obligation to act reasonably and in good faith. It is relevant when a breach of Treaty principle and resulting prejudice to Māori is established. In that situation, the Crown is obliged to restore its honour by providing a remedy for the wrong that has been suffered.<sup>39</sup>

## 1.7 THE PARTIES' TREATY SUBMISSIONS

### 1.7.1 The claimant

Claimant counsel noted that the Department of Corrections identified five Treaty principles as underpinning its *Māori Strategic Plan*. He submitted that three of them – the principles of partnership, active protection, and participation – applied to the present claim.<sup>40</sup> The department's description of those three principles is as follows:

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37. Waitangi Tribunal, *Muriwhenua Land Report*, p 388

38. Waitangi Tribunal, *Napier Hospital and Health Services Report*, p 62

39. See, for example, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 693, per Somers J (CA); Waitangi Tribunal, *The Ngāi Tahu Report 1991*, 3 vols (Wellington: Brooker's Ltd, 1991), pp 243–244 (vol 1), p 1052 (vol 3)

40. Paper 2.37, para 7

**The Principle of Partnership.** This principle includes the need to act reasonably, honourably and in good faith toward Māori. It encompasses the principles of reciprocity and mutual benefit and includes a duty by government agencies to make informed decisions.

**The Principle of Active Protection.** This principle includes the Crown's duty to protect Māori as a people and as individuals, in addition to their property and to actively protect tino rangatiratanga and Māori capacity to retain authority over Māori and to live according to Māori cultural preferences.

**The Principle of Participation.** This principle reiterates the citizenship and equality rights that Māori are treated and protected as British subjects.<sup>41</sup>

In addition, claimant counsel submitted that the Treaty principle of redress – not mentioned in the department's strategic plan – was relevant to the claim.<sup>42</sup>

The claimant's allegations of Treaty breach by the department were very generally framed.<sup>43</sup> Some of the alleged failings might be regarded as being inconsistent with all three of the principles just outlined; for example, the claimant's criticisms of ROC\*ROI's use of ethnicity, and of its alleged influence on Māori offenders' sentences. Likewise, with the claimant's allegations that MACRNS were insufficiently pre-tested, distorted Māori culture, and caused prejudice to some Māori offenders as a result. We consider, however, that the claimant's charges of inadequate consultation with Māori, in respect of both the ROC\*ROI and the MACRNS tools, are essentially allegations of breach of the Treaty principle of partnership. The Treaty principle of equity is the focus of the claimant's allegations that the tools' use prejudices individual Māori offenders.

There is one important matter to highlight about the claimant's Treaty argument. By making the claim to the Tribunal on behalf of Ngāti Kahungunu, the claimant asserted that the interests that were prejudiced by the policy and conduct of the Department of Corrections were those of his iwi. How such prejudice might occur was indicated by the evidence of Ngahiwi Tomoana, the chairperson of Ngāti Kahungunu Iwi Incorporated. Referring to the MACRNS assessment in particular, Mr Tomoana asserted that MACRNS portrayed 'our culture, whakapapa and tikanga in a negative light'. He also observed that, because of the unfortunate fact that so many members of Ngāti Kahungunu iwi were in the criminal justice system, it was absolutely critical that the MACRNS process be 'fair and unbiased'.<sup>44</sup> Finally, Mr Tomoana stated that, while he understood and acknowledged that the high Māori offending and reoffending rates need to be addressed, 'I believe this should not be done in a way that portrays our culture in a negative light, as the MACRNS do'.<sup>45</sup>

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41. Document A35, p 15

42. Paper 2.37, para 8

43. Paper 2.27, paras 9–26, 33–42; paper 2.37, paras 20–76

44. Document A27, paras 5–6

45. Ibid, para 7

From the conduct of the claimant's case, the Tribunal understands that one vital interest that Ngāti Kahungunu asserted it has in the corrections system is its interest in Māori culture and values being used appropriately by that system as part of the efforts made to reduce reoffending by members of the iwi. In addition, the tribe asserted an interest in the corrections system treating Ngāti Kahungunu offenders fairly as compared with other offenders.

### 1.7.2 The Crown

Crown counsel submitted that the circumstances of the claim revealed that the Crown's authority to govern had been exercised consistently with its Treaty obligations. The Treaty principles of partnership, active protection, equity, and options were identified, or adverted to, as being relevant to the assessment of the Department of Corrections' conduct.<sup>46</sup> The principle of redress was not considered relevant, on the basis that the design and use of the assessment tools had not breached any Treaty principles, let alone caused prejudice.

The Crown's position was that the claim concerning ROC\*ROI had very little basis, at least since the effect of the ethnicity variable was reduced to zero. Accordingly, its Treaty submissions focused predominantly on the department's conduct in relation to the MACRNS tool. Crown counsel submitted that the department had consulted with Māori sufficiently to make informed decisions about the content of MACRNS and the advantages of implementing them nationwide at the time that that was done. In support, the Crown argued that, while the department could have consulted more widely than it did, the relevant Treaty standard of behaviour was one of reasonableness, not perfection, and the consultation undertaken met that standard. As well, the Crown argued that, as in another recent urgent inquiry, the Tribunal should focus not on the process by which MACRNS were developed but on the conformity with Treaty principle of the substance of the MACRNS policy. The Crown also argued that the MACRNS constructs were mainly of internal, operational relevance to the department and so were insufficiently momentous to require more extensive consultation than was undertaken.<sup>47</sup>

The Crown's view was that the assessment tools benefited Māori offenders in that they were part of the Department of Corrections' efforts to address massive over-representation of Māori in the reoffender population. In support, Crown counsel relied on the Treaty principle of active protection of Māori interests, maintaining that the tools contributed to a vision where more was done to be more effective for Māori offenders and there was greater Māori involvement in treatment programmes. On the other side of the same coin, Crown counsel argued that the assessment tools did not cause any prejudice to Māori offenders and so conformed

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46. Paper 2.36, paras 165–197. The partnership principle is very often invoked by the courts and the Waitangi Tribunal in connection with the Crown's duty to consult. Crown counsel focused on the Crown's duty to consult but did not refer explicitly to the partnership principle.

47. Paper 2.36, paras 171–186

with the Treaty principle of citizenship and equity, which promises equal treatment of Māori and other citizens. Finally, relying on the macrns tool's use with offenders who have Māori ancestry and who identify as Māori, the Crown submitted that the tool was consistent with the Treaty principle of options, which recognises the right of Māori to choose to live according to Māori cultural values, other cultural values, or some combination of values.<sup>48</sup>

We consider it implicit in the Crown's submissions that Māori groups, not merely individual Māori offenders, have certain interests in the Department of Corrections' policies and practices concerning the ROC\*ROI and macrns assessment tools. Recognition of group interests was indicated by Crown counsel's statement that the assessment tools:

do not impinge on Māori authority. If anything, these tools are a contributory mechanism towards greater Māori involvement into treatment programmes and [they] contribute to a vision where more is done to be effective for Māori offenders.<sup>49</sup>

Further, Crown counsel submitted that the department's use of the macrns tool was consistent with the three measures of active protection advanced in relation to Māori health by the Napier Hospital Tribunal. In that context, it was said that the Crown's responsibility is to reduce, over time, the persistent disparity between the outcomes for Māori and non-Māori.<sup>50</sup> We observe that the Māori interest in improved outcomes for Māori as a population group is a collective interest, of iwi and other Māori groups, rather than an interest of individual Māori. From this, the Tribunal is clear that the Crown recognises that Ngāti Kahungunu as an iwi has Treaty-based interests in the Department of Corrections' policies and operations. By analogy with the health situation mentioned, one such Crown-recognised interest is Ngāti Kahungunu's interest in the reduction of reoffending by its own members.

### 1.8 SUMMARY OF TRIBUNAL FINDINGS

In chapter 6, we make our detailed findings about the facts of the claim and we apply the principles of the Treaty to those facts. The result, as our letter of transmittal to the Minister confirms, is that we consider that there have been certain inconsistencies with Treaty principles in the Department of Corrections' conduct and policies involving the ROC\*ROI and macrns tools. In brief, the principle of partnership has not been upheld, first, by the department's failure to consult with Māori at all about ROC\*ROI and, secondly, by its failure to consult with Māori more extensively than it did in the process of devising the macrns. We also consider that certain shortcomings in the department's management of the process by which macrns

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48. Paper 2.36, paras 187–197

49. Ibid, para 190

50. Waitangi Tribunal, *Napier Hospital and Health Services Report*, pp 53–54 (cited in paper 2.36, para 192)

were designed, implemented, and evaluated mean that the Treaty principle of active protection of Māori interests has not been upheld. The relevant interests that have not been adequately protected are those of Māori groups, in this case Ngāti Kahungunu, in the objective of reducing reoffending by their own members and in having Māori culture used appropriately in the department's dealings with offenders, especially those belonging to that iwi.

We are not persuaded, however, that those inconsistencies with Treaty principles have caused prejudice to Ngāti Kahungunu within the meaning of the Treaty of Waitangi Act 1975. On the evidence, prejudice of any sort is most unlikely to have resulted from the department's failure to consult Māori in designing the ROC\*ROI tool. With the MACRNS tool, however, we are less certain that prejudice has not resulted from the department's conduct inconsistent with the principles of the Treaty. To be conclusive about that matter, our assessment would need to be informed by soundly based evaluation and monitoring of MACRNS' use and effects. But that information is not available, in part, because of the department's conduct that we have determined is inconsistent with the principles.

The outcome is that we are not in a position to recommend that the Crown redress prejudice that has flowed to Māori from conduct or policies of the department that are inconsistent with Treaty principles. Clearly, however, the position we have reached provides a useful vantage point from which to commend the department to do what is now needed to answer the as yet unanswerable questions about its assessment tools. We trust that the analysis undertaken in the remainder of this report assists the department to provide answers. The most pressing question is whether MACRNS are having any prejudicial effects on the interests of Māori offenders and the iwi or other groups to which they belong.

Having observed the parties through the urgent hearing, it is our belief that the Tribunal's process provided them with a useful framework within which to explore and acknowledge the common ground between them. The parties may not in fact be so far apart on the matter of what should be done now to supply answers to the questions that remain about the effects of ROC\*ROI and MACRNS. The commonality that emerged at the hearing was, we consider, largely the result of the claimant's acceptance of two points: first, the Department of Corrections' good faith in seeking to reduce Māori reoffending through the development of ROC\*ROI and MACRNS and, secondly, the fact that the innovative nature of the tools has made their implementation and evaluation more complex and time-consuming than would otherwise be the case. Both points are relevant to the challenges that now face the department.

## **1.9 THE STRUCTURE OF THE REPORT**

In the next chapter, we provide background information about Māori offending, the Department of Corrections, and the department's recent efforts to increase its responsiveness to Māori. In chapter 3, the ROC\*ROI and MACRNS tools, which are central to the claim, are

described in depth, while the parties' arguments about those tools are presented in chapters 4 and 5. Finally, our findings and Treaty analysis are recorded in chapter 6.

The appendix contains the record of inquiry, which itemises all the documentation produced in connection with the claim, including all the written evidence, and the bibliography lists the secondary sources referred to by the Tribunal.

## CHAPTER 2

### THE CONTEXT OF THE CLAIM

#### 2.1 CHAPTER OUTLINE

In this chapter, we look at:

- ▶ the over-representation of Māori in the criminal justice system and some of the causes and consequences of this;
- ▶ the establishment of the Department of Corrections, its strategic goals, and the significance of the IOM system in achieving those goals;
- ▶ the department's strategic responsiveness to Māori and interventions aimed at reducing Māori reoffending.

#### 2.2 THE CONTEXT SURROUNDING MĀORI OFFENDING

##### 2.2.1 The over-representation of Māori in the criminal justice system

It is well-known that Māori offenders are over-represented in the criminal justice system.<sup>1</sup> As a proportion of New Zealand's total population, Māori comprise approximately 15 per cent, New Zealand Europeans 80 per cent, Pacific peoples 6.5 per cent, and people of other ethnicities 7 per cent.<sup>2</sup> However, of all cases resulting in a conviction in 2003 for which the ethnicity of the offender was known, 42 per cent involved Māori offenders, compared to 47 per cent New Zealand European, 8 per cent Pacific peoples, and 3 per cent other ethnicities.<sup>3</sup> Imprisonment statistics paint an even bleaker picture. The *Census of Prison Inmates and*

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1. See, for example, Ministerial Committee of Inquiry into the Prisons System, *Prison Review: Te Ara Hou: The New Way* (Wellington: Ministerial Committee of Inquiry into the Prisons System, 1989); Moana Jackson, *The Maori and the Criminal Justice System: He Whaipanga Hou – A New Perspective, Part 2*, 2 vols (Wellington: Department of Justice, 1988); Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare, *Pūao-te-ata-tū: The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Wellington: Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare, 1988); Ministerial Committee of Inquiry into Violence, *Report of Ministerial Committee of Inquiry into Violence* (Wellington: Department of Justice, 1987)

2. Statistics New Zealand, *2001 Census of Population and Dwellings: Ethnic Groups* (Wellington: Statistics New Zealand, 2002), p 11. The total exceeds 100 per cent because people can identify with more than one ethnic group.

3. Philip Spier and Barb Lash, *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003* (Wellington: Ministry of Justice, 2004), p 51

*Home Detainees, 2001* reveals that 53 per cent of inmates identified themselves as Māori, 31 per cent as European, and 11 per cent as Pacific peoples.<sup>4</sup>

Evidence presented at the Tribunal hearing indicated that Māori now comprise 50 per cent of the prison population and 46 per cent of offenders on community-based sentences. Reconviction statistics show that, within a year of release from prison, 63 per cent of Māori offenders are reconvicted, compared with 51 per cent of European offenders. As for reimprisonment rates, within a year of release from prison, 43 per cent of Māori offenders are reimprisoned, compared with 35 per cent of European offenders.<sup>5</sup>

There is no doubt that the reasons for the over-representation of Māori in the criminal justice system are complex. As the department said, ethnicity itself is not a cause of crime.<sup>6</sup> However, there are factors associated with being Māori that may increase the likelihood of offending and involvement in the criminal justice system. For example, research suggests that the over-representation of Māori in low socio-economic groups increases their vulnerability to offending.<sup>7</sup>

The New Zealand Police also recognise that institutional racism within that organisation is a contributing factor. Research commissioned by the police and Te Puni Kōkiri found that discriminatory language and behaviour are part of the police's occupational culture, which, the report noted, is not surprising given international research on police cultures and the presence of racism in wider New Zealand society.<sup>8</sup> Other New Zealand research indicating the presence of systemic biases in the criminal justice system found that 'young Māori are between 1.6 to 2.4 times more likely to have an official record of police contact or criminal conviction than non-Māori with the same self-reported offending history and social background'.<sup>9</sup>

Finally, it is suggested that historical and socio-cultural factors have shaped the behaviour of the Māori offender. That is not to say that Māori offending is 'caused' by injustices resulting from colonisation, rather that:

those injustices defined Māori/Pakeha relations and determined the contemporary place of the Māori community which so often exhibits the stresses that can render the young criminally vulnerable. To ignore the history which established that environment is inadequately to discern the reality of Māori offending.<sup>10</sup>

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4. Department of Corrections, *Census of Prison Inmates and Home Detainees, 2001* (Wellington: Department of Corrections, 2003) p12

5. Document A6, paras 19, 21

6. Document A21, paras 3.1–3.2

7. D M Fergusson, L J Horwood, and M T Lynskey, 'Ethnicity, Social Background and Young Offending: A 14-Year Longitudinal Study', *Australian and New Zealand Journal of Criminology*, vol 26 (1993), pp 155–170

8. G Maxwell and C Smith, *Police Perceptions of Maori: A Report to the New Zealand Police and the Ministry of Maori Development Te Puni Kōkiri* (Wellington: Institute of Criminology, 1998)

9. D M Fergusson, L J Horwood, and N R Swain-Campbell, 'Ethnicity and Criminal Convictions: Results of a 21-year Longitudinal Study', *Australian and New Zealand Journal of Criminology*, vol 36, no 3 (2003), p 366

10. Jackson, pp 20–21

Legal researcher and commentator Moana Jackson explains further that understanding why some Māori become offenders and how the criminal justice system responds to them requires an ‘essentially holistic framework which places Māori offending in the context of the social, economic and cultural issues which have shaped New Zealand society’.<sup>11</sup>

Lending support to the influence of historical and social-cultural factors is the fact that nations comparable to New Zealand also have disturbingly high proportions of their indigenous populations represented as offenders and prison inmates. In Australia in 2004, indigenous people comprised only 2.4 per cent of the general population but 21 per cent of the prison population, making indigenous Australians 11 times more likely to be in prison than other Australians.<sup>12</sup> In Canada in 2001, indigenous people comprised 3.3 per cent of the general population but 19 per cent of the federal admissions to custody and 17 per cent of the provincial admissions.<sup>13</sup>

### 2.2.2 The social and economic cost of Māori offending

The harm that offending by Māori causes to communities, especially Māori communities, is widely recognised. In the department’s evidence to the Tribunal, it was noted that, in addition to their disproportionately high conviction and imprisonment rates, Māori have a far greater proportion of young people at or about to enter the 15- to 24-year age range, which is the age group most likely to commit offences. The result, it was said, is that Māori communities bear the major burden of Māori offending, and Māori women and children are the major victims of the high levels of offending within their communities.<sup>14</sup> That conclusion is supported by the findings of the *New Zealand National Survey of Crime Victims, 2001*, which found that Māori, especially Māori women, are most at risk of victimisation and that Māori are most likely to be repeat victims. The survey also found that the extent of Māori victimisation is underestimated, as violence against Māori is one of the forms of victimisation least likely to come to police notice.<sup>15</sup>

Measuring the total costs of crime is no simple matter, partly because of the wide span of its effects across the various social sectors (including health, employment, and education). Also, there are some costs that cannot be calculated, including the psychological and physical damage that crime may cause to its victims.<sup>16</sup>

11. Ibid, p17

12. Julian V Roberts and Ronald Melchers, ‘The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001’, *Canadian Journal of Criminology and Criminal Justice*, vol 45, no 2 (2003), p 2; Australian Bureau of Statistics, ‘Australian Social Trends, 2005>Other Areas of Social Concern>Aboriginal and Torres Strait Islander Peoples: Contact with the Law’, [www.abs.gov.au](http://www.abs.gov.au), 2005

13. Roberts and Melcher, p 2

14. Document A6, para 20; Tawhiao, oral evidence, 14 December 2004

15. Alison Morris, James Reilly, Sheila Berry, and Robin Ransom, *The New Zealand National Survey of Crime Victims, 2001* (Wellington: Ministry of Justice, 2003)

16. John Yeabsley, Ian Duncan, and Tracy Mears, *An Estimate of the Costs of Crime in New Zealand: Report to the Department of Justice* (Wellington: New Zealand Institute of Economic Research, 1995), p1

In 2000, the Department of Corrections calculated the approximate financial costs of crime, taking into account such matters as the cost to the justice sector, welfare costs, health costs, and victim costs, including loss of quality of life. From this, it was worked out that the average cost to the country of a serious violent offence is \$570,000 and the average cost of a sexual offence \$460,000. The total cost of crime to New Zealand society was estimated to be at least \$1.9 billion per annum.<sup>17</sup>

Among the costs of offending are its effects on offenders and their families. The 1989 ministerial inquiry into the prisons system noted the financial hardship often endured by an inmate's family and the negative effects that separation can have on relationships:

the families of inmates tend to be the forgotten people . . . It is clear that in many cases the lives of those left outside are thrown into disarray . . . In effect the child loses a parent and for some it is a permanent loss.<sup>18</sup>

In its evidence to the Tribunal, the department emphasised that its goal of reducing re-offending provided a 'big pay-back' in terms of the effects on victims, the victim's family or whānau, the offender's family or whānau, and society overall.<sup>19</sup>

Focusing specifically on Māori offenders, there are clear indications that the harmful consequences of their offending may involve, for themselves, their whānau, and their wider communities, the negative feelings and behaviour associated with whakamā. In her 1986 book *In and Out of Touch*, Dame Joan Metge explored, primarily through interviews and discussions with numerous Māori informants, the meaning and effects of whakamā. Whakamā is a Māori cultural concept that can be quickly but insufficiently described in English as feelings of inadequacy and hurt that are manifested in unresponsive behaviour.<sup>20</sup> While people from different cultures may be able to imagine some of the consequences of an individual Māori – whether offender or whānau member – experiencing such negative feelings and behaviour, Metge offers rare insights into Māori feeling whakamā as members of a Māori group in relation to Pākehā as a group.<sup>21</sup> Among the direct quotations she includes to convey this point is the following:

To me, *whakamaa* is a reflection of the state our people are in at the moment, at an individual and at a group level. The suburbs in the city are full of Maoris with no ambition, no incentives, no aspirations.<sup>22</sup>

And the following words are quoted as part of the explanation of the causes of such whakamā:

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17. Document A45, app E. Yeabsley et al put the figure at over \$5 billion per annum.

18. Ministerial Committee of Inquiry into the Prisons System, paras 3.13, 3.14, 3.18

19. Document A8, para 12

20. Joan Metge, *In and Out of Touch: Whakamaa in Cross-Cultural Context* (Wellington: vuv Press, 1986), p 25

21. Ibid, see especially chs 11, 12, pp 137–146

22. Ibid, p 137

Maoris see themselves by the number of ticks or crosses they have in their individual life and in their group life. They see themselves by their failure or success rate in the Pakeha system. They see that their educational achievement is below par if you compare it with the Pakeha. They see that the prisons are full of our people . . . Maori see their own performance within the system, see that they are underachieving, and they can't help but feel second-class, they see themselves as underachievers.<sup>23</sup>

Metge's conclusion to this part of her discussion is that, ironically, since it is a reaction to perceived powerlessness in relation to Pākehā, whakamā contributes to the maintenance of the status quo. According to her, this is because it causes Māori 'to withdraw and hold back, to reduce their participation in national life, to retreat into a world of their own, and sometimes to resort to violence, which is defined and dealt with as against the law'.<sup>24</sup>

Many further insights into the human cost of Māori offending are to be found in Moana Jackson's 1988 report *The Maori and the Criminal Justice System: He Whaipanga Hou – A New Perspective*. The inspiration for that report's search for a holistic understanding of Māori offending – placing it 'in the context of the social, economic and cultural issues which have shaped New Zealand society' – is explained in this way:

The pursuit of this analysis is based in the hurt shared by Maori people over the pressures which lead their young into offending, and by the harm which crime causes to them and their community. The wasting imprisonment of so many young Maori men, the violence so often meted out by Maori upon Maori, and the shame inflicted by crime upon Maori families, is a source of deep concern to Maori people.<sup>25</sup>

We cannot fairly summarise here Jackson's in-depth exploration of the impact on Māori society and culture of the arrival and spreading dominance of Pākehā law and values. A key element of his analysis, however, is that past suppression and present denigration of Māori culture are inextricably involved in Māori socio-economic deprivation, and that the combined effect of social and cultural deprivation is to confine the existence of most members of the Māori community in a way not experienced by any other New Zealanders.<sup>26</sup> Part of the meaning of this is conveyed by the following quotations from Māori consulted during the research phase of the report:

It's wrong for the Pakeha to talk all the time that our crime or our bad health is a class or a poverty problem . . . it's more basic than that because the poverty grew from what happened to our culture, not the other way round.<sup>27</sup>

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23. Ibid, p 139

24. Ibid, p 141

25. Ibid, p 17

26. See, for example, Jackson, pp 100–103

27. Ibid, p 65

What we are talking about in preventing or handling crime is how to help a young person retain mana or to give him an insight regarding his mauri, his own particular life force, his self-esteem . . . and you can't give a person self-esteem if our people as a whole are not sure about their own self-esteem.<sup>28</sup>

### 2.3 THE DEPARTMENT OF CORRECTIONS, ITS STRATEGIC GOALS, AND THE IOM SYSTEM

During the late 1980s and 1990s, a Government drive for greater economy, efficiency, and effectiveness in policy development and operations led to widespread reforms of the public sector. Central to this restructuring were Treasury imperatives that Government departments should focus on their cost-effectiveness and accountability by measuring the outcomes of their policies and operations.

Against this backdrop, the Department of Corrections was established on 1 October 1995 in the wake of the restructuring of the previous Department of Justice. A central rationale for the structural reform, as stated by a committee that reviewed the Justice Department in 1994, was that it was essential to achieving a 'better strategic focus, an effective leadership style, supportive management structures and skilled staff'.<sup>29</sup> Under a new chief executive officer, the department's overall goal was to contribute to safer communities through reducing reoffending. Its specific strategic goals included:

- ▶ providing integrated and effective sentence management for each offender;
- ▶ reducing reoffending by Māori;
- ▶ developing the quality and skills of staff; and
- ▶ effectively managing the collection and use of information.<sup>30</sup>

During its first year of operation, the department identified several issues that needed addressing, including improving communication and information flows and the quality of information; investing further in managers, staff, technology, and other equipment; and increasing the focus on strategic management and planning.<sup>31</sup> In particular, 'a key strategic objective for the new department was a total overhaul and rationalisation of the way in which offenders were managed during their sentences'.<sup>32</sup> The subject of this inquiry, the risk of reconviction and risk of imprisonment (ROC\*ROI) and Māori culture related needs (MACRNS) tools, are part of the integrated offender management (IOM) system, which was implemented

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28. Jackson, p 157

29. Department of Justice, *Annual Report for the Year Ended 30 June 1995* (Wellington: Department of Justice, 1995), para 10

30. Department of Corrections, *Annual Report for the Nine-Month Period 1 October 1995 – 30 June 1996* (Wellington: Department of Corrections, 1996)

31. Ibid

32. Document A5, para 49

in 1999 to meet that key objective. The system is fundamental to the department's current operations and thus contributes to the attainment of each of the department's current goals, which by 2005 had been refined as follows:

- ▶ ensuring effective offender management;
- ▶ improving responsiveness to Māori;
- ▶ contributing to reducing reoffending; and
- ▶ enhancing capability and capacity.<sup>33</sup>

The introduction of IOM marked a revolutionary change in the department's operations. In its own explanation of the system, the department stated that IOM represented 'the biggest change to the way we do things since probation was introduced in the 1880s'.<sup>34</sup> In brief, IOM is a nationwide, systematic, and evidence-based approach to managing offenders. Its purpose is to increase the department's efficiency by targeting treatment resources to the criminogenic needs of high-risk offenders.

It was emphasised to the Tribunal by witnesses for the department that the development of IOM was driven by a marked internal ideological shift from a social work to a psychological model of treating offenders. This is a significant contextual point and warrants some explanation. Previously, the assessment of an offender's risk of reoffending and treatment needs depended to a very large extent on the judgement of an individual probation officer who was trained in social work and who reached his or her assessment after considering the offender's social circumstances. That situation came to be regarded at the highest levels of the department as problematic, in part because evidence-based measures for predicting offending had been shown to be more accurate than the professional judgements of psychologists, police and prison officers, social workers, and others.<sup>35</sup> The problem was also highlighted in a 1991 study of the (then) Probation Division of the Department of Justice, where it was said that, at that time, many staff made judgements about which offenders were likely to change their offending behaviour using 'intuitive targeting': 'Many Probation Officers said they targeted their energies towards certain clients and that this targeting was based on intuition.'<sup>36</sup>

By contrast, and as is explained further in chapter 3, IOM requires the use of empirically based assessment tools derived from disciplines other than social work (psychology in the case of the CNI, mathematics in the case of ROC\*ROI). Significantly, however, the results of those assessments can be overridden by the professional judgement of probation officers in many situations, and it is inevitable that the principles and skills of officers' social work training will be influential in those override decisions. In addition, it was evident that social work skills remain very important in probation officers' everyday management of offenders.

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33. Document A6, para 11; Department of Corrections, *Statement of Intent, 1 July 2004 – 30 June 2004* (Wellington: Department of Corrections, 2004)

34. Document A45, app E

35. Document A3, para 14; doc A5, para 16

36. Julie Leibrich, *A Study of the Probation Division's Perception of its Role in Reducing Reoffending* (Wellington: Department of Justice, 1991), p 42

Therefore, the marked ideological shift within the department that was reflected in the introduction of IOM is to be seen as just that: a move away from virtual dependence on social work skills (rather than an abandonment of them) in the management of offenders. In sum, the primary area in which the shift has been made is in the method of assessing offender risk and treatment needs.

The ultimate responsibility for the development and implementation of IOM rested with the department's chief executive. Direct control lay within the work of the department's two service delivery groups: the Public Prisons Service (PPS) and Probation and Offender Services, the latter of which incorporates the CPS, the Psychological Service, and Intervention Services.

Further discussion of the development and implementation of ROC\*ROI and MACRNS is considered in chapter 3.

## **2.4 THE DEPARTMENT OF CORRECTIONS' RESPONSIVENESS TO MĀORI**

### **2.4.1 The framework for reducing Māori offending**

The Department of Corrections recognises as serious social issues the over-representation of Māori as offenders and the higher reconviction and reimprisonment rates of Māori as compared to other offender groups.<sup>37</sup> Thus, in 1999, the department's Psychological Service produced the *Framework for Reducing Māori Offending: How to Achieve Quality in Policy and Services to Reduce Māori Offending and Enhance Māori Aspirations*. This document provides an analytical framework to guide the development of effective policies, initiatives, and services by formalising and monitoring Māori participation in the design and delivery of, and decision-making about, such measures. It also guides the testing of new interventions to ensure that they reflect Māori cultural knowledge and practices, enabling policy and practice to be assessed according to whether they enhance Māori outcomes in terms of mana, te reo and tikanga, whānaungatanga, and turangawaewae. It seeks to ensure clear and replicable procedures and examines ways to minimise their impact.<sup>38</sup>

### **2.4.2 The Treaty of Waitangi Strategic Plan, 2001–03**

In 1999, the department produced *He Whaakinga*, a draft Treaty of Waitangi policy statement outlining broad objectives to assist it in meeting its responsibilities under the Treaty and to

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37. Document A6, paras 18–22; Tawhiao, oral evidence, 14 December 2004

38. Department of Corrections, *Framework for Reducing Māori Offending: How to Achieve Quality in Policy and Services to Reduce Māori Offending and Enhance Māori Aspirations* (Wellington: Department of Corrections, 1999); doc A15(j)

respond more effectively to Māori. In 2001, following consultation with Māori communities, prison inmates, department employees, and other Government agencies, the department produced a summary of hui feedback and written submissions called *Let Māori Take the Journey: Nā Tāu Rourou, Na Tāku Rourou, Ka Ora ai te Iwi*. This examined such issues as the department's involvement of Māori stakeholders when working with Māori offenders, the nature of partnerships between the department and Māori, the use of tikanga Māori in a corrections setting, and the representation and role of Māori employees within the department. This document subsequently informed the development of the *Treaty of Waitangi Strategic Plan, 2001–2003: Kotahi Ano te Kaupapa – Ko te Oranga o te Iwi*.<sup>39</sup>

The *Treaty of Waitangi Strategic Plan* outlines a kaupapa or vision statement that aligns Māori expectations expressed during the consultation process with the department's goals of protecting community safety and reducing reoffending. The kaupapa statement is:

Kotahi ano te kaupapa; ko te oranga o te iwi.

There is only one purpose (to our work); it is the wellness and wellbeing of the people.<sup>40</sup>

The plan also outlines a policy statement that articulates the department's position on the Treaty:

The Department of Corrections will provide corrections services that protect community safety and contribute to reducing reoffending. We will provide those services in a way that upholds the Treaty of Waitangi so that 'wellness and well-being for the people' is achieved.<sup>41</sup>

Finally, the plan outlines strategic goals and new initiatives in response to feedback from consultation. These state what the department is doing, and proposes to do, to give effect to the policy statement. They are:

**Effectiveness:** being effective for Māori. The Department of Corrections' programmes and services will be effective for Māori.

**Partnerships:** building partnerships with Māori. We will establish and maintain relationships with Māori communities that enable the Department and Māori to work in partnership to protect community safety and reduce reoffending.

**Responsiveness:** being responsive to Māori. Being effective and enabling the development of partnerships will require that the capability of our people, our service, and our systems are maintained so that they are responsive to the needs of Māori communities.<sup>42</sup>

39. Department of Corrections, *Let Māori Take the Journey: Nā Tāu Rourou, Na Tāku Rourou, Ka Ora ai te Iwi* (Wellington: Department of Corrections, 2001)

40. Department of Corrections, *Treaty of Waitangi Strategic Plan, 2001–2003: Kotahi Ano te Kaupapa; Ko te Oranga o te Iwi* (Wellington: Department of Corrections, 2001), para 1

41. Ibid

42. Ibid, paras 1–2

**2.4.3 The Māori Strategic Plan, 2003–08**

Feedback from the consultation process and the subsequent *Treaty of Waitangi Strategic Plan* formed the basis for the Department of Corrections' 2003 *Māori Strategic Plan, 1 July 2003 – 30 June 2008: Kotahi Ano te Kaupapa; Ko te Oranga o te Iwi*.<sup>43</sup> The plan also incorporated feedback from ongoing dialogue with whānau, hapū, and iwi.<sup>44</sup>

The *Māori Strategic Plan* includes the same kaupapa statement as the *Treaty of Waitangi Strategic Plan*. Its policy statement is similar but notes in addition the importance of partnership with Māori and other Government agencies in providing corrections services that contribute to community safety and reduce reoffending.<sup>45</sup>

The three strategic themes of partnerships, effectiveness, and responsiveness underpin the *Māori Strategic Plan*, amplified as follows:

**BUILDING PARTNERSHIPS WITH MĀORI:** The Department of Corrections will form relationships with Māori communities that are strategic and mutually beneficial.

Corrections views partnership as a continually evolving relationship that balances the duties and obligations of kawanatanga and the aspirations of rangatiratanga.

Corrections believes that establishing partnerships begins with the building of relationships with whānau, hapū, iwi and Māori communities. The nature of these relationships will be focused around the aspirations of the Department and Māori for 'wellness and well-being'. Partnerships with Māori communities are vital to the provision of more effective and responsive services for Māori.

**BEING EFFECTIVE FOR MĀORI:** Corrections will provide quality programmes and services that are effective for Māori.

The Department of Corrections is seeking to develop and provide programmes and services that are appropriate, effective and address the diverse needs of Māori. This approach is underpinned by the notion that Māori world views and methodologies will be included in the development of services.

**BEING RESPONSIVE TO MĀORI:** Corrections will build the capability and capacity of our people and processes to enable us to improve our everyday business with Māori offenders, communities and providers.

To the Department of Corrections, being responsive means having an organisation and staff capable of developing and delivering services that are effective and appropriate for Māori. This includes:

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43. Department of Corrections, *Māori Strategic Plan, 1 July 2003 – 30 June 2008: Kotahi Ano te Kaupapa; Ko te Oranga o te Iwi* (Wellington: Department of Corrections, 2003)

44. Document A6, fn 1

45. Department of Corrections, *Census of Prison Inmates and Home Detainees, 2001* (Wellington: Department of Corrections, 2003), para 7

- ▶ providing appropriate training and development for staff to be able to deliver services in a manner that respects Māori values and supports Māori processes.
- ▶ increasing the involvement of Māori staff at all levels of the Department, to support Māori-to-Māori service delivery, and influence change at a management level to improve overall services to Māori.
- ▶ incorporating Māori values in the Department's organisational policies, practices, processes and culture.<sup>46</sup>

The department aims to achieve partnerships, effectiveness, and responsiveness by focusing on the following priority areas:

- ▶ Development of strong and meaningful partnerships with Māori communities.
- ▶ Māori involvement in decision making within Corrections.
- ▶ Intersectoral approaches that will achieve better outcomes for Māori.
- ▶ Inclusion and engagement of Māori whanau and hapū.
- ▶ Early intervention and prevention.
- ▶ Integration of Māori world views in programmes and services and involving Māori in service delivery.
- ▶ Building the responsiveness of the Department.<sup>47</sup>

The primary spokesperson for the department during the consultation process for the *Treaty of Waitangi Strategic Plan* and the *Māori Strategic Plan* was exposed to several unique insights from Māori communities that have underpinned his subsequent involvement in the corrections system. In his words, his 'personal motivations and intent were formed directly as a result of the consultation process and it is significant that the department has also formally adopted the results of the consultation process to establish its own motivation and intent in respect of Māori'.<sup>48</sup>

#### 2.4.4 The strategic framework for Māori

In February 2002, the Department of Corrections developed a department-wide 'strategic framework for Māori', which aimed to improve the effectiveness of the IOM system for Māori. The framework discussed 15 IOM principles in terms of their overall responsiveness to Māori. It also outlined business rules to guide sentence planning and sentence management decisions for Māori offenders. These were both updated in the Māori interventions pathway (see sec 2.4.5). The framework also described some of the general features and rationale for the department's interventions targeting Māori.<sup>49</sup>

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46. Document A35, paras 8–9

47. Ibid, paras 9, 10–13

48. Document A6, para 6

49. Document A15(l), paras 1–2

**2.4.5 The Māori interventions pathway**

In October 2004, the department concluded that new developments and revisions to policies and services had rendered the strategic framework for Māori outdated. It sought and received the general management team's approval for an updated strategic framework renamed the 'Māori interventions pathway'.<sup>50</sup>

The pathway, which focuses on reducing reoffending by high-risk Māori offenders within the CPS and PPS, outlines interventions and processes that are targeted at Māori offenders according to the stages within the IOM process, which include the pre-sentence offending period criminogenic needs (OCNS) MACRNS and post-sentence predisposing period criminogenic needs (PCNS) MACRNS assessments, sentence planning, and sentence management stages.<sup>51</sup>

If an offender undertakes a MACRNS assessment and MACRNS are identified, they are addressed through the Māori interventions pathway.<sup>52</sup> Pathway interventions addressing Māori offending are:

- ▶ specialist Māori cultural assessments (SMCAs);
- ▶ tikanga Māori programmes (TMPS);
- ▶ Māori therapeutic programmes (MTPS);
- ▶ Māori focus units (MFUS); and
- ▶ whānau liaison worker (WLW) interventions.<sup>53</sup>

The Māori interventions pathway also outlines several supporting mechanisms for offenders and department employees that aim to increase awareness of and support for the interventions outlined above. Cultural supervision aims to enhance employees' interactions with Māori offenders by providing those employees with cultural training and support. The bicultural therapy model aims to ensure that psychological treatment is culturally appropriate by offering inmates the service of cultural experts, including local tohunga or Māori spiritual healers.<sup>54</sup> Community residential centres offer rehabilitative and reintegrative services, which include interventions incorporating tikanga Māori concepts and te reo Māori. The kaiwhakamana visitor policy, which gives kaumātua more access to Māori inmates, aims to help meet the cultural, spiritual, and social needs of Māori offenders.<sup>55</sup>

The pathway also revises the principles in the strategic framework for Māori that focused on improving responsiveness to Māori. The new principles are:

- a) Tikanga Māori is the common thread linking the interventions and processes identified within the pathway;

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50. Document A29, paras 1–3

51. Ibid, paras 8, 11. For a definition of these terms, see the glossary.

52. Document A29, para 12

53. For a definition of these programmes, see the glossary.

54. Document A29, paras 21–24; doc A6, paras 53–55

55. Document A29, paras 25, 27–28

- b) The pathway is dynamic and continues to be developed and refined;
- c) The pathway places priority on high-risk offenders who acknowledge Māori descent;  
and
- d) The pathway ensures that motivational issues are addressed first.<sup>56</sup>

Finally, the Māori interventions pathway revises the business rules outlined in the strategic framework for Māori. The new rules specify eligibility criteria for the maCRNS, SMCA, TMPS, MTPS, MFUS, and WLW interventions. These criteria align with the maCRNS screening questions that require offenders to identify as Māori and have Māori ancestry.<sup>57</sup>

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56. Ibid, para 30

57. Ibid, paras 31–42



## CHAPTER 3

### THE ASSESSMENT TOOLS : THEIR CONTEXT AND DEVELOPMENT

#### 3.1 CHAPTER OUTLINE

In this chapter, we discuss how the Department of Corrections uses:

- ▶ the PCC, a theoretical framework for understanding offending behaviour;
- ▶ the IOM, which aims to provide a coordinated and consistent approach to the management, treatment, and assessment of offenders throughout their sentences;
- ▶ the ROC\*ROI actuarial predictive tool, which assesses static factors in a offender's history in order to predict the likelihood of their reconviction and imprisonment within the next five years;
- ▶ the CNI and MACRNS tools, components of IOM that help identify an individual offender's reoffending risk and treatment needs so that resources can be targeted to high-risk offenders.

#### 3.2 MAKING 'A REAL DIFFERENCE'

Before the establishment of the Department of Corrections, the then Secretary for Justice advised that there was significant Vote Justice funding available for departmental projects that would 'make a real difference' to the Department of Justice's efficiency and effectiveness.<sup>1</sup> In 1993, the department successfully applied to fund the development of an instrument to assess the risk of reoffending by people who entered the criminal justice system.

The department had two primary reasons for wanting a risk assessment tool. First, although substantial resources were devoted to the rehabilitation of offenders, the resource intensive nature of interventions and the 'more rather than less' treatment rule required to achieve significant reductions in recidivism, meant that only a minority of offenders were receiving treatment. Further, the delivery and targeting of treatment in the past was comparatively random, in that high-risk individuals did not seem to be prioritised for treatment.<sup>2</sup> In this environment, some means of targeting was required to ensure that available assessment and

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1. Document A5, para 5

2. Ibid, paras 6-8

intervention resources were used on offenders who were identified as being at high risk of reoffending. This was because the risk of reconviction and imprisonment is strongly linked to serious and persistent offending and high-risk offenders cause a disproportionate amount of societal harm.<sup>3</sup>

Secondly, in order to manage offenders well and to develop a sound case for resourcing, departmental policies and practices must be demonstrably effective. In the early 1990s, there was little evaluation of rehabilitation initiatives, which was understandable given the methodological complexities in comparing a group of treated individuals with a non-treated control group. The department considered that, if an accurate measure of the risk of reoffending were developed, it could be used to match treated and untreated offenders, giving confidence that any differences in offending between the groups following treatment could be attributed to the intervention itself rather than extraneous factors. Currently, ROC\*ROI provides a basis for establishing an untreated control group of a similar risk for the purpose of evaluating rehabilitative programmes.<sup>4</sup>

The Department of Corrections' rationale for pursuing a statistical method of risk assessment, rather than continuing to rely solely on the professional judgements of probation officers and psychologists, was that statistical calculations of risk are more accurate than professional human judgement.<sup>5</sup> This is because assessors, even if well trained, cannot accurately and consistently weigh up all the information relevant to prediction and tend to select and consider only some of that information. Professional judgement may also overestimate the level of risk because of biases based on stereotypical beliefs, including the risk of reconviction for people from different ethnic groups. Conversely, a statistical tool is designed to determine the optimum weighting for a range of variables and combine them to maximise accuracy.<sup>6</sup>

### 3.3 THE PCC

#### 3.3.1 Three aspects of understanding offending behaviour

The causes of crime are complex and cannot be defined in absolute terms. Rather, social and developmental crime prevention research seeks to identify and address 'risk factors' that are thought to predispose people to offending.<sup>7</sup> The psychology of criminal conduct (PCC) is a theoretical framework that seeks a rational and empirical understanding of the variation in delinquent and criminal behaviour among individuals. It focuses on three aspects of understanding offending behaviour: empirical, theoretical, and practical:

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3. Document A3, paras 11–12

4. Document A5, paras 9–14

5. Ibid, para 16; doc A3, paras 14–17; Riley, oral evidence, 15 December 2004

6. Document A3, paras 15–17; Riley, oral evidence, 15 December 2004

7. David Farrington, 'Human Development and Criminal Careers', in Mike Maguire, Rod Morgan, and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 1994)

Empirical understandings are based on observations of the nature and extent of individual variation in offending behaviour and on personal, social and situational variables associated with offending. Static risk factors and dynamic criminogenic needs are of interest here.

Theoretical understanding involves a search for general theories (that account for variations between offences and offenders), rational theories (that withstand internal and external logical analyses), simple theories (that make relatively few assumptions), emotionally pleasing theories (that make personal sense) and predictive theories (that are empirically defensible).

Practical understanding follows if the empirical and theoretical base of the Psychology of Criminal Conduct is sound. In exploring variations in offending behaviour, the Psychology of Criminal Conduct examines the number, type and variety of criminal acts that people engage in, as well as the individual variations in offending across time and in different situations.<sup>8</sup>

According to the department, the PCC demonstrates that:

- ▶ individuals are responsible for their own offending;
- ▶ behaviour can be changed;
- ▶ certain factors in an individual's experience are good indicators of the likelihood of their reoffending; and
- ▶ the greatest chance of success in changing behaviour is finding interventions and programmes that are targeted at particular individual needs.<sup>9</sup>

### 3.3.2 Risk, need, and responsivity principles

The principles of risk, need, and responsivity are central to the PCC. The first aspect of the risk principle is that offending behaviour can be predicted. The second aspect is that levels of treatment should be matched to the risk level of offenders: higher risk offenders require more intensive treatment whereas low-risk offenders need minimal or no intervention.<sup>10</sup>

The need principle focuses on the distinction between criminogenic and non-criminogenic needs. Criminogenic needs are a subset of an offender's risk level and are defined as those 'potentially changeable aspects of an offender's behaviour that if successfully targeted by rehabilitative treatment will reduce the offender's risk of reoffending'.<sup>11</sup> Non-criminogenic needs are also dynamic and changeable, but are weakly associated with recidivism. To reduce recidivism, treatment must target and change criminogenic needs that are thought to be linked to offending behaviour.<sup>12</sup>

8. DA Andrews and James Bonta, *The Psychology of Criminal Conduct*, 3rd ed (Cincinnati: Anderson Publishing, 2003)

9. Department of Corrections, 'Programmes for Offenders', Department of Corrections factsheet, 2003

10. Andrews and Bonta, pp 260–265

11. Document A30; doc A8, para 17

12. Document A18, para 18

The responsivity principle involves delivering treatment in a style and mode consistent with an offender's ability and learning style. It assumes that cognitive behavioural strategies are the most powerful form of treatment for bringing about change in offenders and, furthermore, that treatment is better matched to offenders when their personality and cognitive styles are identified. Increasing motivation is particularly important with high-risk offenders, who have a tendency to discontinue treatment.

The risk, need, and responsivity principles are important for guiding the management, assessment, and treatment of offenders. Put simply, the risk principle concerns who to treat – rehabilitation is more effective when targeted at those with the greatest risk of reoffending – while the need principle concerns what to treat – the successful targeting of an offender's criminogenic needs will reduce the risk of reoffending. The responsivity principle concerns how to treat – treatment should be matched to an offender's individual characteristics.<sup>13</sup>

### 3.4 THE IOM SYSTEM

When the Department of Corrections was established in October 1995, it had limited information technology systems and did not have a common system for managing offenders. Information technology strategies were subsequently developed, which, coupled with the department's shift from a social work to a psychological model derived from the PCC, effected a major change process<sup>14</sup> and drove the development and implementation of the IOM system.

Based on package software from the United States that was substantially modified to support the corrections environment in New Zealand, IOM began development in 1997 and was successfully implemented in 1999. Since then, IOM has been progressively and successfully modified to support legislative and business changes and updates in underlying system technology.<sup>15</sup>

The department defined IOM as 'a coordinated, consistent approach to managing offenders across their sentence. It targets programmes and interventions for offenders most at risk of reoffending, to address the factors that are linked to their offending.'<sup>16</sup> Before the implementation of IOM, the risk, need, and responsivity principles were not consistently and systematically addressed in the management of offenders. Consequently, intensive treatment was sometimes targeted at low-risk offenders, offenders were treated for incorrect criminogenic needs, and offenders were not always matched to appropriate interventions.<sup>17</sup> In fact, one witness described the department's assessment of offender risk, before the advent of IOM,

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13. Document A8, para 15; paper 2.36, para 11

14. Coebergh, oral evidence, 15 December 2004

15. Department of Corrections, *IOM Review: IOM Strategy to 2012* (Wellington: Department of Corrections, 2004)

16. Document A3, para 5

17. Document A8, para 21

as being ‘comparatively random’.<sup>18</sup> IOM’s systematic, evidence-based approach to managing offenders throughout their sentences ensures that the work of the department’s main services – the PPS, the CPS, and the Psychological Service – and other departmental groups, are integrated and focused on achieving departmental objectives.<sup>19</sup> Measuring and testing the effectiveness of departmental interventions and operations is central to the IOM system.<sup>20</sup> The ROC\*ROI, CNI, and MACRNS assessment tools are integral components of the system, and we will discuss them shortly.<sup>21</sup>

First, however, we wish to highlight department witnesses’ descriptions of the dramatic nature of, and the reaction of staff to, the change introduced to the department by IOM, with its incorporation of ROC\*ROI and the psychologically based CNI tool. Clearly, the change involved was thoroughgoing – the biggest in over a century we were told. As well, the complexity of the new approach placed extra demands on staff, particularly those responsible for assessing offenders’ reoffending risks and treatment needs. Doubtless, the department’s senior managers predicted a number of difficulties in implementing change of that order. David Riley, the director of the Psychological Service, referred to international research showing that major change at a systemic level often has to be repeated or reiterated for it to really bed in. He provided a vivid image of the difficulties of introducing such change for an organisation such as the department, with its thousands of staff who had to change procedures in fundamental ways, when he likened the situation to turning around an oil tanker – an achievement that requires considerable amounts of time and energy.<sup>22</sup> That image certainly helped the Tribunal appreciate the strength of the commitment to change that was held by the chief executive and group managers of the day, and the weight of the responsibility they accepted in pushing through with it. Those matters also revealed the senior management team’s conviction that the reasons for such change were compelling. We understand that those reasons were supplied in part by the Government’s general drive for effective practice and in part by the strength of the case made by the department’s Psychological Service for improving the effectiveness of scarce treatment resources.

With regard to the pace at which the department implemented IOM with its many facets, the Tribunal understands that, for the nature of the change, the pace was very rapid and may in fact have aggravated the difficulties encountered along the way. For example, when speaking about the absence of a pilot test of the MACRNS, Mr Riley said that, although it would have been preferable to have had a five-year pilot period, that risked losing the will and momentum for change, especially if the chief executive, who was promoting change, should leave in that time. Therefore, he explained, the costs of moving forward without a pilot were weighed

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18. Document A5, para 8

19. Document A8, para 8

20. Paper 2.36, para 10

21. Document A3, para 6

22. Riley, oral evidence, 15 December 2004

up and the senior management team decided to ‘really go for broke’ and commit to the implementation and do the best that could be done.<sup>23</sup>

With particular regard to the need for change in the department’s management of Māori offenders, the Tribunal gained the impression that the ‘oil tanker’ that needed turning carried a considerable amount of scepticism about possible differences between the treatment needs of Māori, as compared to non-Māori, offenders and, therefore, about the value of Māori culture-based programmes. Looking back at the progress made in the department’s responsiveness to Māori offenders since the introduction of IOM, Charlie Tawhiao, the manager of the Treaty Relationships Unit, indicated that the obstacles had been greater than he had foreseen. In particular, he noted that the department’s ability to generate new treatment initiatives outstripped its ability to implement them successfully.<sup>24</sup> He remained positive about the department’s direction, however, and convinced that a more responsive system was needed to move beyond an ‘arts and craft’ level of engagement with Māori offenders to focus on the positive aspects of Māori culture that could help in reducing reoffending.<sup>25</sup>

With that general introduction to the two assessment tools with which our inquiry is concerned, we turn now to explain them in some depth.

### 3.5 THE ROC\*ROI MODEL

#### 3.5.1 What is ROC\*ROI?

The Department of Corrections’ risk of reconviction and risk of imprisonment (ROC\*ROI) assessment tool is an initial pre-sentence assessment conducted on all offenders who are found, or who plead, guilty. It was developed by the (then) Department of Justice in conjunction with Dr James O’Malley of the Department of Mathematics and Statistics at the University of Canterbury (now at Harvard University).<sup>26</sup>

Addressing the risk component of the risk, need, and responsivity principles,<sup>27</sup> ROC\*ROI calculates the likelihood or risk that an offender will, in the next five years, be reconvicted of a crime that will result in imprisonment. The five-year period relates to the five years following an individual’s last sentence for an offence or, if an offender is imprisoned, the five years following release. In calculating a ROC\*ROI score, two probabilities are multiplied together: the risk of future conviction (ROC) and the risk of imprisonment (ROI).<sup>28</sup>

A ROC\*ROI score is calculated using a statistical method called logistic regression (see sec 3.5.2). This enables a group of variables to be combined to produce a probability (ie, a value

23. Riley, oral evidence, 15 December 2004

24. Document A6, para 41

25. Tawhiao, oral evidence, 14 December 2004

26. Document A3, para 8

27. Paper 2.36, para 125

28. Document A5, paras 3–4; Riley, oral evidence, 15 December 2004

ranging from 0 to 1) that a person will, first, be reconvicted and, secondly, if reconvicted will be imprisoned. The higher the score (ie, the closer to 1) the more likely that a person will be reconvicted and, if reconvicted, imprisoned.<sup>29</sup> The ROC\*ROI score is calculated within IOM using an individual's full criminal history, which is electronically stored in IOM.<sup>30</sup>

The ROC\*ROI rating an offender receives then places them in four possible categories, as the table below shows.

Score	Level of risk	Probability of going to prison in the next five years
0.50–0.64	Medium	Greater than even
0.65–0.89	High	Likely
0.90–1.00	Very high	Greater than 90 per cent

**ROC\*ROI rating and level of risk. Source: document A49, para 3.**

The department notes that 'currently the ROC\*ROI threshold for undertaking a level 2 assessment is 0.65, although the actual criteria contain a number of exceptions and exclusions' which are detailed in the CPS operations manual. The level 2 assessment is automatically triggered by sexual or violent offending, by three or more elevated blood alcohol readings, or by a conviction for driving with elevated blood alcohol three or more times, since 'these cases are ones where a higher level of Assessment is required due to the nature of the offending. They may present a risk to the community as well as a risk to the Department of Corrections.'<sup>31</sup>

### 3.5.2 The variables in the ROC\*ROI data set

There are generally two primary approaches to developing measures to predict reoffending. The first uses an offender's criminal history to produce an estimate of the risk of reoffending, because it is argued that past behaviour is the best predictor of future behaviour. Static offence history variables may also be combined with other basic social and demographic variables such as sex, age, or ethnicity. The second approach focuses upon certain dynamic personal characteristics of an individual (eg, association with other offenders and drug and alcohol abuse) that have a degree of association with offending.<sup>32</sup>

In developing ROC\*ROI, the department obtained two different data sets: a criminal history data set from the law enforcement system (LES), which was stored on the former Wanganui computer system, and a smaller data set based on personal characteristics of an individual, obtained from pre-sentence reports. The latter data set was subsequently abandoned because of missing data and uncertainty about its accuracy.<sup>33</sup> This was because the ROC\*ROI data set

29. Document A3, para 10

30. Document A5, paras 3–4

31. Ibid, paras 5, 6

32. Ibid, paras 16–18

33. Document A3, paras 20–21

does not analyse variables that may change over time or respond positively to rehabilitation. Collecting information on dynamic individual factors by way of interviewing and psychometric assessment would have required an enormous amount of resourcing, notably time, whereas the department wished to have a prediction tool available in the shorter term. Time also precluded the inclusion of personal characteristics because individuals would have had to have been followed up in several years' time to determine the relationship between individual characteristics and reoffending. However, the criminal history information available on the LES, which dated back to 1976 and was unique among developed countries at that time, made it possible to identify a group of offenders at some point in history and to follow them for a period in order to determine the relationship between criminal history variables and reoffending.<sup>34</sup>

The criminal history information contained on the LES included nine variables for each offence, which are used to predict the likelihood of conviction or reconviction (ROC). These variables were the date of conviction, the police offence code, the number of counts of the offence, the sentence type, length, and date of commencement, and the offender's sex, date of birth, and ethnicity. These were used to develop many other variables, including age at first conviction, offence seriousness, time between convictions, and time spent in prison.<sup>35</sup>

The initial phase of data collection for ROC\*ROI involved extracting criminal histories from the 1988 calendar year of all individuals who were convicted of an imprisonable offence. This netted over 30,000 criminal histories from the LES. These were examined to determine a list of predictor variables, which resulted in 96 discrete variables being programmed into the data set. The statistical method of logistic regression was used to determine the relationship of these variables, individually and in various combinations, with aspects of reoffending. Variables do not necessarily operate in isolation or independently of each other. Also, variables that do not appear to be connected at face value might actually be highly correlated with each other. Because of these complexities, the use of logistic regression analysis allowed the precise nature of the relationship between predictor variables and outcomes to be described in mathematical terms.<sup>36</sup> Although the ROC\*ROI model was developed on 1988 data, it was subsequently validated on data from another four years within a 15-year range.<sup>37</sup>

Developing a model that shows the precise and unique relationship that any one variable has to the predicted outcome depends on two things. First, it depends on the raw and blunt relationship that a variable has on its own in relation to the outcome. Secondly, and more subtly, it depends on the impact that a variable has when the relationship it has with other variables in regard to the outcome is removed or controlled for. Much of this has to do with the order in which the variables are entered into the statistical (logistic regression) analyses,

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34. Document A5, paras 18, 20–22

35. Document A3, paras 22–23

36. Document A5, paras 25–32

37. Document A46, para 19

which is itself determined by a process of trial and error to produce the optimal relationship between predictor variables and outcomes.<sup>38</sup> The basis of the ROC\*ROI model is the combination of all the mathematical terms that describe the relationships between predictor variables and reoffending. A mathematical formula known as the ‘Schwartz criterion’ tested the final version of the model to ensure that it was not overly complex or unstable.<sup>39</sup>

It was emphasised that the department had never claimed that ROC\*ROI makes perfect individual predictions. Instead, it predicts the probability of an offender becoming part of a group of people who will be reconvicted and imprisoned, based on data about that offender’s criminal history and personal characteristics as compared with data on a group of people with similar characteristics.<sup>40</sup>

There is some agreement between the claimant and the Crown as to the possibility of biases being inherent in the variables contained in the ROC\*ROI data set (eg, police institutional racism). Written evidence filed by the department before the hearing stated that, although human judgement may be subject to biases and prejudices that are not obvious, the properties of a statistical model are transparent.<sup>41</sup> During the hearing, however, it was acknowledged that LES data does not correct any systemic biases such as police discrimination, but that it is the best data that the department has available to it.<sup>42</sup>

### 3.5.3 The inclusion of the ethnicity variable in the ROC\*ROI data set

Of particular interest to the Tribunal’s inquiry was the inclusion of the ethnicity variable in the ROC\*ROI data set. Department witnesses, including those responsible for developing ROC\*ROI, maintained that ethnicity was included to enhance the accuracy of ROC\*ROI because of the limited information available from the LES. Therefore, the accuracy of the model would be reduced by 2 per cent if ethnicity were removed.<sup>43</sup> The claimant and Crown agree that the ethnicity variable, and the ROC\*ROI model in general, is not causative, in that it does not measure why people offend.<sup>44</sup> Rather, the model is a tool for predicting future behaviour based on past behaviour. Accordingly, it measures what people are likely to do.<sup>45</sup> The impact of ethnicity was not a static variable. Responding to further questions from the Tribunal on the topic, the department stated:

The impact of ethnicity does not have a direct and constant influence on the probabilities expressed in either ROC [risk of conviction] or ROI [risk of imprisonment]. Rather its

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38. Document A5, paras 45–46, 68

39. Ibid, paras 32, 37

40. Document A46, paras 88–93

41. Document A3, para 16

42. Riley, oral evidence, 15 December 2004

43. Document A3, para 24

44. Ibid; doc A5, para 44; paper 2.36, para 130; paper 2.37, para 58

45. Paper 2.36, para 130

**3.5.4**

influence varies in relation to other variables, and the value of those variables. For instance, the influence of ethnicity will differ for males and females, for older and younger persons and for various types of crimes. Moreover, to the extent that other variable used in the equation have 'high' values, then the influence of ethnicity will be diminished.<sup>46</sup>

Department witnesses stated that ROC\*ROI produced different scores for ethnic groups (males and females) with the same criminal history because of the differing reoffending and imprisonment rates for those groups. Māori are over-represented in relation to reoffending more than any other group.<sup>47</sup>

**3.5.4 The reviews of ROC\*ROI and the reduction of the ethnicity variable**

The department conducted a review of ROC\*ROI in 1998 following social, demographic, and sentencing changes that required ongoing monitoring and evaluation of the tool. The review utilised histories of offenders who had offended in 1993. Its five-year follow up revealed that the model's predictive accuracy had not decreased.<sup>48</sup>

In 2003, following significant changes in legislation and parole processes, a more detailed review of ROC\*ROI was carried out. This involved reanalysing all the variables in the model to ensure that the interrelationships between the predictor variables and the relationship between the variables and reoffending still had predictive accuracy. This review led to adjustments in the value of some variables and the reordering of the sequence in which predictor variables were entered into the statistical (logistic regression) analyses, which resulted in a 2 per cent increase in the model's predictive accuracy. In reordering the predictor variables, the predictive contribution or variability previously provided by ethnicity was allocated to other variables. Therefore, despite the reduction of the ethnicity variable to zero (often referred to in the evidence as the 'removal' of the ethnicity variable), the ROC\*ROI scores of individuals of various ethnicities remained very similar to the scores they would have obtained previously.<sup>49</sup> The claimant and the Crown agreed that ROC\*ROI produced different scores for different ethnic groups, both before and after the reduction of the ethnicity variable to zero.<sup>50</sup>

**3.5.5 The purpose and use of ROC\*ROI**

The claimant and the Crown agreed that the purpose of the ROC\*ROI assessment tool is to determine what type of further assessment an offender will receive.<sup>51</sup> Offenders who are

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46. Document A49, para 11

47. Document A3, paras 24, 26

48. Document A5, para 66

49. Ibid, paras 67–70

50. Document A1, para 9; doc A3, para 26; doc A5, para 70; paper 2.36, para 209

51. Document A1, para 5; doc A3, para 18; doc A5, para 55

classified as high risk are referred, before sentencing, to a CNI assessment, called a 'level 2 assessment'.<sup>52</sup> This assessment details 'the features of an offender's personality, lifestyle and social circumstances that have been linked with risk of reoffending'.<sup>53</sup> If a person is not classified as high risk at the pre-sentence stage but is a serious violent or sexual offender or has multiple earlier driving offences, an automatic override is triggered, resulting in referral to a CNI assessment. In other cases, probation officers may exercise their professional judgement and refer offenders not classified as high risk to a CNI assessment. Conversely, high-risk offenders may not be referred to a CNI assessment if they have committed an offence of low seriousness or have recently undertaken a level 2 assessment.<sup>54</sup> The role of ROC\*ROI in this process is to guide resource allocation for decisions about appropriate interventions.<sup>55</sup>

In closing submissions, Crown counsel stated that the other most common factor considered in determining the level of assessment was the offence tariff (any guidelines on length of sentence given by the Supreme Court or Court of Appeal for particular types of offence<sup>56</sup>). Other issues could also be considered, including mental health, risk of self-harm or harm to others, the judge's directions, and family concerns.<sup>57</sup>

Before the court sentences an offender, the offender's probation officer makes an overall assessment of his or her risk of reoffending (low, medium, or high). That assessment, which will be included in the officer's pre-sentence report to the court, has regard to the offender's ROC\*ROI score but does not report the actual score. Other matters considered in assessing an individual's overall risk of reoffending include the nature and seriousness of the current offence, responses to previous sentences and interventions, motivation to change, criminogenic needs, and social and cultural circumstances (including any MACRNs).<sup>58</sup>

The second major use of ROC\*ROI is after offenders have been sentenced, when those who are assessed as high risk are assigned to intervention categories for the purpose of sentence planning.<sup>59</sup> A ROC\*ROI score also determines the amount of time a probation officer will be allocated to work with an offender.<sup>60</sup> Motivated high-risk offenders are prioritised for intensive interventions to reduce their risk of reoffending, while those lacking motivation are invited to participate in programmes designed to overcome treatment barriers.<sup>61</sup> As noted, ROC\*ROI also provides a basis for comparing offenders who have received interventions with similar offenders who have not, for the purpose of evaluating rehabilitative programmes.<sup>62</sup>

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52. Document A5, para 55; paper 2.27, para 7.3

53. Document A30, p 2

54. Document A5, para 57; doc A13, paras 5–7

55. Document A5, para 58. It was noted that reliance on an offender's ROC\*ROI score as the basis for referral to a CNI assessment is overridden on more occasions than not (doc A13, para 7).

56. Paper 2.36, para 146

57. Document A13, para 13

58. Document A12(a); doc A13, para 14

59. Document A5, para 59

60. Document A13, para 15

61. Document A5, paras 59, 61

62. Document A3, para 19; doc A5, para 13

## 3.6

The final use of ROC\*ROI is during the pre-release parole process for offenders who have served sentences of more than two years. In assessing an offender's risk of reoffending, the ROC\*ROI score is considered alongside his or her responses to interventions, the nature and availability of reintegrative support, and the likely view of the community about the offender's release.<sup>63</sup>

As a matter of current policy, a new ROC\*ROI score, which overwrites the old score, is calculated:

- ▶ when an offender is convicted and referred to the CPS for a pre-sentence report;
- ▶ in the PPS, when an offender's sentence plan is being developed;
- ▶ in the PPS, when an offender's sentence plan is reviewed every six months;
- ▶ in the CPS, when an offender's sentence plan is reviewed; and
- ▶ for any Parole Board considerations.<sup>64</sup>

Since the ethnicity variable was reduced to zero, the ROC\*ROI scores of all offenders currently in prison have not been recalculated. However, when a sentence plan is reviewed (every six months), a new ROC\*ROI score is generated. Offenders who have been in the system since before sentence management procedures were implemented but have still not been sentence planned will have a ROC\*ROI score calculated when they are sentence planned.<sup>65</sup>

### 3.6 THE CNI

#### 3.6.1 Why was the CNI developed?

The CNI is the level 2 assessment that high-risk offenders (and others whose risk scores are overridden) are referred to before sentencing. In February 1998, the department decided that it needed to adopt an empirically based means of assessing criminogenic needs so it began reviewing existing needs assessments, including the Canadian level of service inventory (LSI-R). Several limitations were identified with this and with similar tools, including that:

- ▶ They did not identify as criminogenic needs some behaviours that had been successfully targeted by New Zealand interventions.
- ▶ They were developed using overseas offender populations, thus some measures of criminogenic needs were less valid when applied to different populations.
- ▶ They did not allow for the consideration of factors unique to Māori offenders.<sup>66</sup>

Because of these limitations, and because these tools were developed to predict the risk of recidivism, which ROC\*ROI already measured, the department decided to develop a New

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63. Document A13, para 20; doc A5, para 64

64. Paper 2.36, paras 138–140

65. Document A20, paras 30–31

66. Document A8, paras 25.1–25.5, 26.1–26.3

Zealand criminogenic needs assessment tool. In July 1998, senior management approved the project proposal outlining the rationale for the tool and the project plan.<sup>67</sup>

Following this, Dr Branko Coebergh and Dr Leon Bakker, then both senior psychologists with the Psychological Service, were assigned the task of developing the Western scientific aspects of the CNI, assisted by a psychologist with the service and a research assistant who was soon to be appointed a service psychologist. However, the CNI's overall design was a collaborative approach between the Psychological Service and the Policy Development and CPS employees assigned to design the MACRNS, the Māori cultural aspects of the tool.<sup>68</sup>

### 3.6.2 What is the CNI?

The CNI assessment, which offenders consent to undergo and which includes MACRNS for eligible offenders (see secs 3.7.1–3.7.8), occurs before and after sentencing. The pre-sentence part of the CNI, called the offending period criminogenic needs (OCNS) assessment, is usually assessed by probation officers in the CPS. This assessment covers the offending period, which is defined as extending from the day before the commission of the primary or main offence up to the completion of the offence. It targets proximal dynamic factors; that is, potentially changeable criminogenic needs that occurred relatively close in time to and during an offence. The OCNS assessed are offence-related emotions and cognitions, propensity to violence, alcohol and drugs, gambling, relationships, offence-related risk taking arousal, criminal associates, and offence-related sexual arousal. Psychiatric disorder and organic disorder are screened for by a specialised assessor when responses to set questions, which are overseen by a supervisor, support such a referral.<sup>69</sup>

The major component of the OCNS assessment is a narrative interview. This involves a progressive inquiry using probes that ask offenders their version of events leading up to and during the offence.<sup>70</sup> For an OCN to be identified, evidence must be found of behaviour consistent with its definition. In turn, this behaviour must be linked into an offence chain (a specific sequential chain of events that brought the offender closer to committing the offence or kept the offence going).<sup>71</sup>

The pre-sentence CNI assessment is used to determine the presence of dynamic risk factors that should be targeted to reduce reoffending, the severity of those needs, and the offender's level of readiness for change. The assessment results are used by probation officers to recommend rehabilitative sentencing options for high-risk offenders, which are written up in a level 2 pre-sentence report for the sentencing judge.<sup>72</sup>

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67. Ibid, paras 27–28

68. Ibid, para 29

69. Document A14, paras 2, 4, 89; doc A8, para 86

70. Document A8, para 91

71. Document A14, para 4

72. Document A13, paras 21–23; doc A8, para 83

The post-sentence part of the CNI, called the predisposing period criminogenic needs (PCNs) assessment, is usually assessed by sentence planners in the PPS. Mostly undertaken with incarcerated high-risk offenders whose sentences allow for rehabilitative interventions,<sup>73</sup> it covers the predisposing period, defined as the six-month period immediately prior to the offending period. It targets distal dynamic factors (ie, more distant factors identified as predisposing the offender to offending). The PCNs assessed are mostly the same as the pre-sentence ones, but also include lifestyle balance, emotions, and offence-related cognitions.<sup>74</sup>

The PCNs are assessed in an interview that uses a timeline to prompt recall of major life events and problems in the six-months prior to the offending period. The feelings which offenders were left with by these events and problems, and the intensity and duration of those feelings, are then added to the timeline. Finally, offenders are asked set questions pertaining to each possible PCN. When evidence is found of behaviour consistent with the definition of a PCN, this is also added to the timeline, along with associated feelings and their intensity and duration.<sup>75</sup>

The probation officer records the results of the CNI assessment in the department's sentence planning indicator document. This shows the criminogenic needs that were identified, prioritises which needs should be addressed first, and records information about an offender's motivation to change and any additional information that may assist in sentence management decisions. This informs the development of a sentence plan outlining how an offender's needs will be met, what interventions will be undertaken, and what the offender's and probation officer's expectations are throughout the sentence.<sup>76</sup>

When preparing a pre-release report, the probation officer receives information from the PPS sentence planner who completes the Parole Board report. This includes information from the sentence plan about the extent to which an offender has addressed their criminogenic needs during his or her prison sentence.<sup>77</sup>

### 3.7 MACRNS

#### 3.7.1 What are macrns?

During the research and consultation process (see sec 3.7.3), the department developed six Māori culture related needs (MACRNS) constructs in an attempt to better understand and so be better placed to reduce reoffending by Māori.<sup>78</sup>

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73. Document A8, paras 83, 86, 88

74. Document A14, para 54; doc A8, para 88

75. Document A14, para 52

76. Document A13, paras 24–27

77. Ibid, para 28

78. Document A7, para 5; Maynard, oral evidence, 15, 16 December 2004

Five of these macrns are assessed during the pre-sentence cni assessment (the ocns assessment). These macrns, which are called offending period macrns (op macrns) are as follows:<sup>79</sup>

- ▶ *Limited or lack of whānau contact*: This macrn assumes that a lack of contact with whānau and the stress it can cause may lead to offending.<sup>80</sup> Māori cultural values that ‘emphasize inter-dependence and collective identity are likely to leave some offenders more susceptible to negative thoughts and feelings associated with limited or a lack of whānau contact’. For example, some Māori offenders may feel unable to maintain contact with their whānau due to feelings of whakamā (shame) because of their offending.<sup>81</sup>
- ▶ *Whānau-related stress*: This macrn assumes that:
 

cultural values embodied by the concept of whānau may result in some Māori experiencing negative feelings on *behalf* of whānau who he/she knows are encountering negative life events. This can be thought of as a form of empathetic distress. The Whānau-Related Stress macrn can potentially be identified when the perceived obligation to reduce a whānau member’s negative feelings are met through offending behaviour. Or, when the way they coped with negative thoughts and feelings about the empathized whānau member took them closer to offending. [Emphasis in original.]<sup>82</sup>
- ▶ *Whānau social influence to crime*: This macrn assumes that social messages that approve of or are indifferent to offending behaviour (which give offenders the message that offending is an acceptable or a normal thing to do) may be stronger when they come from a whānau member than when they come from a non-whānau member. It is theorised that this is due to the interdependence of Māori whānau members and a strong sense of obligation to, or responsibility for, each other.<sup>83</sup>
- ▶ *Whakawhānaunga*: This macrn examines ‘the strong inclination of Māori to form whānau-like bonds with non-whānau friends, particularly where regular whānau support may be absent’.<sup>84</sup> It assumes that ‘the social reinforcement of a Māori offender’s criminal behaviour may be stronger when it is judged to have come from someone who is like whānau than when it comes from a friend/associate not considered to be like whānau. This is because, similar to whānau (but possibly not as strong), there is a sense of obligation/responsibility for each other and interdependence’.<sup>85</sup>

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79. Document A8, para 53; doc A14, para 99

80. Document A3, para 53.4.1

81. Document A8, para 65

82. Ibid, para 66

83. Ibid, para 67

84. Ibid, para 64

85. Ibid, para 68

- *Cultural tension*: This macRN theorises that any analysis of Māori behaviour must accept that there are many historical and contemporary pressures that challenge Māori values. It attempts to 'identify situations where an individual may be experiencing cultural tension, the nature of the tension, the extent to which it has caused personal distress, and whether or not the manner in which the offender dealt with the tension has contributed to their offending'. Any cultural tension related thoughts do not need to be a realistic appraisal of cultural differences.<sup>86</sup>

The same five macRNs are assessed during the post-sentence CNI assessment (the PCNS assessment). In addition, the 'cultural identity' macRN is also assessed during the post-sentence CNIS assessment:

- *Cultural identity*: This macRN assumes that 'the loss of an accurate understanding of traditional Māori cultural values and practices has left some Māori prone to make negative or pro-criminal attributions about what it means to be Māori'.<sup>87</sup> It asks offenders about things that left them feeling proud or comfortable, and not proud or uncomfortable, about being Māori in the pre-disposing period:

A negative identity is identified when the offender reports negative thoughts and feelings about being Māori that notably impacted upon functioning in the six months leading up to the offence. A pro-criminal identity is identified when the offender reveals pro-criminal values when reporting what left him/her feeling proud or comfortable about being Māori during that period of time.<sup>88</sup>

As outlined in departmental evidence:

macRNs operates on the basis that there are specific and unique needs of Māori offenders, which are characterised by culture and the place of that culture in New Zealand society. The Department has concluded that failure to recognise these distinct cultural needs is likely to contribute to an inappropriate and incomplete assessment of the rehabilitative needs and responsivity factors relevant to Maori offenders.

It is assumed that in order to effectively identify and seek solutions to more holistically address offending and re-offending by Maori, assessment tools must provide for consideration of those specific needs.<sup>89</sup>

In this way, the department considers that Māori culture is part of the solution to offending, rather than part of the problem.<sup>90</sup>

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86. Document A7, para 62; doc A8, para 70

87. Document A8, paras 54, 71–72; doc A14, para 100

88. Document A8, para 73

89. Document A3, paras 51–52

90. Document A6, para 30; doc A8, para 56

### 3.7.2 Why were macrns developed?

In developing the CNI, one of the project requirements was ‘to measure potential factors unique to Māori as a collective’ and, in particular, ‘the development of a better understanding of Māori offending was viewed at the time the CNI was being developed, as it is now, as a priority due to the over-representation of Māori in the New Zealand offender population’.<sup>91</sup> The impetus for measuring macrns as a more effective way of understanding factors that may contribute to behavioural change for some Māori offenders came from Policy Development, in particular the Cultural Perspectives Unit. For many years, the unit had argued for more intensive investment in Māori cultural rehabilitative initiatives, but this was declined because of a lack of evidence supporting such strategies. The unit saw the measurement of macrns as a way of gathering this evidence and of ensuring that rehabilitative interventions were accurately targeted to Māori offenders.<sup>92</sup> It also reasoned that integrating macrns into the CNI assessment tool ‘would ensure the retention of comparable status between criminogenic needs and Māori culture-related needs and also legitimise the routine consideration of cultural factors within assessment practice’.<sup>93</sup>

Working closely with the Cultural Perspectives Unit, Kristen Maynard, a senior policy adviser in the Policy Development Group from June 1997 to May 2000, was responsible for analysing the cultural and gender appropriateness of the Australian risk and needs assessment tool then used by the CPS.<sup>94</sup> In November 1997, a CPS national Māori hui identified the cultural appropriateness of this tool as a key issue. Concerns identified included that the tool trivialised things that were typically Māori, that there was a lack of Māori theory underpinning the tool, that the tool needed to be aligned with Māori offenders’ needs, and that a Māori model for working with high-risk offenders should be developed using concepts derived from other assessment models.<sup>95</sup>

The department was also reviewing whether it should retain the Australian risk and needs assessment tool, which was an adaptation of the Canadian level of service inventory tool (LSI-R), or if a revised version of the LSI-R, the LSI-R2, should be introduced. Other criminogenic needs assessments were also examined as to their suitability for use in the New Zealand corrections context. As noted, Policy Development was examining the cultural and gender appropriateness of these tools, whereas the Psychological Service was examining whether they reliably identified offender risk, need, and responsivity.<sup>96</sup> The Psychological Service review identified several limitations with the LSI-R and other similar tools so had proposed and received approval to develop a New Zealand criminogenic needs assessment tool in July 1998 (see sec 3.6.1).

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91. Document A8, paras 31.3, 32

92. Ibid, paras 33–35

93. Ibid, para 36

94. Document A7, paras 4, 8

95. Ibid, para 9

96. Ibid, paras 10–11

In June 1998, Policy Development's draft report, *Whaia te Maramatanga 1*, was circulated for comment to the Psychological Service, head office staff, and some Māori practitioners in the cps. In September 1998, it was reviewed by the department's senior management team.<sup>97</sup> The report concluded that the current risk and needs assessment tool:

failed to identify important cultural and gender factors, thereby contributing to an inappropriate assessment of the risk and needs of particular offender groups. Accurately identifying the full range of needs for each individual was considered important for assisting with understanding the context within which offending occurs and identifying the most appropriate interventions for that individual'.<sup>98</sup>

More specifically, Policy Development's report highlighted three issues regarding the application of the Canadian LSI-R to Māori offenders. Overseas assessment tools, it was said:

- ▶ 'assume that Māori and non-Māori are essentially the same and that the reasons for their offending are the same [and they] implicitly undermine the validity of different worldviews or knowledge bases';
- ▶ 'have been developed and tested in overseas jurisdictions [and] both the instrument and the theory underpinning it have not been validated with Māori offenders'; and
- ▶ 'fail to take into account other factors potentially relevant to Māori offenders that could assist with a better understanding of the types of interventions most likely to be effective in promoting behavioural change amongst Māori offenders'.<sup>99</sup>

The report also found that the Australian tool then being used by the cps had substantial potential for cultural bias because the subjective value judgements it required may be influenced by the assessor's ethnic and cultural background. The tool also failed to identify and consider the extent, severity, and types of need relevant to Māori.<sup>100</sup>

Policy Development's report recommended that:

- ▶ research be undertaken into identifying risk and need factors of the New Zealand offender population, particularly Māori offenders;
- ▶ the department design, trial, and pilot a New Zealand risk and needs assessment tool;
- ▶ the department incorporate the report's findings into the design and testing of any new assessment tools;
- ▶ sufficient cultural and gender competence training be provided to assessors administering the tool in order to minimise any bias; and
- ▶ sufficient resources be allocated to implement the report's findings.<sup>101</sup>

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97. Document A7, paras 12–13

98. Ibid, para 13

99. Ibid, paras 21.1–21.3

100. Ibid, paras 22.1–22.2

101. Ibid, paras 13.1–13.5

It was also recommended that the draft report be widely circulated to departmental employees and Māori stakeholders.<sup>102</sup>

### 3.7.3 The development of macrns

Ms Maynard was also responsible for progressing the development of macrns in collaboration with the Psychological Service, which was developing the cni.<sup>103</sup> However, during macrns' initial development phase, Policy Development undertook a separate research process to ensure that they were developed according to Māori research methodologies and were based on Māori research and expertise.<sup>104</sup> This separate process was viewed as essential to maintaining macrns' cultural integrity.<sup>105</sup>

In July 1998, Policy Development conducted a more detailed analysis of the potential culture- and gender-related needs of Māori, Pacific, Vietnamese, and women offenders. The purpose of this research was to advise how these needs could be used to enhance existing interventions and identify new, more effective, ones.<sup>106</sup> The resulting literature review drew primarily on material from health and Māori profiles research.<sup>107</sup>

The resulting report, *Whaia te Maramatanga II*, identified several interrelated factors that were potentially applicable to Māori. These were grouped as:

- ▶ mana tangata – acculturative factors;
- ▶ mana tikanga – positive cultural identity; and
- ▶ mana whānau – traditional support structures.<sup>108</sup>

These factors were identified as potentially important needs that could be assessed and addressed to increase the likelihood of behavioural change among Māori offenders. It was thought they could also identify responsivity areas that might enhance the effectiveness of interventions targeting Māori offenders. However, it was noted that further and more in-depth research was required into the relationship between macrns, responsivity, and offending.<sup>109</sup> The report also identified criteria for measuring the concepts of mana tangata, mana tikanga, and mana whānau.<sup>110</sup>

These initial findings formed the basis of discussions between Policy Development and the Psychological Service at a one-day hui led by the Cultural Perspectives Unit in December 1998. The hui examined how macrns could, first, improve the department's understanding of

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102. Ibid, para 14

103. Ibid, para 4

104. Document A8, para 40

105. Document A7, para 35

106. Ibid, paras 24–25

107. Ibid, para 37

108. Ibid, paras 29, 29.1–29.3

109. Ibid, para 30

110. Ibid, para 37

the context in which offending by Māori occurs and, secondly, help to more accurately target interventions to Māori. It also identified a window of opportunity to create a radical change in the department's response to offending by Māori: namely, to progress the development of macRNS as initially identified at the hui and to ensure that they were integrated into the CNI that was being developed. Therefore, macRNS would not be tacked-on to the CNI, but would be an integral part of the assessment process administered by all assessors.<sup>111</sup>

The department planned to circulate Policy Development's *Whaia te Maramatanga I* and *Whaia te Maramatanga II* reports widely for comment. However, because the department had decided not to use the Canadian LSI-R assessment tool but to develop a New Zealand assessment tool (the CNI) as part of the wider IOM system,<sup>112</sup> the macRNS assessment tool, which was to be integrated in the CNI, also had to be ready for the roll-out of IOM. This meant that the department's consultation was undertaken 'as widely as possible, within time and resource constraints', during February and March 1999.<sup>113</sup>

During the development of macRNS, consultation was undertaken with some key Māori experts and practitioners, both internal and external to the department.<sup>114</sup> Those consulted included Māori academics, Māori programme providers, a department cultural adviser, department psychologists, an external psychologist, the manager of public prisons, and several service managers and probation officers in the CPS.<sup>115</sup> These people's expertise included a combination of theoretical and practical knowledge and experience in:

- ▶ kaupapa Māori research design and delivery;
- ▶ cultural assessment in correctional facilities;
- ▶ psychological and clinical assessments of Māori offenders; and
- ▶ the practical implementation of assessment tools among Māori offenders.<sup>116</sup>

This consultation was undertaken to ensure that the cultural needs that were identified were appropriate and relevant and that the assessment questions were engaging and safe for Māori and were capable of eliciting the information required to assess the relevance of each need.<sup>117</sup> Those consulted did not offer alternative approaches to the macRNS constructs.<sup>118</sup>

In February 1999, Policy Development also examined evaluations of tikanga Māori based interventions, including prison-based programmes, which suggested that Māori offenders responded positively to tikanga or kaupapa Māori approaches to programme content and delivery.<sup>119</sup> Fostering a positive cultural identity, feeling safe and good about being Māori,

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111. Document A7, paras 31–32

112. See doc A15(a)

113. Document A7, para 34; doc A33

114. Document A7, para 40

115. Ibid, fn 22

116. Ibid, paras 40.1–40.4

117. Ibid, paras 41, 41.1–41.3

118. Document A8, para 47

119. See doc A15(d)

facilitating positive relationships with whānau, and promoting collectivity were identified as particularly important components of effective interventions.<sup>120</sup>

A reference group of senior Māori Department of Corrections employees and the Cultural Advisory Team provided management oversight and quality assurance during the development of macRNS. A Māori probation officer, Terry Huriwai, also worked closely with Policy Development in the development of macRNS. Ms Maynard also made presentations on macRNS at several corrections practitioners hui during 1999 and 2000, and at the Psychological Service hui in 1999. In 1999 and 2000, several articles about the CNI and macRNS were published in various departmental newsletters.<sup>121</sup>

The development of macRNS was not a simple process, owing to time and resource constraints, scepticism, and, to some extent, resistance from some relatively senior departmental employees to the notion that different factors might help explain the context in which offending by Māori occurred. The macRNS' developers continued motivation came from support from whānau, from several Māori colleagues, from the CNI designers, and from the hope that macRNS could contribute to better outcomes for Māori offenders.<sup>122</sup>

In December 1999, the Cultural Advisory Team applied the framework for reducing Māori offending (FREMO) to the CNI assessment tool. Positive findings of the review included:

- ▶ the involvement of Māori stakeholders in the development of macRNS;
- ▶ greater responsiveness to Māori through the inclusion of macRNS in the CNI;
- ▶ more substantive interaction and consultation with offenders, which enabled their responsiveness and motivational needs to be better addressed; and
- ▶ the FREMO processes assisted the department to develop new best-practice standards.<sup>123</sup>

Negative findings were that:

- ▶ there was no Māori involvement in macRNS' initial scoping phase;
- ▶ only a narrow pool of Māori expertise was engaged in the project;
- ▶ sufficient resources, including financial support, human resources, time, and venues, were not secured; and
- ▶ there was poor coordination between the CNI and macRNS developers and the wider IOM project team.<sup>124</sup>

### 3.7.4 The pre-testing of macRNS

The research and consultation process outlined above resulted in the identification of the macRNS constructs and the development of assessment questions designed to identify and

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120. Document A7, paras 38, 38.1–38.4

121. Ibid, paras 42–43

122. Ibid, para 36

123. Document A15(j), para 23

124. Ibid, para 24

**3.7.5**

measure macRNS.<sup>125</sup> In April 1999, the assessment questions were pre-tested on 12 randomly selected volunteer Māori inmates in Auckland and Christchurch by the Māori probation officer working on the development of macRNS and a Māori psychologist with corrections experience. An observer, who was present with the inmates' consent, assessed the questions for their ability to elicit appropriate and relevant information. The pre-test indicated that the constructs were relevant and applicable to the Māori offenders interviewed and led to the development of more focused assessment questions.<sup>126</sup> In October and November 1999, the final version of the macRNS assessment was piloted on 30 Māori offenders, mostly from the MFU in Rimutaka Prison.<sup>127</sup> Each inmate was assessed using the full CNI and macRNS assessments on two occasions, by Māori and non-Māori non-specialist assessors. This found that 86 per cent of the time assessors identified the same assessment outcomes, which represented a high degree of reliability for a complex assessment process.<sup>128</sup>

**3.7.5 The integration of macRNS into the CNI**

In integrating macRNS into the CNI, the challenge was to maintain their cultural integrity from development through to integration.<sup>129</sup> Because the CNI is a Western-based structured assessment tool that explores thoughts, feelings, actions, and physiological responses related to offending behaviour, a cautious approach was taken to integrating macRNS, which are derived from a Māori theoretical model. There was some uncertainty as to whether integration could successfully be achieved without compromising the cultural integrity, focus, and value of macRNS. However, the CNI assessment process complemented macRNS' purpose of better understanding the context in which Māori offending occurs by considering cultural variables. Following integration, the CNI developers, the Cultural Advisory Team, and other Māori staff concluded that the cultural integrity of macRNS had been maintained in the integration process.<sup>130</sup>

**3.7.6 macRNS training**

The training for the macRNS assessors involved a 10-day training module called OCN 2 training and a three-day follow-up training module called PCN 3 training.<sup>131</sup> The purpose of the training, which was compulsory, was to ensure that all course participants:

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125. Document A7, paras 55; doc A8, para 44

126. Document A8, paras 45–47

127. See doc A17(b)

128. Document A7, paras 52–53; doc A8, paras 44–45

129. Document A7, para 33

130. Ibid, paras 48–51

131. Document A11, para 37

- ▶ understood the philosophy behind the assessment tools, their format, and process;
- ▶ were able to conduct an interview, complete an assessment, pre-sentence report, and sentence planning indicator; and
- ▶ were trained in how the CNI and MACRNS assessments would contribute to decisions surrounding responsivity, motivation, and referral to programmes.<sup>132</sup>

The department underestimated the extent of opposition from operational staff to the new assessment models, which contributed to and reinforced employees' misunderstandings about MACRNS. It was felt that the training communicating MACRNS' purpose and use could have been improved.<sup>133</sup>

### 3.7.7 The use of MACRNS

Offenders who identify as Māori and have Māori ancestry are assessed for the presence of culture-related needs (MACRNS) by attempting to measure the impact that colonisation and related socio-historical processes have on Māori offenders today. In this way, MACRNS attempt to improve the department's understanding of the context in which Māori offending occurs and to identify interventions most likely to be effective in promoting behavioural change among Māori offenders.<sup>134</sup> The claimant and the Crown agreed that the department developed MACRNS in good faith to respond to the over-representation of Māori in the criminal justice system.<sup>135</sup>

To be eligible for a MACRNS assessment, offenders must answer 'yes' to the two MACRNS screening questions:

- ▶ 'Do you identify as New Zealand Māori?' or 'Do you think of yourself as New Zealand Māori?'; and
- ▶ 'Are you of Māori ancestry? By this I mean do you have a New Zealand Māori parent, grandparent, great grandparent or a more distant Māori ancestor?'<sup>136</sup>

If an offender answers 'no' to identifying as New Zealand Māori but 'yes' to having New Zealand Māori ancestry, MACRNS can be assessed only using professional override confirmed by a CNI supervisor.<sup>137</sup> Another exception occurs when an offender has been a whangai child (adopted) in a Māori whānau. In this case, answering 'no' to the first question and 'yes' to the second question will qualify an offender for a MACRNS assessment.<sup>138</sup>

All eligible offenders are screened for MACRNS during the pre-sentence (OCNS) and post-sentence (PCNS) CNI assessments. The MACRNS assessed are called offending period MACRNS

132. Ibid, paras 29, 33–35, 44–45; see also docs A16(a), A17(a),(b)

133. Document A11, para 6.3

134. Document A7, para 55; doc A8, paras 65–70

135. Paper 2.27, para 9; paper 2.36, para 182

136. Document A16(b), p 7

137. Ibid; doc A14, para 103

138. Document A19, app 1, p 3

(OP MACRNS) and predisposing period MACRNS (PP MACRNS), respectively. As with OCNS, OP MACRNS evidence behaviour within the offending period that can be linked into an offence chain because it took an offender closer to committing the primary offence or kept the offence going once started.<sup>139</sup> Also like OCNS, OP MACRNS are assessed using a narrative interview that involves a progressive inquiry using probes that ask offenders their version of events leading up to and during the offence. Set questions are also asked to confirm the accuracy of recorded information and to obtain any information that may have been missed during the narrative interview, although most information critical to developing the offence chain is gathered from the narrative interview.<sup>140</sup>

Similarly, as with PCNS, PP MACRNS evidence behaviour in the six months leading up to the offending period that was likely to predispose an offender to committing the primary offence. Also like PCNS, PP MACRNS are assessed using a timeline interview with set questions that prompt recall of major life events and problems in the six months prior to the offending period.<sup>141</sup> MACRNS can be identified and investigated during the post-sentence assessment even if they were not identified in the pre-sentence assessment. However, MACRNS are not identified in many offenders. As with criminogenic needs, behavioural evidence must be found in support of the identification of MACRNS.<sup>142</sup>

As at 5 November 2004, the percentage of offenders under CPS and PPS management who were assessed as having between none and seven MACRNS is given in the table opposite.<sup>143</sup>

When MACRNS are identified before an offender is sentenced, the probation officer writing the pre-sentence report can recommend an appropriate intervention; for example, within the PPS, attending a TMP or undertaking an SMCA. During sentence management, offenders identified with MACRNS are usually referred to a TMP, although Māori offenders not assessed with MACRNS are also considered for these programmes. MFUS and SMCAs are also available to Māori offenders with and without MACRNS. Should demand for these programmes exceed supply, eligibility may be restricted to offenders identified with MACRNS. At the pre-release stage, offenders who have not had their MACRNS addressed by the CPS or PPS can ask their

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139. Document A14, para 106

140. Ibid, paras 111–113; doc A8, paras 94–95

141. Document A14, paras 52, 107; doc A8, para 96

142. Document A14, paras 104–105

143. The figures given for those assessed as having no MACRNS refer to the percentages of Māori offenders who were eligible for, and were assessed for, MACRNS but who did not have any identified. The very small number of instances where seven MACRNS were recorded resulted from coding or data entry errors in the IOM operational CNI database. Because more than one sub-category of an individual need can be recorded for an offender, a count across the database sometimes overestimates the total number of needs – meaning that more MACRNS are counted than were assessed. Given that few offenders have more than one MACRN, it is likely that the error occurs with only a minority of offenders. The department's work on the IOM database intends to correct this error. Additionally, this error occurs when collating data on MACRNS detection generally, and does not effect the treatment of individual offenders. The preparation of pre-sentence reports and sentence and treatment planning is undertaken based on individual CNI results and other assessments (paper 2.40, para 4.2).

Assessment result (MACRNS)	Percentage of offenders under CPS management	Percentage of offenders under PPS management
None	74.4	45.7
One	11.6	18.3
Two	9.7	18.7
Three	2.3	8.6
Four	1.2	5.1
Five	0.6	2.2
Six	0.3	1.1
Seven	0.03	0.2

Percentage of offenders under CPS and PPS management assessed as having between none and seven MACRNS. Source: document A13(a), pp 2–3.

probation officer to explore the availability of appropriate interventions following their release.<sup>144</sup>

The pre-sentence report prepared for the sentencing judge identifies OP MACRNS along with their supporting evidence. This information is required to be written up in the ‘social factors’ section of the pre-sentence report, in order to reduce the risk of MACRNS being inadvertently judged as additional criminogenic needs.<sup>145</sup>

### 3.7.8 The MACRNS review

In December 1999, the department’s senior management team directed Policy Development to outline a strategy for the continuous improvement and evaluation of the CNI by May 2000. In October 2000, a paper to the senior management team sought approval of a CNI research and evaluation strategy. Policy Development noted that the delay in presenting the paper was due to the need to examine funding issues and to undertake consultation on the CNI evaluation.<sup>146</sup> The aims of the CNI research and evaluation strategy included evaluating the validity, effectiveness, and efficiency of MACRNS.<sup>147</sup>

The department commissioned a review of MACRNS, to be undertaken during the 2002–03 year with delivery expected in April or May of 2003. The terms of reference for the review noted that it had three interrelated components:

- ▶ an external peer review of MACRNS’ construct validity;
- ▶ an assessment of the predictive validity of MACRNS; and
- ▶ a review of MACRNS’ usefulness in the field.<sup>148</sup>

144. Document A13, paras 29–35

145. Document A14, paras 98, 109

146. Document A15(k), paras 1–3

147. Ibid, para 12

148. Document A3, app B

The review of MACRNS' construct validity was to examine several aspects, including whether there were real phenomena underpinning MACRNS and whether MACRNS were able to adequately measure those phenomena, the relationship between culture-related factors and offending by all cultures, including Māori, and the implications of the report's findings for MACRNS and the department's interventions targeting Māori.<sup>149</sup>

The review of MACRNS' predictive validity was to determine if there was a statistical relationship between them and subsequent reoffending, taking into account known, measurable factors related to offending. Because of the knowledge required about the department's information systems, the CNI, and statistical analysis, the predictive validity analysis was to be undertaken by the department and provided to the reviewers.<sup>150</sup>

The review of MACRNS' usefulness in the field was to examine several aspects, including how MACRNS were being used, whether they were being applied consistently, how useful they were for field staff and for providing additional information about Māori offenders' cultural needs, and what the relationship was between them and the likelihood of subsequent reoffending.<sup>151</sup>

The department commissioned Te Aho Associates and Te Whiriwhiri-Nuku, the Family Centre, to undertake the MACRNS review, which was submitted to the department in draft form on 5 August 2003.<sup>152</sup> The review raised several issues that needed to be addressed; notably, that some practitioners were refusing to administer the tool or were administering it inconsistently. The review also suggested that the department engage practitioners, especially Māori staff, to improve MACRNS by developing solutions that did not compromise the tool's integrity but did address the reviewers' concerns.<sup>153</sup>

In particular, the MACRNS review suggested that the department consider:

- ▶ inviting the researchers to consider the issues raised during the feedback phase and to revise the report accordingly;
- ▶ forming a working group of key staff to develop: a Departmental response to the report which included steps to address issues raised by the report; a strategy for communicating the response to staff and for engaging practitioners, particularly Māori, to identify viable solutions to the issues identified by the draft report; and a user-friendly resource for managers and practitioners answering key questions on MACRNS that was continually updated;
- ▶ revising the current levels and quality of cultural training and supervision; and
- ▶ ensuring that other existing and planned cultural initiatives were linked strongly to the MACRN screening tool.<sup>154</sup>

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149. Document A3, app B

150. Ibid

151. Ibid

152. Document A4, app B

153. Document A7, para 70

154. Ibid, paras 70.1–70.4

The department is taking several steps to address issues surrounding the use of MACRNS in response to some of the review's findings. These include:

- ▶ A communications strategy that includes key messages about MACRNS, the evaluation, the way forward, expectations, and a way to increase staff buy-in.
- ▶ A package of updated written communications for management support that comprise clear expectations and a user-friendly resource for managers to enable them to respond to practitioners' concerns and to promote the leadership of MACRNS.
- ▶ A review and update of the training component for staff, including further training of the cultural trainers and the incorporation of any changes into training manuals.
- ▶ The further roll-out and implementation of the cultural responsiveness programme and an updated general cultural training resource for employees.
- ▶ The continued monitoring of compliance to MACRNS assessment procedures, identifying any drift from MACRNS' intended administration as early as possible.
- ▶ A widely communicated policy paper outlining the links between all cultural interventions.<sup>155</sup>

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155. Document A6, paras 64, 64.1–64.6



## CHAPTER 4

### THE CLAIMS

#### 4.1 CHAPTER OUTLINE

This chapter sets out the key arguments in the claimant's case, including criticism of the development, implementation, and likely effect of ROC\*ROI and MACRNS. The chapter details Mr Hemopo's concerns with the ROC\*ROI tool, including the reasons for reducing the weighting of the ethnicity variable to zero, consultation over the development of ROC\*ROI, and the possible prejudicial effect of the tool.

MACRNS are claimed to be flawed in their inception, consultation, and implementation, and to have a potentially prejudicial effect on Māori offenders. Mr Hemopo claimed that the departmental review of MACRNS was not accorded sufficient weight by the department, nor was it followed up in any meaningful way.

#### 4.2 THE ROC\*ROI MODEL

##### 4.2.1 Concerns with the ethnicity variable

###### (1) *The original value*

In his statement of claim of 11 November 2002, Mr Hemopo contended that:

the allocation in the ROC/ROI of a higher score to all Māori offenders compared to non-Māori, based purely on ethnicity, is discriminatory. The ROC/ROI is drafted on the presumption that simply because an offender is Māori there is a higher risk that they will re-offend.<sup>1</sup>

Mr Hemopo's own use of ROC\*ROI since April 2001 convinced him that the assessment was severely weighted against Māori offenders and resulted in them being classified as higher risk than their non-Māori counterparts.<sup>2</sup> His own 'tests' of ROC\*ROI assessments, he said, revealed that, as between a Māori and a non-Māori offender with otherwise identical backgrounds (including age, previous convictions, employment, and socio-economic status), the Māori offender would in every case receive a higher overall risk score.<sup>3</sup> A consequence of this, Mr

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1. Claim 1.1, para 16.1

2. Document A1, para 8

3. Ibid, para 9

## 4.2.1(2)

Hemopo maintained, was that Māori offenders would be more likely to be referred to the CNI assessment, which, in his view, also had adverse consequences for Māori.<sup>4</sup>

In support of his concerns, Mr Hemopo referred to the draft report of the team contracted to review the MACRNS. Those reviewers also contended that the inclusion of the ethnicity variable in the ROC\*ROI data set led to racial discrimination that may have adversely affected Māori offenders. They commented that the inclusion of the ethnicity variable did not add significant value to the ROC\*ROI assessment tool and recommended that the different weightings attached to the different ethnicities be removed.<sup>5</sup>

In his closing submissions, claimant counsel, Grant Powell, produced new information about ROC\*ROI in the form of an unpublished article by SJ Bull, DC Bull, and BJ Bull entitled 'Risky Business: The Development and Use of Prediction Models within the Department of Corrections'.<sup>6</sup> While counsel said that Mr Hemopo did not specifically rely on the article other than to note that it showed there were other perspectives on the ROC\*ROI tool,<sup>7</sup> it had been provided by one of its authors after the December hearing and addressed concerns about ROC\*ROI that had arisen there.<sup>8</sup> With regard to the ethnicity variable in the ROC\*ROI data set, the article's authors argued that it was a statistically non-significant predictor that should not have been included in the model.<sup>9</sup>

**(2) *The reduction of the variable to zero***

In January 2004, Mr Hemopo was provided with a copy of a memorandum dated 22 December 2003 containing the results of the second review of ROC\*ROI. He understood the memorandum to recommend that the ethnicity variable in the ROC\*ROI data set be reduced to zero so that it did not influence an offender's overall risk score. Mr Hemopo believed that the recommendation for change supported his concerns about the variable and that, once the change was made, it would prevent any differences in ROC\*ROI scores based solely on ethnicity. However, after the variable was reduced to zero in February 2004, Mr Hemopo ran several ROC\*ROI assessment tests and found that, when identical variables except for ethnicity were entered into the data set, Māori offenders continued to receive higher scores. Consequently, the reduction of the ethnicity variable to zero had not diminished Mr Hemopo's concerns about the ROC\*ROI assessment.<sup>10</sup>

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4. Document A1, paras 10–11

5. Document A4, app B, p 45

6. SJ Bull, DC Bull, and BJ Bull, 'Risky Business: The Development and Use of Prediction Models within the Department of Corrections', unpublished paper, undated (paper 2.37, app)

7. Paper 2.38, para 32

8. Paper 2.37, para 61

9. Bull, Bull, and Bull, p 11

10. Document A4, paras 17–20

**(3) Unclear reason for, and effect of, change**

Claimant counsel advised that, on the subject of ROC\*ROI, the claimant had been largely reliant on information provided by Mr Riley and by Dr Bakker. However, counsel argued, confidence in these witnesses was gravely shaken by their evidence that the ethnicity variable had been removed for reasons of ‘statistical goodness of fit’, rather than because of any concerns about using ethnicity as a variable. He submitted that, in light of an email from Dr Bakker to Dr James O’Malley (one of the original designers of ROC\*ROI), it was patently wrong to maintain that the change to the ethnicity variable was effected for statistical reasons.<sup>11</sup> The email contains this passage:

We are also having a lot of heat applied from some staff about the fact that ROC\*ROI is ‘racist’ because it penalises Māori. This is an issue that may require us to modify the algorithm to remove ethnicity. I remember James when we ran the model and removed this variable it decreased the AUC by about .02. Can you confirm what reduction we would get in accuracy if we did remove this variable? Are there any other variables that are highly correlated with ethnicity that could be used instead?<sup>12</sup>

In light of this, counsel submitted, there could be no doubt that Dr O’Malley’s subsequent remodelling of the ROC\*ROI data set to reduce the ethnicity variable to zero was done primarily for political reasons.<sup>13</sup>

Claimant counsel further maintained that it was not clear exactly how the change affected the assessment of Māori offenders because the department had provided no information regarding the implementation of the recommendation to reduce the ethnicity variable to zero. Mr Riley’s evidence, he noted, indicated that, while that variable had been reduced to zero, other variables had been reapportioned (ie, they were allocated ethnicity’s predictive contribution), thereby leaving the outcome of the assessment largely unchanged. This left unanswered the question why the ethnicity variable had not been removed altogether.<sup>14</sup>

**(4) The legacy of the variable**

Claimant counsel also submitted that the legacy of the ethnicity variable lived on, despite its reduction to zero, citing the department’s recently released report on high-risk offenders.<sup>15</sup> That report, he said, was touted as the most comprehensive analysis of high-risk offenders, and publicity was given to the fact that there was a high proportion of Māori in that group. However, counsel maintained, the report did not acknowledge that the criteria by which the

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11. Paper 2.37, paras 58–59

12. Document A41, p 8

13. Paper 2.37, para 60

14. Paper 2.27, paras 6, 34–36

15. Nick J Wilson, *New Zealand High-Risk Offenders: Who Are They and What Are the Issues in their Management and Treatment?* (Wellington: Department of Corrections, 2004)

## 4.2.2

offenders had been classified included an assessment based on ethnicity. This meant, he concluded, that the report's findings reinforced stereotypes about Māori offenders.<sup>16</sup>

#### 4.2.2 The lack of consultation on, and external validation of, the ROC\*ROI data set

Claimant witness Dr Fiona Cram, a research manager for a research and evaluation company, stated that the department had not provided any written evidence that the risk, need, and responsivity principles applied to Māori.<sup>17</sup> While research demonstrated that the Canadian LSI-R risk and needs assessment tool had predictive validity for Canadian aboriginal offenders, even though the model was designed for non-Aboriginal offenders, she said that this should not be taken to indicate that the same would be true for Māori offenders. Referring specifically to ROC\*ROI, Dr Cram stated that Mr Riley's evidence indicated there was no Māori input into the development of ROC\*ROI and that the underlying rationale for the measure was silent on the imprisonment of indigenous peoples. Overall, Dr Cram argued that ROC\*ROI was fundamentally lacking in relevance to Māori.<sup>18</sup>

In closing submissions, claimant counsel contended that the development, validation, and updating of the ROC\*ROI data set could not be evaluated by third parties unless they had access to the original data set and precise methodological details. He maintained that, given the critical importance of the risk assessment and its effect on Māori offenders, it was essential that ROC\*ROI's basis was fair and objective. However, there was no evidence to suggest that Māori were consulted in the development, deployment, and review of the ROC\*ROI assessment. Further, counsel maintained, the inability to evaluate the ROC\*ROI tool contrasted starkly with the situation in regard to the equivalent British risk assessment model, the offender group reconviction scale. Counsel stated that the British Home Office makes the 'offenders' index' database, on which the scale is based, available to bona fide researchers and statisticians, and that the scale's modelling process and statistical methodology have been published.<sup>19</sup>

#### 4.2.3 Inaccuracies and the possibility of bias in the ROC\*ROI data set

Bull et al argued that the ethnicity data held on the 'Wanganui computer' (the LES) was not necessarily complete or accurate. They further contended that the recording of ethnicity had changed, modern police policy allowing offenders to self-identify ethnicity, whereas previously police assigned offenders' ethnicity on the basis of their appearance. Thus, a quarter of those offenders officially identified as Māori in 1996 had not been so identified in 1991.

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16. Paper 2.37, para 70; paper 2.27, para 40

17. Document A26, para 20; Cram, oral evidence, 14 December 2004

18. Document A26, para 35

19. Paper 2.37, paras 65–68

Consequently, when the ROC\*ROI model was being developed, many offenders who would subsequently self-identify as Māori were officially identified as Caucasian.<sup>20</sup> The authors maintained that ‘ethnic identity is a dynamic variable in the New Zealand context, self-determined and able to change with time’.<sup>21</sup>

In closing, claimant counsel argued that, to the extent that the LES had in the past been biased against any societal group, that bias would have become part of the ROC\*ROI data set. Accordingly, if bias had contributed to Māori offenders being classified as high risk, and if that high-risk classification influenced sentencing, then the earlier bias would be perpetuated. Counsel claimed that this was particularly important given Mr Riley’s statement that an offender would have received a very similar ROC\*ROI score before and after the reduction of the ethnicity variable to zero. Counsel also contended that, where an individual had served a longer sentence as a result of a high-risk classification, any future ROC\*ROI score would be even higher, and that this, in effect, double-counted the original risk. Similarly, he maintained that there was a risk that the ROC\*ROI model would ‘feed upon itself’ if its data was used to recalibrate the model in the future, which could result in a ‘poisoned’ data set. Counsel argued that increased model sophistication and planning would be required to address this issue.<sup>22</sup>

#### **4.2.4 The prejudicial effect of ROC\*ROI**

##### **(1) *Disadvantage to Māori offenders from pre-sentence to release***

Mr Hemopo stated that the ROC\*ROI assessment is used at several stages in the criminal justice system, including before sentencing to provide sentencing recommendations, after sentencing to provide information on sentence management, prior to release to advise the Parole Board, and upon release at the end of a sentence. He was particularly concerned that the use of the ROC\*ROI assessment was causing further discrimination to already disadvantaged Māori offenders and that, since making his original application for an urgent hearing of the claim, prejudice and discrimination against Māori offenders had become more entrenched.<sup>23</sup> In support, Mr Hemopo referred to the MACRNS reviewers’ concern that the department could not provide evidence to refute the possibility of Māori offenders suffering adverse effects as a result of including ROC\*ROI risk classifications in pre-sentence reports.<sup>24</sup>

##### **(2) *Influence of high-risk classification in pre-sentence reports***

Geoffrey Hall, an associate professor of law at the University of Otago, provided evidence to the Tribunal on the background to sentencing in New Zealand and the importance and

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20. Bull, Bull, and Bull, p 6

21. Ibid, pp 15–16

22. Paper 2.37, paras 62–64

23. Document A4, paras 25–27

24. Ibid, app B, p 45

## 4.2.4(2)

purpose of pre-sentence reports.<sup>25</sup> According to Associate Professor Hall, the key feature of sentencing was that it was discretionary, meaning that it was for the sentencing judge to balance the ‘often competing demands of sentencing’ and determine an appropriate disposition within the statutory requirements for maximum penalties. This was done by a judge weighing, ‘usually intuitively’, the various purposes of punishment, the circumstances of the offence, and the characteristics of the offender.<sup>26</sup>

Associate Professor Hall noted that, when sentencing, a court relied on information from many sources, including the pre-sentence report prepared by the probation officer at the court’s request.<sup>27</sup> Section 26(2) of the Sentencing Act 2002 governed the content of pre-sentence reports and provided, most relevantly to the ROC\*ROI assessment, that such reports may contain ‘recommendations on the appropriate sentence or other disposition of the case, taking into account the risk of further offending by the offender’.<sup>28</sup>

Associate Professor Hall stated that it was in this determination of risk by the probation officer that ROC\*ROI played its role and that the pre-sentence report’s recommendation on the appropriate sentence would be relied on by the court to determine both the nature and the severity of the disposition.<sup>29</sup> He emphasised that, ‘Given the significance of the pre-sentence report to the sentencing process, it is essential that reports be prepared and presented to the sentencing Court in such a way that the Court can have confidence in the fairness, accuracy and objectivity of their contents’.<sup>30</sup>

Associate Professor Hall also stated that, the greater an offender’s perceived risk of reoffending, the more likely the court was to impose a sentence type that protected the community through individual deterrence or incapacitation to a greater extent than was suggested by the aggravating and mitigating features of the offence and the offender.<sup>31</sup> He observed that imposing a sentence because of the risk an offender presented was pre-emptive in that it may amount to punishing for a crime not yet committed. Accordingly, the accurate prediction of an offender’s future criminality or dangerousness was an essential component of incapacitative sentencing.<sup>32</sup> This was reflected in section 87(4)(c) of the Sentencing Act, which required a court, when considering whether to impose an indeterminate sentence (such as preventive detention) to take into account ‘information indicating a tendency to commit serious offences in the future’.

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25. Document A24, para 6

26. Ibid, para 7

27. Ibid, para 9

28. Ibid, app 1

29. Ibid, paras 9–10

30. Ibid, para 12

31. Individual (specific) deterrence is based on the premise that the imposition of a sufficiently severe sentence will discourage an offender from subsequent offending through fear of a repetition of the punishment. Incapacitation is based on the premise that offenders who are the most criminally active and who present a real and constant threat to society should receive the severest sentences (doc A24, paras 17, 19). The court must take into account, to the extent they are applicable, the aggravating and mitigating factors set out in section 9 of the Sentencing Act 2002.

32. Document A24, para 19

**(3) *Judicial reliance on ROC\*ROI***

Claimant counsel submitted that the department did not appear to have carried out an assessment on how ROC\*ROI related to the requirements of the Sentencing Act 2002. He said that departmental witnesses were at pains to point out that ROC\*ROI placed offenders in a statistical category or group and did not determine whether an individual would reoffend or be imprisoned. Moreover, he said that departmental witnesses maintained that there were no disadvantages to being identified as high risk; it simply meant that appropriate interventions could be identified for these offenders.<sup>33</sup>

Counsel maintained that the random sample of 30 pre-sentence reports presented to the Tribunal at its request by the Crown revealed that the ROC\*ROI assessment was being put to the judiciary in a way that could clearly influence how an offender is sentenced.<sup>34</sup> Moreover, he claimed that among the 10 sentencing decisions he had produced to the Tribunal were examples of judges relying on probation officers' risk classifications.<sup>35</sup> He contended that the decisions contained several references to the high-risk status of the offenders, and he submitted that:

it is clear from the frequent and varied use of the assessment findings in the sentencing decisions that the assessment results are having a real impact on the sentences received by offenders. It is submitted that it is now certain that the prejudice inherent in ROC\*ROI and MACRNS assessments is a real part of the sentencing process and as such is adversely impacting on the sentences received by Māori offenders.<sup>36</sup>

Counsel emphasised the basic point that it was critical that information placed before the judiciary be fair and objective.<sup>37</sup> He also reiterated Associate Professor Hall's evidence that the inclusion of an offender's high-risk classification in a pre-sentence report potentially influences how that offender is sentenced because the judge's perception that an offender is high risk may influence him or her to decide upon a harsher sentence than would otherwise be warranted.<sup>38</sup> In conclusion, claimant counsel submitted that:

the evidence clearly shows that there are still many unanswered questions relating to the foundation, validation and updating of the ROC\*ROI assessment tool. Until those questions are addressed there is a considerable prospect of prejudice resulting from the use of the assessment in sentencing.<sup>39</sup>

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33. Paper 2.37, para 10

34. Ibid, para 69

35. Ibid; paper 2.9, apps A–J

36. Paper 2.9, paras 11–12, 14–15

37. Paper 2.27, para 37

38. Paper 2.37, paras 69–70; paper 2.27, para 38

39. Paper 2.37, para 74

**4.3 MACRNS****4.3.1 Limited research underpinning the macrns concepts**

Mr Hemopo contended that the department did not carry out adequate research into the suitability of macrns as an assessment tool.<sup>40</sup> In support, he referred to the draft report of the macrns review team, which stated that macrns were experimental and there was insufficient evidence to support them being criminogenic needs.<sup>41</sup> At the hearing, the claimant added that he was not placated by the evidence on the reliability of macrns from Crown witness Dr Branko Coebergh (a senior research adviser in the Psychological Service) because he was concerned about the adequacy of the research underpinning macrns rather than whether they could be consistently applied by Māori and non-Māori assessors.<sup>42</sup>

Dr Cram stated that the literature review that the macrns developers undertook was a limited assessment of corrections research about indigenous peoples. She contended that the developers should have drawn on the small but growing body of literature on indigenous corrections in Canada and Australia, as well as the Māori health and education research used by Crown witness Dr Te Kani Kingi, Health Research Council post-doctoral research fellow, in his evidence for the Crown. The draft macrns review also commented on the ‘dearth’ of international literature on culture-related criminogenic needs of indigenous peoples and stated that the development of macrns represented an innovation within an assessment tool that itself had not been widely examined.<sup>43</sup>

Claimant counsel submitted that the department could point to ‘no empirical evidence to support the notion that macrns have any validity as part of the CNI assessment process, and, most importantly, whether macrns are indeed able to assess what their designers hoped they would assess’.<sup>44</sup> Counsel also contended that the department’s shift in emphasis over time, from macrns being criminogenic needs to culture-related needs, reflected the lack of research on, and conceptualisation of, macrns prior to their implementation (see secs 4.3.7, 5.3.7).<sup>45</sup>

**4.3.2 Limited consultation on the macrns concepts**

The claim also asserted that the department did not adequately consult with Māori about the macrns’ suitability as an assessment tool before it introduced them.<sup>46</sup> Mr Hemopo maintained that the consultation described by Crown witnesses Ms Maynard, former senior policy adviser, and Dr Coebergh:

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40. Document A4, app C, para 16.10

41. Ibid, app B, p 9

42. Document A27, para 23(c)

43. Document A4, app B, p 49

44. Paper 2.27, para 17; paper 2.37, para 31; paper 2.38, para 17

45. Paper 2.38, para 13

46. Claim 1.1, para 16.10

cannot be considered actual consultation with Māori as those consulted were employed by the Department and would have been consulted in that capacity. The individuals who were consulted were also not (to my knowledge) mandated by their iwi to represent them in the consultation.<sup>47</sup>

Mr Hemopo referred in support to the negative findings of the FREMO review of the CNI and macRNS, which included the findings that there was no Māori involvement in the macRNS' initial scoping phase and that only a narrow pool of Māori expertise was engaged in the project (see sec 3.7.3).<sup>48</sup> He also stated that Ms Maynard's presentation on macRNS at various hui did not amount to consultation, because she focused on the theory underpinning macRNS rather than providing a working demonstration of them.<sup>49</sup>

Claimant counsel submitted that time and resource constraints meant that initial and ongoing consultation on the macRNS concepts was limited to a number of employees and close associates of the department.<sup>50</sup> The department's failure to consult more widely, he said, greatly reduced the likelihood of the most appropriate design for macRNS being identified.<sup>51</sup> Although the department had conceded that, to some extent, more consultation could have been undertaken (see sec 5.3.2), counsel asserted that it had attempted to play down the importance of the process by arguing, first, that macRNS did not amount to an important decision made by it and, secondly, that the process itself need not be addressed by the Tribunal.<sup>52</sup>

Counsel described as curious the suggestion that macRNS lacked importance, when departmental evidence presented to the Tribunal emphasised the importance of macRNS in making Māori culture central to the department's work for the first time. He argued that other departmental Māori initiatives that received wide consultation, including the *Māori Strategic Plan*, were of less importance than macRNS, especially when one considered the high number of Māori processed through the criminal justice system.<sup>53</sup> As for the department's argument that the Tribunal should focus on the policy of the macRNS, not the consultation process involved in their development, counsel described this as very selective, observing that the department sought to justify macRNS' validity by reference to elements of the process used in their development, including the limited consultation undertaken.<sup>54</sup>

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47. Document A27, para 23(a)

48. Document A15(j), para 24

49. Document A27, paras 30–31

50. Paper 2.27, para 12; paper 2.37, paras 23–24; paper 2.38, paras 9, 19

51. Paper 2.37, paras 23–24

52. Paper 2.38, paras 9, 9.1–9.2

53. Ibid, paras 10–11

54. Ibid, para 12

**4.3.3 The failure to develop macrns according to a 'kaupapa Māori framework'**

Dr Cram maintained that, while Ms Maynard said that the macrns' research process was consistent with a kaupapa Māori framework, she did not outline what such a framework incorporated or how the research process was consistent with it. Dr Cram explained that such a framework adopted the view that to be Māori is normal, and that kaupapa Māori is about creating spaces for Māori realities within wider society. She also said that a kaupapa Māori framework involved analysing existing power structures and social inequalities to facilitate an awareness of the difficulties and repercussions of attempting to create such spaces.<sup>55</sup>

Dr Cram considered that, while the macrns research process sought to make being Māori more 'normal' within the corrections system, it did not analyse the power structures that have had the effect of leaving Māori realities outside the norms of the system. She also maintained that a kaupapa Māori framework would adopt a strengths-based approach that focused on developing inmates' strengths in order to address their needs, and that this would be offered to all inmates who wished to engage with it. By contrast, she argued, macrns adopt a deficit-based approach, focusing on compromised cultural identity, cultural tension, dysfunctional whānau, and criminal associates.<sup>56</sup>

Claimant counsel submitted, in summary, that the department had not formulated an assessment system that was consistent with a kaupapa Māori framework. He maintained that identifying cultural needs was not the same as formulating an assessment that was consistent with kaupapa Māori, and he reiterated Dr Cram's claim that a kaupapa Māori approach would be strengths based.<sup>57</sup>

**4.3.4 Limited testing of the macrns concepts**

Dr Cram stated that, in their current form, macrns had largely intuitive or anecdotal validity and that basic empirical validity testing should have been carried out before they were implemented.<sup>58</sup> She expressed surprise that macrns were rolled-out without such testing and said that this was very unusual in the social science field and that the pre-test of macrns questions with 12 inmates gave them no more than face validity.<sup>59</sup> Further, the reliability testing of the macrns did not confer construct validity, predictive criterion validity, or content validity.<sup>60</sup>

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55. Document A26, paras 37–38

56. Ibid, paras 39, 40; Cram, oral evidence, 14 December 2004

57. Paper 2.27, para 23; paper 2.37, paras 38–39

58. Document A26, para 33

59. Cram, oral evidence, 14 December 2004. Face validity involves looking at an instrument to see if it seems reasonable.

60. Document A26, para 32. Construct validity is proof that an instrument measures what its designers think it measures. Predictive criterion validity is proof that an instrument can predict what it is intended to predict. Content validity is the extent to which an instrument measures the specific domain it attempts to measure.

Mr Hemopo also criticised the reliability testing of macRNS on the ground that, while at the time there were approximately 2800 Māori inmates and many more Māori offenders sentenced to community-based sentences, the testing involved only 30 subjects.<sup>61</sup>

Dr Catherine Love, the senior research and Māori development fellow in the School of Psychology at Victoria University of Wellington and a member of the macRNS review team, stated that the review found that macRNS lacked solid construct validity.<sup>62</sup> The reasons for this were identified as follows:

- ▶ macRNS were derived from a Māori framework that was too different from the Western psychological framework underpinning the CNI to enable worthwhile or accurate comparisons. This diminished the cultural integrity of the Māori values underpinning macRNS (see sec 4.3.5).
- ▶ macRNS were interpreted in a negative, offence-related way, rather than as positive constructs that may, if incorporated into holistic rehabilitative interventions for Māori offenders, reduce Māori offending.
- ▶ macRNS were part of an individualised assessment methodology that changed them from being potentially transformative to probably criminalising.
- ▶ There was significant construct drift because of the extensive variations in the application of macRNS, which impacted on their predictive validity.<sup>63</sup>

In claimant counsel's submission, there was no excuse for the department not rigorously testing macRNS prior to their implementation. The need for internal and external validation had been identified, he said, by at least the conclusion of the design process. However, instead of obtaining the necessary validation, the department rolled-out the macRNS nationwide with the CNI in 2000.<sup>64</sup> Counsel identified the limited resources and tight timeframes involved in integrating macRNS into the CNI as the cause of this situation. In addition to Dr Cram's criticisms of macRNS' lack of proven validity, counsel criticised the fact that macRNS were not tested on a non-Māori control group and that the department's test of macRNS' predictive validity had been delayed due to difficulties with data collection.<sup>65</sup> Finally, he emphasised the claimant's position that macRNS lacked construct validity and rejected the view of certain Crown witnesses, including Dr Kingi, that a degree of construct validity was conferred by the reliability testing that had been undertaken. Counsel also submitted that Dr Kingi's evidence could not be viewed as independent because Ms Maynard was his partner.<sup>66</sup>

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61. Document A27, para 22(b)

62. Document A23, paras 36, 50; Love, oral evidence, 14 December 2004

63. Document A4, app B, p 6

64. Paper 2.27, para 18; paper 2.37, paras 32, 34

65. Paper 2.37, paras 31–32, 40

66. Paper 2.38, para 18

**4.3.5 Criticisms of what macrns measure and the distortion of Māori culture**

The statement of claim contended that, although only Māori offenders were assessed for macrns, the criteria by which they were defined were ‘equally applicable to other cultures and ethnic groups in New Zealand’.<sup>67</sup>

Claimant witness Tangihaere Walker, a social policy researcher, voiced several criticisms of what the macrns concepts measured and how they distorted Māori culture. First, he stated that, while it was admirable that the department had attempted to acknowledge the long-term effects of acculturation on Māori, it was difficult to see how examining an offender’s life history for the six months prior to the primary offence could adequately assess any such long-term effects. Secondly, Mr Walker stated that the department’s view that ‘Māori culture is part of the solution not the problem’<sup>68</sup> seemed contradictory given that macrns were located within a deficit-based assessment tool that did not assess strengths. Thirdly, he argued that the department’s failure to use a control group to test macrns raised doubt that macrns were a culturally specific assessment tool, since it was assumed that the macrns were specific to Māori and Māori values. Because of this, Mr Walker stated that macrns did not identify Māori cultural needs.<sup>69</sup>

Mr Walker’s evidence also addressed the construct validity of the macrns that related to the concept of whānau: limited or lack of contact with whānau, whānau-related stress, and whānau social influence to crime. Critiquing Dr Coebergh’s contention that ‘the concept of whānau differs from the Western concept of family’,<sup>70</sup> because family placed more emphasis on independence whereas whānau placed more emphasis on inter-dependence, Mr Walker acknowledged that Māori were probably more collectively focused than Pākehā but contended that the degree to which a family or whānau influenced an individual, particularly in a criminal sense, was unknown. Mr Walker also argued that the whānau social influence to crime and whakawhānaunga macrns ignored evidence suggesting that the nature of the relationship between individuals or between a group and an individual was highly influential on that person’s behaviour, irrespective of their cultural background. In terms of the whakawhānaunga macrn, he said that the ability to distinguish important groups of people, or people who were ‘like whānau’, was not peculiar to Māori. He also said that there was no research demonstrating that whānau had a stronger influence over a Māori person’s behaviour than a close friend did over a Pākehā and that non-Māori also had strong relationships with non-family persons.<sup>71</sup>

Claimant counsel submitted that the macrns assessment distorted Māori culture by inserting grossly simplified terms into the CNI resulting in an artificial consideration of Māori

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67. Claim 1.1, paras 16.4, 16.6

68. Document A8, para 56

69. Document A28(a), paras 8–10

70. Document A8, para 63

71. Document A28(a), paras 14–17

culture. He alleged that this distortion of kaupapa Māori or tikanga meant that, although macRNs were purportedly unique to Māori, in their current form they could equally apply to other cultural groups; for example, a Sicilian family with a propensity to crime. He commented that, had the department assessed non-Māori according to the same criteria, it would have provided a control group against which to assess macRNs and their effectiveness. A second consequence, counsel submitted, of the allegedly distorted and negative view of Māori cultural needs was that it did not take account of positive aspects of an offender's personal, whānau, community, and cultural background (see sec 4.3.12).<sup>72</sup>

In his submissions in reply, claimant counsel commented on the department's responses that neither the claimant nor claimant witnesses had criticised the macRNs constructs and that it would be difficult and inappropriate to incorporate strengths into the macRNs assessment. To the first response, counsel stated that:

It is difficult to see the basis for this submission. The fact that the macRNs are negative, do not appear to reflect anything specifically Māori, do not reflect the whole ambit of Māori culture, and for which there is no evidence to support their use, would seem to be fundamental criticisms, and have been consistently made by the claimant.<sup>73</sup>

As for the second matter, counsel maintained that difficulty arose because the CNI was deficit-based and the department feared that confusion would arise if strengths were assessed within it, a position it supported by saying that strengths were relevant during the treatment phase. He contended that incorporating strengths in the CNI raised the wider issue of whether a cultural assessment tool should be located in the CNI if it could not adopt a holistic approach. Furthermore, counsel argued that the so-called separation of diagnosis and treatment ignored the fact that macRNs' purpose was diagnosis as well as treatment planning. He said that trying to reconcile seemingly inconsistent objectives illustrated a fundamental design problem of the CNI and macRNs.<sup>74</sup> Counsel noted Dr Cram's acknowledgement that Dr Kingi had identified successful, holistic, Māori-centred approaches to mental health service delivery that had made the health system more responsive to the needs of Māori clients. However, Dr Cram had also commented that:

No such holism is evident within the macRNs. Only need and deficit are focused on and this leads me to wonder about the potential efficacy of the macRNs as a starting point for Māori (re)habilitation within the corrections system. This is notwithstanding Mr Tawhiao's comments about a further, strengths-based assessment being undertaken with inmates some time after the macRNs are introduced.<sup>75</sup>

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72. Paper 2.27, paras 23, 25; paper 2.37, paras 38, 40

73. Paper 2.38, para 22

74. Ibid, paras 24–25

75. Document A26, para 42

**4.3.6 The inappropriate integration of MACRNS into the CNI**

Another aspect of the claimant's view that MACRNS distort Māori culture related to the integration of MACRNS into the CNI. Dr Love stated that 'within culture-related literature, there are serious concerns about the utility and conceptual coherence of Western psychology-based models and tools in relation to indigenous populations'.<sup>76</sup>

Dr Love contended that Western psychological models of assessment and intervention were derived from individualistic conceptions of the 'self' that are vastly different from the collective conceptions held by most indigenous peoples, including Māori, which inform cultural systems and institutions that can be described as holistic and integrated.<sup>77</sup> Dr Love maintained that:

to pull certain cultural factors out of the context within which they attain coherence (in this claim that is within the Maori cultural framework), and to then insert them within a very different system of meanings and understandings (such as the CNI) is fundamentally problematic [and] undermines the process of attaining construct validity.<sup>78</sup>

Dr Love stated that concerns about the fit between Western psychological models and Māori cultural concepts were central to the MACRNS review findings on the development of MACRNS and their location within the CNI.<sup>79</sup> The review found that, because the integration model did not examine historical circumstances or systemic inequalities that contributed to Māori offending, it was limited in the extent to which it could address more profound issues underlying Māori offending.<sup>80</sup> The review also stated that MACRNS assessors were:

trying to force a fit between selective aspects of Maori culture and cognitive behavioural psychology. In forcing the fit, the constructs are reframed and changed from potentially positive transformative constructs of Maori culture to pathologised constructs of Maori culture.<sup>81</sup>

Moana Jackson, a lawyer and noted researcher into Māori and the justice system, was commissioned by the claimant to analyse MACRNS. He stated that difficulties with MACRNS had arisen for four main reasons (see sec 4.3.7(2)), one of which was a 'theoretical assumption which rightly rejected overseas models based solely on western psychological empiricism but then effectively "tacked on" a Māori "need" to the existing framework in order to meet pressing yet policy-driven time constraints'.<sup>82</sup> Mr Jackson commented that, while MACRNS were a 'commendable and even brave attempt to develop a distinct Māori perspective within the CNI', they were 'problematic' because their base was within an 'epistemological framework that is

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76. Document A23, para 39; Love, oral evidence, 14 December 2004

77. Document A23, paras 40–45

78. Ibid, para 45

79. Ibid, para 47

80. Document A4, app B, p 5

81. Ibid, app B, p 13

82. Document A15(q), p 4

not Māori'.<sup>83</sup> He noted the successful development of Māori standards assessing the quality of health care and recommended that the department undertake a similar process, one which did not tack Māori assessment tools onto non-Māori models.<sup>84</sup>

In opening and closing submissions, claimant counsel stated that:

attempting to squeeze the intricacies of Maori culture into a psychological assessment framework does not work and indeed it is not even attempted. On the contrary, only grossly simplified terms are inserted into the CNI which make it impossible to consider cultural considerations on anything other than an artificial level.<sup>85</sup>

#### **4.3.7 The confused relationship between MACRNS, offending, and criminogenic needs**

##### **(1) *Conclusions of the MACRNS review***

The reviewers found the location of MACRNS in the CNI to be problematic for most CPS employees interviewed, because MACRNS were perceived as being Māori criminogenic needs.<sup>86</sup> The review contended that the department was 'using selective aspects of Maori culture to explain Maori offending in concert with general offender population criminogenic needs'.<sup>87</sup>

It was noted that Terry Huriwai, the probation officer involved in the development of MACRNS, had said that MACRNS were developed not to be treated as criminogenic needs but to identify positive cultural factors that informed more effective interventions with Māori offenders. The review stated that MACRNS were treated as the 'cultural part of a criminogenic need' and that this could be construed as suggesting a link between Māori cultural factors and crime even though that may not have been intended.<sup>88</sup> It suggested that there was 'a significant gap between the *ideal* of using Maori cultural constructs to develop positive Maori programmes as tools for the prevention of offending by Maori and the *actual* use of them to identify cultural needs relevant to Maori offending' (emphasis in original).<sup>89</sup> The review concluded that 'the MACRNS constructs are not easily understood because their identity as criminogenic versus cultural needs is unclear'.<sup>90</sup>

##### **(2) *Crown witness confusion alleged***

Mr Hemopo and Dr Cram both expressed concern that MACRNS were viewed as Māori criminogenic needs even though they were not intended to be. Dr Cram considered that Ms

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83. Ibid, p 8

84. Ibid

85. Paper 2.27, para 23; paper 2.37, para 38

86. Document A4, app B, p 38

87. Ibid, app B, p 8

88. Ibid, app B, pp 7, 8

89. Ibid, app B, p 7

90. Ibid, app B, p 23

## 4.3.7(2)

Maynard's written evidence did not make clear that macRNs were not criminogenic needs and that Ms Maynard and Dr Kingi appeared to be under the impression that the work on macRNs was in the area of criminogenic needs. Noting Ms Maynard's view that, if appropriately addressed, cultural factors in the area of need could assist with behavioural change among Māori offenders, Dr Cram contended that this 'certainly seems to fit the criteria for criminogenic needs'.<sup>91</sup> Both Dr Cram and Mr Walker maintained that, although Dr Coebergh's evidence was that macRNs measured non-criminogenic needs, this contradicted his earlier work, which recorded that the motivation for developing macRNs was that 'the LSI-R does not measure potential criminogenic needs uniquely related to Māori'.<sup>92</sup>

Dr Cram said that, given this confusion, she examined whether the distinction between criminogenic and non-criminogenic needs was valid for Māori offenders. She referred to a 1999 study, *Evaluation of the Framework for Measuring the Effectiveness of Corrections Programmes for Māori: A Report to the Department of Corrections*, which found that department programme providers, employees, and inmates clearly perceived a link between non-criminogenic behaviour and reoffending.<sup>93</sup> Dr Cram said that the study found that, by addressing non-criminogenic needs that often underpinned criminogenic needs (such as, for example, feelings of alienation), reoffending could be reduced. Noting that the distinction between criminogenic and non-criminogenic needs was mainly sourced from the work of Bonta and colleagues in Canada, which largely excluded indigenous peoples, Dr Cram argued that its relevance to New Zealand, let alone to Māori, had to be questioned. However, she said, if it was assumed that there was a distinction between criminogenic and non-criminogenic needs, then it was unclear why Dr Coebergh considered macRNs to be non-criminogenic, especially in light of the references to Mr Jackson's work, which linked Māori cultural needs to reoffending. Dr Cram stated that she could not answer these questions, but that the confusion and contradictions between Ms Maynard's and Dr Coebergh's briefs of evidence had shaken her confidence in their work.<sup>94</sup>

In his analysis of macRNs, Mr Jackson stated that the department was aware that their identification as possible contributory causes of offending might be misconstrued as an assumption that Māori culture produced crime. Nevertheless, it 'proceeded to label them as criminogenic needs'.<sup>95</sup> This was an unwise decision, Mr Jackson believed, because it created unnecessary concern among Māori staff and criticisms of macRNs' intent, which could have been avoided had the department had extra time to consider the issues more carefully. He concluded that there was an 'inevitable linguistic confusion' inherent in the term 'criminogenic needs', as well as a 'theoretical confusion between cultural factors that might predetermine

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91. Document A26, para 24

92. Ibid; doc A15(e), p 4; doc A28(a), para 20(b)

93. Document A38

94. Document A26, paras 21, 25–29

95. Document A15(q), p 4

behaviour and a lack of cultural awareness that might seek realisation in behaviour deemed to be culturally appropriate or inappropriate'.<sup>96</sup>

On the linguistic confusion surrounding criminogenic needs, Mr Jackson commented that, while the term 'need' was appropriate in describing generic criminogenic factors that may predispose an individual to crime or to identify successful rehabilitative programmes, 'it is problematic when used in a cultural context because it is inappropriate and even damaging'.<sup>97</sup> Mr Jackson said that, for example, it could be misconstrued as meaning, or it may even imply, that an offender 'needs' whakawhānaungatanga in order to offend. He commented that, 'in some instances [an offender] may "need" encouragement from an associate who is whanaunga, and that person may be more persuasive than some other associate, but whanaungatanga itself is not the "need" – the act of encouragement is'.<sup>98</sup> Mr Jackson stated that in this context attempting to assess the strength or absence of whakawhānaungatanga as a 'culture-related need' that may predispose Māori to offend was misplaced, as was the very idea of 'need' in a Māori assessment process.<sup>99</sup>

On the theoretical confusion between cultural factors and a lack of cultural awareness that might predetermine behaviour, Mr Jackson stated that someone with a positive self-identity may be less likely to offend, although many Māori offenders with cultural certainty acted in breach of tikanga, just as Pākehā breached their social norms. However, he said that most Māori offenders lacked cultural certainty, that this lack may be a predisposing factor in offending, and that efforts to address it through culture-based programmes may be an appropriate aspect of a rehabilitation strategy.<sup>100</sup> Yet, Mr Jackson stated that:

in the development of the Criminogenic Needs Inventory the absence of what may be termed 'cultural anchors' has been unnecessarily and perhaps unwittingly confused by the focus on a 'needs' discourse. Indeed many Māori staff have felt that the listing of something like whanau or cultural identity as a criminogenic 'need' is not merely inappropriate but offensive. Although staff training has attempted to clarify the matter, the basic construct of the inventory continues to be misplaced. The confusion could have been prevented if the process had removed the notion of 'needs' and clearly stated that it is the absence or the misunderstanding of certain cultural anchors that may be validly assessed as a pre-disposing factor.<sup>101</sup>

Mr Jackson commented that the department appeared unwilling to make such a change with the model in place, because of the inconvenience or because other criminogenic models were needs-based. He stated that, with respect, these reasons were self-serving, if not fatuous,

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96. Ibid

97. Ibid, p 5

98. Ibid

99. Ibid

100. Ibid, p 6

101. Ibid

## 4.3.7(2)

and that, if the department wanted to develop a Māori assessment process, it had to develop one that was distinctly Māori. He suggested that the department might wish to develop a process based on denied Māori cultural anchors, which would more clearly specify that it was the lack of specific cultural attributes that may be predisposing factors. Mr Jackson also said that emphasising ‘denied’ Māori cultural anchors would show that their absence was due to broader historical and social processes, rather than a personal failing of the offender. He recommended that the department ‘remove the confusion inherent in the term “needs” as applied to Māori cultural factors and substitute a more appropriate terminology’.<sup>102</sup>

Claimant counsel submitted that the ‘lack of care taken by the department in the development of MACRNS is nowhere more evident than in the issue of whether MACRNS are criminogenic needs or not’. He said that, while departmental witnesses had sought to distinguish MACRNS from criminogenic needs also assessed within the CNI, there was no doubt that MACRNS were originally conceptualised as criminogenic needs and that the department’s change of emphasis was comparatively recent.<sup>103</sup> Counsel said that the more circumspect approach appeared to have developed after the roll-out of the CNI, when questions were raised about MACRNS, as was illustrated in an email written by Dr Coebergh on 3 September 2002, in which he stated:

The MACRNS are only described as non-criminogenic because we haven’t yet been able to show a statistical relationship between them and reoffending risk. However, they’re measured essentially the same way as criminogenic needs . . . As such we conceive of them as being criminogenic in nature. Research and evaluation will eventually confirm or reject this conceptualisation. . . .

In addition to awaiting evidence to confirm or otherwise that they’re criminogenic in nature we have played down the notion of MACRNS as criminogenic needs because of the sensitivity around the notion of Māori culture being labelled as criminogenic – which of course isn’t how the CNI conceives of Māori culture.<sup>104</sup>

Claimant counsel commented that, in light of this, for departmental witnesses to maintain that MACRNS were not criminogenic, or were never intended to be, defied comprehension. He also referred to Ms Maynard’s admission in cross-examination that she had asked Dr Coebergh to refer to MACRNS as the cultural dimensions of criminogenic needs or as Māori culture related needs. Counsel paraphrased her reasons as being that she ‘did not like that term criminogenic and did not feel comfortable using that word’ and that, ‘as far as she was concerned, Māori culture-related needs and criminogenic needs were the same thing’.<sup>105</sup>

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102. Document A15(q), p 6

103. Paper 2.27, paras 14, 15; paper 2.37, paras 27, 28

104. Paper 2.37, para 28

105. Ibid, para 29

Claimant counsel contended that, in the Crown's closing submissions, the department further changed the conceptual emphasis from culture-related needs to 'a cultural dimension of criminogenic needs'. He said that, although this notion was mentioned during the hearing, it was developed to a whole new level in an appendix attached to the Crown's closing submissions, which outlined the interdependent relationship between MACRNS and corresponding criminogenic needs. Counsel commented that it was difficult to see how the 'cultural tension' and 'cultural identity' MACRNS were connected to, let alone a subset of, the criminogenic needs of 'relationships' or 'violence propensity', as described in that appended document. He said that it would be expected that, unless the appropriate criminogenic need were identified, a MACRN could not follow, but no such instructions were in the CNI assessment training managers' folder or the OCN/PCN assessment booklets. Conversely, counsel stated that these documents revealed that the identification of criminogenic needs and MACRNS were independent, not interdependent, as the department alleged in closing submissions. Additionally, counsel said that there were no such links in the pre-sentence reports. He stated that this recent conceptual formulation was not reflected in how MACRNS were applied in practice.<sup>106</sup> Counsel further stated that the department's argument that MACRNS were not criminogenic needs could not stand against Dr Cram's point that cultural factors that might assist with behavioural change among Māori offenders seemed to fit the criteria for criminogenic needs.<sup>107</sup>

#### 4.3.8 Deficiencies in the MACRNS training

Claimant witness David Balfour was employed by the Department of Corrections as a probation officer between May 1997 and August 2003.<sup>108</sup> He and Mr Hemopo attended the MACRNS training in October 2002.<sup>109</sup> Responding to the evidence of the trainer, Malcolm Robson, a former specialist Māori cultural trainer, that the majority of issues raised during training reflected on wider change processes in the department rather than the assessment model,<sup>110</sup> Mr Balfour said that at the training he attended almost all the issues raised were about the MACRNS assessment.<sup>111</sup> In particular, there were questions about the scientific, philosophical, and psychometric bases of MACRNS, particularly relating to the sample size MACRNS were tested on. Mr Balfour said that he asked the trainers whether or not a control group was used and for documentation relating to the MACRNS peer review and validation. He had asked for clarification that the MACRNS were screening and identifying Māori offenders who were 'culturally disconnected' or had 'cultural distortions' and that, because those matters contributed to offending by Māori, addressing them would therefore reduce reoffending. Mr Balfour said

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106. Paper 2.38, paras 14–16

107. Paper 2.27, para 16; paper 2.37, para 30

108. Document A2, para 1; doc A28, para 4

109. Document A11, para 5

110. Ibid, para 6.2

111. Document A28, para 11; Balfour, oral evidence, 14 December 2004

## 4.3.9

that he was praised for his clear understanding of the macRNs concepts, but he also said that the head trainer lost her temper when he asked what treatment modes would be available for those who were assessed with macRNs. He was also told that he would be disciplined if he did not administer macRNs.<sup>112</sup>

Mr Balfour stated that the responses to issues raised during the macRNs training increased his concerns about the theory underpinning macRNs and the usefulness of the assessment itself. He said that Mr Robson had told him that macRNs had not been empirically validated and that the sample was a small number of volunteer offenders, but that, despite macRNs shortcomings, it was good that the department was doing something for Māori offenders.<sup>113</sup>

While Mr Balfour agreed with Mr Robson that the training communicating macRNs' purpose and use could have been improved,<sup>114</sup> he believed that 'the reason there was no specific explanation of the purpose and theory is because the Department knew that they could not really explain it in a manner that would be accepted'.<sup>115</sup>

Mr Balfour considered that the department failed to invest adequate time, energy, and resources into explaining the theory underpinning macRNs and that this was a fundamental and irreversible error. Furthermore, he believed that the department failed to ensure that the macRNs trainers were able to answer questions about macRNs theory as they were at a loss to explain or justify macRNs.<sup>116</sup> Mr Balfour said that the trainers talked over questions and tried to isolate the people asking them.<sup>117</sup> He made particular criticism of part of the training, an exercise known as the 'waka journey' and the discussion that followed it, on the basis that it did not contribute to an understanding of macRNs.<sup>118</sup>

#### 4.3.9 Deficiencies in the use of macRNs by the cps and the pps

##### (1) *Improper use of macRNs screening questions*

Mr Balfour was concerned that, when administering macRNs, assessors were required to deceive offenders about why they were being asked questions about their ethnicity.<sup>119</sup> He said that the macRNs training and training manual required that probation officers not explain to Māori offenders why they were being questioned about their ethnicity and their whānau. This, he said, eroded probation officers' ability to build a trusting relationship with offenders and compromised offenders' human rights.<sup>120</sup>

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112. Document A28, paras 11(a)–(d)

113. Ibid, paras 12, 13, 13(a)–(c)

114. Document A11, para 6.3

115. Document A28, para 15

116. Ibid, para 17; Balfour, oral evidence, 14 December 2004

117. Document A28, para 17

118. Ibid, para 24

119. Ibid, para 16; Balfour, oral evidence, 14 December 2004

120. Document A2, paras 4–10; Balfour, oral evidence, 14 December 2004

**(2) Limited and inconsistent use of macrns**

Mr Balfour also expressed concern that macrns were being used to identify Māori offenders that the department felt were sufficiently motivated to successfully complete sentences of supervision with criminogenic programmes. He said that this effectively ruled out sentences of supervision with such programmes for offenders assessed as having low motivation levels, and that these offenders were being recommended for sentences of community work or imprisonment. While Mr Balfour did not have a problem with assessing motivation, he was concerned at a screening device based on cultural assessments being used to this effect, especially when offenders were not told the purpose of the ethnicity questions and what would follow this if they identified as being Māori.<sup>121</sup> During the hearing, he stated that the department should work with all offenders, not just those with a high motivation to change.<sup>122</sup> Mr Balfour also questioned why, if the department saw macrns as being so critical in assisting Māori rehabilitation, their assessment was not compulsory for all Māori, regardless of whether or not they identified as Māori.<sup>123</sup>

The macrns review stated that the confusion surrounding whether macrns were criminogenic or cultural needs ‘impacts on how and why they are administered (or not administered) by staff’.<sup>124</sup> It summarised the following key issues identified by macrns assessors about macrns use in the field as reported in a Department of Corrections survey:

- ▶ Most employees rated the ocn and pcn macrns as useful, except for the cultural identity macrn.
- ▶ There were differences in how the cultural constructs underpinning macrns were interpreted and applied, although many respondents could recite the differences between the constructs.
- ▶ Concerns were raised about the quality of the macrns training and the lack of clarity about macrns’ purpose and what they measured.
- ▶ Some employees were uncomfortable about asking the ethnicity screening questions.
- ▶ Many employees commented that they did not have access to appropriate supervision, which was likely to lead to wide variations in practice surrounding macrns.<sup>125</sup>

The review team also interviewed 30 offenders about macrns. It highlighted five main points about offenders’ experiences of macrns and their relationship to offending:

- ▶ Cultural values were not the primary offence-related needs identified; rather, they identified issues like poverty and drug addiction.
- ▶ Generic criminogenic needs and social circumstance related needs, especially poverty, were identified as significant factors.

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121. Document A28, para 23

122. Balfour, oral evidence, 14 December 2004

123. Document A28, para 25

124. Document A4, app B, p 23

125. Ibid

## 4.3.10

- Most offenders did not understand the relevance of macRNs to their offending until researchers explained the link between macRNs and offending.
- Some offenders had macRNs identified that they did not understand, agree with, or see as relevant.
- While whānau may have had an instrumental role in offending for some Māori offenders in that, for example, they offended to support their whānau, this was more an indication of poverty and social circumstance than whānau-related macRNs.<sup>126</sup>

In closing, claimant counsel submitted that, because macRNs were ‘tacked on’ to the CNI, they had not been fully accepted and applied within the CPS. He said that this became apparent during the macRNs training and remained equally apparent in the limited use of macRNs in the field, as evidenced both by statistics provided by Heather Mackie, the regional manager for the central region of the CPS, on the numbers of CPS and PPS offenders identified with macRNs and by the random sample of 30 pre-sentence reports.<sup>127</sup> Counsel also suggested that macRNs were applied inconsistently in that they were not assessed for all Māori. He remarked that someone who had Māori ancestry but who did not acknowledge this or identify as Māori would appear to be suffering from cultural tension, but there was no provision for assessing this person for macRNs. Further, Ms Mackie’s statistics revealed that only a minority of those assessed for macRNs were actually diagnosed as having them. Counsel submitted that, if macRNs were entrenched within the CNI through the Māori interventions pathway, offenders who were not assessed were likely to be seriously disadvantaged (although no restrictions on access to interventions had been imposed so far). Finally, counsel observed that the implementation of the pathway would require the consistent, accurate, and monitored application of macRNs.<sup>128</sup>

#### 4.3.10 Interventions for Māori offenders not influenced by macRNs

Mr Hemopo contended that the CPS and PPS interventions for Māori that Charlie Tawhiao referred to in his evidence were of such limited availability that they were not realistic options for most offenders. He also said that only the TMPs, MTPs, and MFUS were actual programmes, the others being SMCAs and departmental policies and support networks for Māori employees.<sup>129</sup>

Mr Hemopo acknowledged that TMPs were well accepted and useful for offenders but expressed particular concern at their limited availability in Hawke’s Bay.<sup>130</sup> More generally, commenting on Ms Mackie’s evidence of the range of interventions provided by the department, Mr Hemopo maintained that there was severe under-utilisation of TMPs in 2003–04,

126. Document A4, app B, p17

127. Paper 2.37, para 25

128. Paper 2.27, paras 27–29; paper 2.37, paras 43–46; paper 2.38, paras 26, 28

129. Document A27, paras 6–7, 18

130. Ibid, paras 8–10

with only 239 CPS offenders and 841 Māori inmates attending such programmes out of approximately 7980 Māori offenders managed by the CPS and approximately 3000 inmates in the PPS.<sup>131</sup>

Mr Hemopo also said that Mr Tawhiao did not provide details about where the MTPs were provided or to whom. It was his own understanding that they were not yet available and that, when introduced, they would be available only in MFUS, thereby restricting their availability to sentenced inmates.<sup>132</sup>

Mr Hemopo maintained further that the interventions Mr Tawhiao referred to did not justify the assessment of MACRNS in their current form and were not available to offenders as a result of the MACRNS assessment. To his knowledge, no new programmes that were readily available had been established since the development of MACRNS. Given no apparent link between MACRNS and interventions, Mr Hemopo also challenged Mr Tawhiao's statement that, if MACRNS were not assessed, the programmes might cease to operate.<sup>133</sup>

In closing, claimant counsel reiterated that when MACRNS were applied they did not lead to any tangible benefits for Māori offenders that were not already available in the corrections system.<sup>134</sup> Counsel contended that MACRNS' stated purpose of providing appropriate interventions for Māori offenders had not been met, that no new interventions had been developed since MACRNS' introduction, and that MACRNS were not currently a prerequisite for acceptance into an intervention.<sup>135</sup>

#### **4.3.11 The problematic treatment, and shelving, of the MACRNS review**

Mr Hemopo stated that, in January 2004, the department informed him that it had been decided on 1 December 2003 that the draft MACRNS review report would not be finalised and that the recommendations would not be implemented. He commented that the department's failure to act on any aspect of the report was unbelievable, especially given its critical findings, and that, since the report was released, the department had delayed the review process, had been uncooperative, and had not acted in good faith.<sup>136</sup>

Dr Love, a member of the review team, stated that the department accepted the review team's evaluation proposal without amendment and that both parties signed an agreement for the provision of services on 9 January 2003.<sup>137</sup> It was agreed that the review team would rely on the department's advice about appropriate corrections research sites, accessing departmental staff, inmates, and predictive validity data, and arranging for the review team

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131. Ibid, paras 12–14

132. Ibid, paras 15–17

133. Ibid, paras 6–7, 20

134. Paper 2.37, para 43

135. Ibid, para 49

136. Document A4, paras 10–13

137. Document A23, paras 17–18

to attend the macrns training and provide them with training documentation. She stated that prison and probation office sites were agreed between the department and the review team but that several site visits were delayed because of matters internal to the department, which substantially slowed the review process. Further, Dr Love said, the delay in the results of the department's predictive validity analysis contributed significantly to subsequent delays in designing questionnaires and interviews based on full data and completing the research. She also stated that, despite an agreement that all review team members should attend the macrns training, the department informed the reviewers that only two members, and then later only one member, could attend.<sup>138</sup>

Dr Love advised that, when the draft review was submitted to the department two months late on 5 August 2003, the review team agreed to a financial penalty, notwithstanding the department's role in the delays. She said that the review team understood that the department would consider the draft report and that, once feedback on it was received, the review team would finalise it. However, she said, the review team was not given a formal opportunity to finalise the report.<sup>139</sup>

Dr Love contended that departmental criticisms of the report were inaccurate and unjustifiable. Contrary to the views of Ms McDonald, as expressed in a 15 October 2003 memorandum on the department's views of the draft macrns review, Dr Love considered that the report clearly outlined its key findings and that it was appropriate for the review team to make comments on ROC\*ROI, especially as the department had given the review team detailed information about ROC\*ROI, IOM, and the CNI. Dr Love also maintained that comments made about departmental agendas were based on departmental material, supplemented by interview data, not on 'supposition and hearsay'. Further, she contested the view that opinions in the report were factually incorrect, stating that they were based on the comments of department field staff. Dr Love also emphasised that the review found that macrns created a potential for adverse or negative effects to occur and that, in the absence of evidence indicating that such effects did not occur, macrns should be treated with caution. Finally, Dr Love backed up the report's finding that macrns did not lead to interventions, stating that feedback from staff and inmates indicated that the lack of interventions linked to macrns was problematic at the time of the review.<sup>140</sup>

In his submissions, claimant counsel stated that the treatment of the review was particularly problematic in that the reviewers were not given the opportunity to finalise the report and that, in the 18 months since the draft report was shelved, the department had sought no further validation to address the issues that originally brought about the review. Counsel contended that, notwithstanding criticisms of the review, the department's failure to seek

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138. Document A23, paras 20–21, 23–24

139. Ibid, paras 26–30; Love, oral evidence, 14 December 2004

140. Document A23, paras 58(a)–(h)

validation occurred despite the fact that many of the review's findings were accepted at different levels within the department, notably in a copy of the review annotated by Jared Mullen, then the general manager policy development.<sup>141</sup>

#### **4.3.12 The inconsistent use, and prejudicial influence, of maCRNs**

##### **(1) *Māori offenders disadvantaged from pre-sentence to release***

The statement of claim contended that 'the use of maCRNs requires the classification of positive aspects of Māori culture and family as a cause of crime and/or aggravating factors for sentencing'.<sup>142</sup> Further, it was claimed that the assessment of ROC\*ROI and maCRNs for Māori offenders adversely affected the type and length of sentences that offenders were given, the time of release from detention, and any conditions that may have been attached to sentences.<sup>143</sup> Mr Hemopo maintained that it had become evident that judges were referring to maCRNs assessments when determining sentences.<sup>144</sup> He was concerned that the continued use of the assessment to provide information for sentencing was having a detrimental and irreparable effect on Māori offenders' sentence type and length.<sup>145</sup>

##### **(2) *Influence of maCRNs in pre-sentence reports***

Associate Professor Hall stated that courts relied upon pre-sentence reports' recommendations to determine both the nature and the severity of sentences.<sup>146</sup> He identified section 26(2)(a) and (b) of the Sentencing Act 2002 as being particularly relevant to this part of the claim.<sup>147</sup> That section provides that a pre-sentence report may include:

- (a) information regarding the personal, family, whanau, community, and cultural background, and social circumstances of the offender:
- (b) information regarding the factors contributing to the offence, and the rehabilitative needs of the offender:

Associate Professor Hall commented that:

the current assessment of maCRNs, which only considers Maori culture and whanau in a negative sense, would appear to disadvantage Maori. The implication is that these factors are merely crime producing with positive aspects being over-looked.<sup>148</sup>

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141. Paper 2.27, para 19; paper 2.37, para 35. Mr Mullen's annotated version was appended to paper 2.40.

142. Claim 1.1, para 16.3

143. Ibid, para 16.8

144. Document A4, paras 21–25

145. Document A1, paras 25–26

146. Document A24, para 10

147. Ibid, para 9

148. Ibid

## 4.3.12(2)

He also drew attention to section 8(i) of the Sentencing Act, which provides that, when sentencing, a court ‘must take into account the offender’s personal, family, whānau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose’. This further emphasised the need for the court to have before it information that illustrated positive as well as negative aspects of whānau, community, and cultural background.<sup>149</sup>

Claimant counsel submitted that the department did not appear to have carried out an assessment as to how macRNs related to the requirements of the Sentencing Act 2002 and that macRNs’ ‘narrow, negative, view of cultural needs’ was inconsistent with the Act’s requirements.<sup>150</sup> Counsel contended that, while several Crown witnesses had said that positive aspects of Māori culture could be included in pre-sentence reports independently of the CNI and macRNs analysis, none of the 30 pre-sentence reports provided by the department made any positive comments about Māori culture or any comments about cultural issues except for those surrounding macRNs analysis.<sup>151</sup> The result, in his submission, was that the treatment of macRNs in pre-sentence reports did not comply with section 8 or section 26 of the Sentencing Act.<sup>152</sup>

Counsel also submitted that section 6(1)(c) of the Corrections Act 2004 did not provide for the selective and negative use of Māori culture when managing offenders.<sup>153</sup> The section provides that:

- (c) in order to reduce the risk of reoffending, the cultural background, ethnic identity, and language of offenders must, where appropriate and to the extent practicable within the resources available, be taken into account—
  - (i) in developing and providing rehabilitative programmes and other interventions intended to effectively assist the rehabilitation and reintegration of offenders into the community; and
  - (ii) in sentence planning and management of offenders.

On the basis of the 30 reports provided to the Tribunal, claimant counsel submitted that the reporting of macRNs in pre-sentence reports was inconsistent because they were reported not only in the ‘social and cultural factors’ section but also, variously, in the ‘offending’,

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149. Document A24, para 22

150. Paper 2.37, paras 10, 40

151. Ibid, para 40. The 30 pre-sentence reports submitted to the Tribunal at its request were divided into groups of 10: non-Māori offenders, Māori offenders assessed as having no macRNs, and Māori offenders identified with one or more macRNs. The reports were derived from 1464 level 2 assessments completed between 1 November and 19 December 2004, which were sorted on the basis of ethnicity (700 Māori, 764 non-Māori). Each offender in these two groups was assigned a random number, and these were used to ‘shuffle’ the samples into a random order. The first 10 randomly shuffled reports from the non-Māori group were selected from that sample. The first 10 reports on Māori offenders without macRNs were selected from the Māori group, followed by the first 10 reports on Māori offenders reported as having macRNs. All identifying details were then removed from each report (paper 2.34).

152. Paper 2.37, para 11

153. Ibid, paras 13–14

‘motivation and readiness to change’, and ‘summary’ sections.<sup>154</sup> From this, it was submitted that no clear distinction between macRNs and other causes of offending was drawn by departmental staff compiling the reports.<sup>155</sup>

### (3) *Judicial reliance on macRNs*

Claimant counsel further submitted that there was no indication in the pre-sentence reports that the judiciary should not rely on macRNs assessments when sentencing. He contended that a recently publicised sentencing decision, *New Zealand Police v Joshua Keil*,<sup>156</sup> illustrated that one judge, at least, had treated the existence of macRNs as an aggravating feature in sentencing, giving rise to the prospect of significant prejudice for Māori offenders:

the lack of control over how the macRN assessments are being undertaken, how the resulting conclusions are presented to the Court, and how the information is then used by the judiciary, epitomised by the decision in *Keil*, give rise to a real risk of prejudice to Maori offenders as compared to non Maori to which no easy solution presents itself.<sup>157</sup>

Claimant counsel argued that the department had largely ignored *Keil*, suggesting that it did not provide evidence of prejudice, but that this was incorrect. In response to questions from the Tribunal, however, counsel acknowledged that there was no evidence that the offender was prejudiced by the sentencing judge’s decision. He also acknowledged that the judge’s criticisms were very clearly directed at the department and at what the judge perceived to be its attempt to justify the offender’s conduct by reference to macRNs, which made it unlikely that the judge had penalised the offender by imposing a more severe sentence. Further, counsel stated that it was arguable, either for or against the department, as to whether macRNs were prejudicing Māori offenders.<sup>158</sup>

Despite those acknowledgements, claimant counsel submitted that the prejudicial effects of macRNs’ use may not have been more apparent to date because of the comparatively low level of macRNs assessments.<sup>159</sup> Further, the macRNs reviewers had expressed concern that the department could not provide evidence to refute the possibility of any adverse impacts on Māori offenders as a result of including macRNs assessments in pre-sentence reports.<sup>160</sup>

### (4) *macRNs discriminatory in terms of Bill of Rights and Human Rights Acts*

Finally, in addition to the claimant’s argument that the claim disclosed Crown breaches of Treaty principle, counsel maintained that the imposition of the macRNs assessment criteria

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154. Ibid, para 47

155. Paper 2.38, para 28

156. *New Zealand Police v Joshua Keil* unreported, 9 December 2004, Deane DCJ, District Court, Hastings, CRN04020017280 (doc A44)

157. Paper 2.37, para 55 (see also paras 47–48)

158. Claimant counsel, oral submission, 14 January 2005

159. Paper 2.38, para 28

160. Document A4, app B, p 45

**4.3.12(4)**

upon Māori offenders was discriminatory in terms of the Bill of Rights Act 1990 and the Human Rights Act 1993. He contended that this was so because macrns were inherently negative and were applied only to Māori, despite the fact that the same needs might apply to other ethnicities. He submitted that, because of the experimental nature of macrns, the lack of validity testing, and the potential for macrns to be used adversely against offenders at different points in the corrections system, any exemptions in those Acts for positive discrimination measures did not apply.<sup>161</sup>

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161. Paper 2.37, paras 15–16

## CHAPTER 5

### THE CROWN'S RESPONSE

#### 5.1 CHAPTER OUTLINE

This chapter details the Crown's response to the claim, and covers:

- ▶ the development, implementation, and effect of the ROC\*ROI actuarial predictive tool, and the use and review of the ethnicity variable within the tool;
- ▶ the development, implementation, and effect of the MACRNS tool;
- ▶ the robustness of these tools, and their compliance with the principles of the Treaty of Waitangi; and
- ▶ the Department of Corrections' responsiveness to Māori.

#### 5.2 THE ROC\*ROI MODEL

##### 5.2.1 The reduction of the ethnicity variable to zero

###### **(1) *The nature and effect of the 2003 review***

Mr Riley, the director of the Psychological Service, stated that the 2003 review of ROC\*ROI sought the unique combination and weighting of variables that best distinguished between offenders who would be reconvicted and imprisoned and those who would not. This led to the reordering of predictor variables and the calculation of the variance they contributed to the assessment outcome, resulting in ethnicity no longer accounting for any variance.<sup>1</sup> In other words, the amount of correlation that ethnicity had with all the other predictors (eg, age of offender, frequency and seriousness of offending) was such that, after taking these variables into account and making minor adjustments to their values, ethnicity no longer contributed any predictive power or showed any statistical significance. Therefore, ethnicity no longer had any bearing on the expressions of probability of reoffending and probability of being imprisoned for an offence.<sup>2</sup>

Explaining further, Mr Riley said that, in reordering the entry of the predictor variables, the variability (or predictive contribution) to the accuracy of the model that was previously provided by the ethnicity variable was reapportioned to other variables. In practice, he said,

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1. Document A20, para 20

2. Ibid, paras 21–22

## 5.2.1(1)

the reapportioning of the variance associated with ethnicity had had very little practical impact on how any given individual would rate. Both Mr Riley and Dr Bakker commented that Māori and non-Māori offenders would now receive a very similar risk score to that which they would have received previously; that is, with and without the ethnicity variable.<sup>3</sup> The removal of ethnicity as a discrete predictor variable resulted in a very small change in the predictive value of the variables in the revised model, since ethnicity's unique contribution to predictive validity was only 2 per cent.<sup>4</sup> However, Mr Riley emphasised that, to the extent that being of a certain ethnicity conferred a slightly higher risk of reoffending on an offender, it was still the case that a more favourable allocation of departmental resources flowed to higher risk offenders.<sup>5</sup>

While he acknowledged that, before the reduction of the ethnicity variable to zero, small variations in ROC\*ROI scores may have occurred as a result of changing an offender's ethnicity, Mr Riley did not accept that this would have changed an offender's classification from low risk to high risk. He said that it could have moved an offender over the threshold between the low- and medium-risk or medium- and high-risk classifications, but only if the offender had already been very close to that threshold.<sup>6</sup> Dr Bakker stated that the ethnicity variable would have had the greatest effect (ie, up to 0.2 of an offender's ROC\*ROI score) for those offenders with very short criminal histories, whereas offenders with longer criminal histories would have been much less affected.<sup>7</sup>

At the Tribunal's request, further evidence was produced on the ethnicity variable after the hearing.<sup>8</sup> This reiterated that, at the time the ethnicity variable was part of the ROC\*ROI tool, its impact changed in relation to other variables and to their values. For example, the influence of ethnicity differed for males and females, for younger and older offenders, and for various crimes. The Tribunal also received tables of probability calculations including and excluding ethnicity that the department had commissioned from Dr James O'Malley. The department observed that these results did not detract from the more general answers given by Mr Riley and Dr Bakker at the hearing.<sup>9</sup>

In his submissions, Crown counsel, Craig Linkhorn, reiterated that high-risk offenders were classified as such by ROC\*ROI because of combinations of variables, especially those relating to criminal history.<sup>10</sup> Counsel emphasised the point that ethnicity did not 'cause' people to be categorised as higher risk, since the model made no assumptions about causality. Rather, it predicted what a group of offenders would do, based on the behaviour of a past

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3. Document A5, para 70; Bakker, oral evidence, 15 December 2004; doc A40(a)

4. Document A20, para 23

5. Document A5, para 71

6. Riley, oral evidence, 15 December 2004

7. Bakker, oral evidence, 15 December 2004; doc A40(a), paras 2–4

8. Paper 2.44

9. Document A49, paras 10–14

10. Paper 2.36, para 245

group of offenders.<sup>11</sup> Counsel submitted that, before it was reduced to zero, the ethnicity variable contributed only a very small (2 per cent) unique predictive power, in the context of a system that informed staff judgement about what level of assessment an offender required. Counsel stated that, in part, the ROC\*ROI assessment led to a generalised statement of risk of reoffending in a pre-sentence report (ie, low, medium, or high risk). However, he maintained that the role played by ethnicity in this process had been overstated in the claim. In support, counsel referred to the increased predictive power of ROC\*ROI since the ethnicity variable was reduced to zero (see sec 3.4.5). That result, he said, showed that other variables must be very highly correlated with ethnicity. Accordingly, he contended that the Tribunal should assess any prejudice arising from ROC\*ROI as minimal.<sup>12</sup>

**(2) *Why the ethnicity variable was reduced to zero***

Mr Riley's written evidence stated that the ethnicity variable was reduced to zero for no reason other than statistical 'goodness of fit'.<sup>13</sup> During the hearing, Mr Riley stated that his written evidence was as honest and accurate as it could be, based on his recollection and experience. He said he was not aware of Dr Bakker's email exchange with Dr O'Malley about reducing the ethnicity variable to zero because of concerns that ROC\*ROI was racist (see sec 4.3.7(2)). Mr Riley also stated that his evidence was not prepared in consultation with Dr Bakker.<sup>14</sup>

Dr Bakker informed the Tribunal that he had left the department 18 months previously and had not attended all the meetings that Mr Riley had with Dr O'Malley. He explained that he had provided the email to the claimant's lawyer because he wanted to give accurate evidence. He had asked Dr O'Malley about the predictive contribution of the ethnicity variable because Mr Riley had long said that ethnicity had little effect on reoffending, and he wanted to check both this and whether reducing ethnicity to zero would affect the accuracy of the model. Had the ethnicity variable been found to be significant, Dr Bakker said, it would not have been reduced to zero.<sup>15</sup>

Crown counsel submitted that the evidence suggested there was a mixed purpose for reducing the ethnicity variable to zero. Which of the two reasons was seen as being more significant, he added, depended on one's perspective. The first reason was that the ethnicity variable no longer contributed to the overall predictive accuracy of the tool after the reordering of the other predictor variables. The second reason was that, once the ethnicity variable had been confirmed as making a minimal unique contribution to predictive accuracy, reducing it to zero addressed the discomfort felt by some staff and stakeholders about the use of ethnicity as a variable.<sup>16</sup> Counsel acknowledged that Mr Riley's evidence that the ethnicity

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11. Ibid, para 136

12. Ibid, para 260

13. Document A5, para 72

14. Riley, oral evidence, 15 December 2004

15. Bakker, oral evidence, 15 December 2004

16. Paper 2.36, paras 132–135

## 5.2.2

variable was reduced to zero purely for reasons of statistical ‘goodness of fit’ was incomplete. However, he contended, statistical ‘goodness of fit’ was the primary driver of the change and it was fortuitous that the reordering of the predictor variables resulted in the ROC\*ROI tool being more acceptable to stakeholders, removing the uninformed criticism that the ethnicity variable had been attracting.<sup>17</sup> He added that the reduction of the ethnicity variable to zero in February 2004 was the practical equivalent of removing the variable but lacked the risks associated with modifying the computer programmes to remove it.<sup>18</sup> Significantly, counsel submitted that as a result of this change most of the issues the claimant raised about ROC\*ROI had been addressed.<sup>19</sup>

### 5.2.2 The external validation of the risk principle underpinning ROC\*ROI and of the ROC\*ROI data set

#### (1) *Relevant research*

Dr Coebergh, Mr Riley, and Dr Bakker all stressed the applicability of the risk, need, and responsivity principles to the New Zealand context.<sup>20</sup> During the hearing, Mr Riley stated that there were ‘over 30’ meta-analyses on treatment effectiveness that referred to over 2500 individual treatment evaluations, which ‘consistently affirm’ the principles of risk, need, and responsivity. Accordingly, he said that the department assumed that this was a sensible and prudent way to move forward.<sup>21</sup> Dr Coebergh reiterated this, stating that ‘a large and persuasive body of evidence’ was consulted regarding the targeting of ‘needs’ under the PCC – evidence that he said was ‘about as compelling as you get’.<sup>22</sup>

In closing, Crown counsel submitted that, given the large body of evidence supporting these principles, it was not unreasonable for the department to conclude that they would have some relevance to New Zealand offenders, including Māori offenders. He stated that ROC\*ROI was as effective for predicting the risk of recidivism for Māori as it was for non-Māori and that it provided a sophisticated understanding of static predictors of risk for Māori.<sup>23</sup>

#### (2) *Evaluation and consultation*

Responding to Bull et al’s criticisms of the lack of transparency and accessibility of the ROC\*ROI data set and methodology, Mr Riley observed that, as with ROC\*ROI, the risk assessment tools used in the United Kingdom and Canada were based on basic criminal history variables. He indicated that the ROC\*ROI data set, which was drawn exclusively from criminal

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17. Paper 2.36, para 136

18. Ibid, paras 132–133

19. Ibid, para 124

20. Document A8, para 20; Coebergh, oral evidence, 15 December 2004; Riley, oral evidence, 15 December 2004; Bakker, oral evidence, 15 December 2004; doc A40(a), paras 5–6

21. Riley, oral evidence, 15 December 2004; see also doc A8, para 20

22. Coebergh, oral evidence, 15 December 2004; paper 2.36, para 12

23. Paper 2.36, paras 13–14

history data encoded on the LES, was externally verifiable to the extent that offenders were entitled to access their criminal history and to request corrections of any errors. He noted further that an offender's criminal history was attached to the pre-sentence report for the court.<sup>24</sup>

On the matter of consultation with Māori about ROC\*ROI, Mr Riley said that there was none. He noted that ROC\*ROI's development occurred 10 years ago, when the department was not as sensitive to consultation issues and, moreover, he said that he was unsure what they would have consulted about. However, he conceded that the department could have consulted with Māori about ROC\*ROI.<sup>25</sup>

### 5.2.3 The accuracy of, and effects of bias in, the ROC\*ROI data set

#### (1) *The accuracy of the data set*

Mr Riley stated that ethnicity was not a dynamic variable and that what Bull et al referred to as inaccuracies in recording the ethnicity of offenders (see sec 4.2.3) actually reflected variability in recording patterns, which may not be as haphazard as they claimed. He described as invalid the argument that uneven or biased reporting of ethnicity could seriously skew a model, commenting that the extent to which data were inaccurate would merely blur the relationship between variables and outcomes. Emphasising this was the fact that, although ROC\*ROI was developed, trialled, and refined on 1988 data, it was subsequently validated on data from four other years within a 15-year range. Mr Riley said that the relationship between predictor variables and outcomes remained relatively constant, which would not have been achieved if the recording of information pertaining to any variable was biased or random as claimed.<sup>26</sup> Mr Riley also emphasised that, since February 2004, the ethnicity variable was no longer used to model an offender's risk of reconviction and imprisonment. Therefore, the ROC\*ROI data set was no longer reliant on the accuracy of ethnicity data in the LES.

In response to other criticisms made by Bull et al about the accuracy of the ROC\*ROI data set, Mr Riley maintained that the major problem with errors in the LES was not the inaccuracy of data entered but the potential that one offender may have multiple identities, which situation could have arisen from the use of aliases, the entering of different spellings of names, or the reordering of Christian names. He noted that the system regularly ran automatic processes to minimise those errors and that police and corrections and justice department employees who entered data on the system could correct inaccurate offender data at any time. In fact, Mr Riley contended that the procedures for correcting errors regarding multiple identities may have enhanced the quality of the data, since the recalibration and testing of ROC\*ROI in February 2004 revealed the model to be 2 per cent more accurate in its predictions. Overall,

24. Document A46, paras 80, 82

25. Riley, oral evidence, 15 December 2004

26. Document A46, para 19

**5.2.3(2)**

he stated, the New Zealand LES was internationally regarded as being highly accurate and complete, the department remained confident about using its data, and ROC\*ROI demonstrated an exceptional level of predictive accuracy.<sup>27</sup>

Mr Riley described as an ‘elementary statistical error’ Bull et al’s finding that a statistical model was valid only if every variable passed a statistical significance test. He maintained that there was no problem in including in a prediction model a variable that had a small effect; it would merely have little effect on predictions, as was the case with ethnicity in the original ROC\*ROI model. Mr Riley also argued that to remove a variable from a model would be to assume that it had no effect, when this was virtually never the case. As a result, he contended that removing variables with small effects would be errant, unless the variance could be reapportioned. Mr Riley also said that it was illogical to criticise ROC\*ROI for including non-significant variables and then claim that the model discriminated against certain ethnic groups because of such variables, since a non-significant variable would have only a minimal effect. In support, Mr Riley referred to the almost identical results produced before and after the ethnicity variable was reduced to zero in February 2004.<sup>28</sup>

**(2) *The effects of bias in the ROC\*ROI data set***

Mr Riley acknowledged that a variety of institutional biases impacted at various stages of the criminal justice system, whether during detection or prosecution or in court decisions, and that any such biases would find their way into criminal history information. However, he was confident that ROC\*ROI predicted future conviction and imprisonment irrespective of any biases in the data, and predicted it very well. Mr Riley also maintained that, to the extent that staff relied on them, ROC\*ROI ratings were likely to be significantly less biased than human judgements about risk, any bias in which impacted disproportionately on people prone to prejudice.<sup>29</sup> He noted that it was the role of the CNI to investigate other factors, including ‘why’ questions that may focus on bias. He conceded, however, that the CNI did not take discrimination into account, commenting that the department was not there to second-guess judges and sentencing and that any police bias was part and parcel of the criminal justice system.<sup>30</sup>

**5.2.4 Information for the judiciary and the limited influence of ROC\*ROI on the sentencing process****(1) *Information provided to the judiciary***

David Wales, manager special projects with the Psychological Service, is responsible for overseeing the service’s contribution to new departmental initiatives. During the implementation

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27. Document A46, paras 83–84, 93

28. Ibid, paras 44–45, 63

29. Ibid, para 86

30. Riley, oral evidence, 15 December 2004

of IOM (incorporating ROC\*ROI, the CNI, and MACRNS), it was his task to ensure that there was widespread understanding and acceptance of IOM and that those aspects of it that were designed using the PCC were rolled-out and used as intended. To this end, the Psychological Service collaborated with other parts of the department to develop information on IOM for stakeholders, including the judiciary.<sup>31</sup> The key features of the provision of information to the judiciary were as follows:

- ▶ Before 2001, communications with the judiciary as a whole about IOM were ad hoc. However, the chief justice was kept informed, the use of IOM assessments was piloted in some courts,<sup>32</sup> and, in March 2000, the department prepared an outline of the IOM assessment process for the judiciary and parole boards<sup>33</sup> dealing with risk and needs profiling, the IOM assessment processes (including ROC\*ROI screening), differences between the new and the old systems, and progress on implementation to date.<sup>34</sup>
- ▶ In January 2001, Mr Wales sought and received approval for an IOM judiciary stakeholder management plan outlining a communications strategy involving presentations to and meetings with the judiciary about IOM.<sup>35</sup>
- ▶ During the implementation of IOM's assessment phase, the judiciary in each region was given a presentation on IOM and ROC\*ROI by senior managers of the CPS and PPS and the principal psychologist in the area. The then general manager of the CPS also attended several of the presentations.<sup>36</sup> The judges were also given the booklet *Integrated Offender Management – An Explanation*, which included information about ROC\*ROI.<sup>37</sup> The judicial presentations provided an opportunity for questions and discussion, and involved significant interaction between regional departmental staff and local judges to ensure IOM's smooth implementation.<sup>38</sup>
- ▶ The February 2001 issue of *Judges' Update*, a quarterly publication by the CPS, briefly discussed ROC\*ROI.<sup>39</sup>

Mr Wales also commented that the department regularly sought feedback from the judiciary on the department's performance, with quarterly meetings between regional and area managers and local judges being common. He stated that the general manager of Probation and Offender Services, which incorporated the CPS and the Psychological Service, was largely responsible for managing the department's relationship with the judiciary at a national level. Mr Wales said that currently, the general manager met with the chief judges of the District and Youth Courts every two to three months. He provided a two-page document outlining

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31. Document A45, paras 1–2

32. Ibid, paras 5–6

33. Ibid, para 7

34. Document A45(b)

35. Document A45, para 8

36. Ibid, paras 9–10

37. Document A45(3); doc A45(e), para 5

38. Document A45, para 13

39. Ibid, para 14; doc A45(h)

## 5.2.4(2)

aspects of the use of ROC\*ROI that was tabled at a meeting between the then general manager of the CPS and executive judges in December 2001.<sup>40</sup>

In conclusion, Mr Wales commented that:

With the exception of the judgments of which the Tribunal is already aware, feedback from the judiciary has not indicated particular concern about ROC\*ROI or MACRNS. The main issues that have been raised with the Department were around delays caused by the introduction of IOM, particularly the length of time involved in undertaking the CNI assessment and preparation of pre-sentence reports, and the format of the reports. In some judges' views, more information is provided in the pre-sentence reports than is needed for sentencing offenders who have committed less serious crimes. The format of the reports was streamlined and simplified in 2002 in response to this feedback.<sup>41</sup>

**(2) ROC\*ROI and sentencing**

Departmental witnesses stated that the role ROC\*ROI played in assigning offenders to an in-depth CNI assessment was to guide resource allocation.<sup>42</sup> They emphasised that an offender's ROC\*ROI assessment was not provided to the judiciary:

There are no references in the operational manuals or training materials on CNI for ROC\*ROI to influence sentencing recommendations. Such statements of risk, if made at all in pre-sentence reports, are derived from the assessed needs not from the ROC\*ROI tool. The recommendations made by Probation Officers to assist the judiciary do not change the fact that the sentencing judge must decide what sentence to impose on an offender using all the criteria in the Sentencing Act 2002.<sup>43</sup>

Mr Riley stated that, along with assessed dynamic factors, a ROC\*ROI assessment of low, medium or high risk contributed to the CPS's overall statement of an offender's risk of reoffending, which was included in pre-sentence reports provided to the judiciary.<sup>44</sup> Having reviewed the 10 sentencing decisions<sup>45</sup> presented by claimant counsel, Mr Riley contended that 'they do not establish that descriptions of risk of reoffending reconviction in pre-sentence reports, whether derived from ROC\*ROI scores or not, lead to harsher sentences for Māori than non-Māori'.<sup>46</sup>

Indeed, Mr Riley maintained that the monitoring of sentencing patterns since the full-scale implementation of ROC\*ROI and the CNI indicated a small, but statistically significant,

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40. Document A45, paras 16–18

41. Ibid, para 19

42. Document A3, paras 29–30

43. Ibid, paras 30–31

44. Document A12(a), para 3

45. Paper 2.9, app A–J

46. Document A12(a), para 2

reduction in the rate of Māori offenders being sentenced to imprisonment in the two years following.<sup>47</sup> He acknowledged that there was no evidence that established unambiguously that the reduction in the rate of Māori being imprisoned was attributable to the ROC\*ROI or CNI assessments. However, Mr Riley stated, the reduction lent no support to the claimant's contention that the assessments had impacted negatively on the proportion of Māori who were sentenced to imprisonment.<sup>48</sup>

In closing, Crown counsel reiterated that the ROC\*ROI score was not used by a judge in sentencing an offender. Rather, it informed judgements by CPS staff about how detailed an assessment a particular offender would require, which would lead to a statement that the person was at low, medium, or high risk of reoffending.<sup>49</sup> Counsel submitted that:

The starting point in sentencing an offender is the maximum penalty for the offence prescribed in the legislation. Within that parameter, the task of the Sentencing Judge is to fix the appropriate penalty. In doing so the Judge is required to take into account the criteria in the Sentencing Act 2002, any other statutory criteria applicable to the particular offence, the aggravating and mitigating features relating to the offence or the offender, and any guidelines or 'tariff' set out in judgments of the Supreme Court and/or Court of Appeal for that particular type of offence. A Sentencing Judge has a number of sources of information to assist in this task, including the evidence established at trial and/or police summary of facts and a pre-sentence report. As is obvious, the task is an exercise in judgment that is not dissected into components.<sup>50</sup>

Crown counsel also submitted that there was no evidence suggesting that ROC\*ROI assessments were adversely affecting the length and type of sentences given to Māori offenders.<sup>51</sup> Finally, he replied to a point made by claimant counsel by submitting that he doubted that there was a policy document examining how ROC\*ROI related to the requirements of the Sentencing Act 2002, because 'policy must follow the law'. He added that departments took great care in this respect, given their wish to avoid judicial review.<sup>52</sup>

### 5.3 MACRNS

#### 5.3.1 Relevant research underpinning the macrns concepts

Ms Maynard stated that a dearth of national and international literature examining culture-related needs in a criminal justice setting explained the MACRNS developers' primary reliance,

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47. Document A5, para 58

48. Document A20, paras 25–27

49. Paper 2.36, para 145

50. Ibid, para 146

51. Ibid, para 245

52. Crown counsel, oral submission, 14 January 2004

in their *Whaia te Maramatanga II* report (see sec 3.7.3), on health and Māori profiles research.<sup>53</sup> However, she added, they did review evaluations of tikanga Māori based interventions, including the evaluation of the New Life Akoranga programme conducted in prisons by the Mahi Tahi Trust. These studies, she maintained, supported the notion that Māori offenders responded positively to tikanga or kaupapa Māori approaches to programme content and delivery. This was particularly so if such programmes addressed positive cultural identity and feeling safe and good about being Māori, assisted in positive whānau relationships and interactions, and promoted collective cultural needs.<sup>54</sup> Ms Maynard acknowledged that more research could have been undertaken by the macrns developers. However, she said, they did do some in-depth research, including examining Dr Cram's and Mr Jackson's work, and they also consulted with a panel of experts.<sup>55</sup>

In his submissions, Crown counsel stated that there was 'no pre-existing international or New Zealand assessment template for investigating cultural factors in relation to offending. As such, the macrns are groundbreaking in nature.'<sup>56</sup> Counsel maintained that, in developing macrns, the department had reviewed and critiqued relevant research by Māori academics, department staff, and health practitioners, including work by Mr Jackson, Professor Mason Durie, Dr Paul Hirini, Dame Joan Metge, and the Hoe Nuku Roa project authors. Counsel voiced the department's view that appropriate research and consideration of the theoretical issues did occur before the CNI, including macrns, was finalised.<sup>57</sup> He also submitted that the department considered the macrns tool to be still in its infancy, referring to it as 'a construct that will be confirmed or modified over time as further evidence of the tool's utility and effectiveness is gathered'.<sup>58</sup>

### 5.3.2 Adequate consultation on the macrns concepts

Ms Maynard said that some key Māori research experts and practitioners, both within and outside the department, were consulted on macrns (see sec 3.7.3).<sup>59</sup> Among the positive findings of the FREMO review of the CNI assessment tool was the involvement of Māori stakeholders in the development of macrns.<sup>60</sup> Ms Maynard acknowledged that there was no comprehensive consultation with the wider community, and she said that, in hindsight, she would have liked to have involved people like Mr Jackson, Dr Love, and Dr Cram. However, she said, the macrns developers were working with time and resource constraints, and wider consultation may not have changed the substance of the macrns constructs that were developed, a

53. Document A7, paras 29, 29.1–29.3, 37

54. Ibid, paras 37–38; doc A15(d)

55. Maynard, oral evidence, 16 December 2004

56. Paper 2.36, para 87

57. Paper 2.25, para 11; paper 2.36, para 54; transcript 4.1, p 3

58. Paper 2.36, para 251

59. Document A7, para 40

60. Document A15(j), para 23

point that was echoed by Dr Kingi in his evidence.<sup>61</sup> Ms Maynard also referred to the view of the department's Cultural Advisory Team; namely, that consultation with iwi on macRNS was not required.<sup>62</sup>

Crown counsel submitted that:

No process is perfect and time and resource constraints are always a reality. . . . However, the importance of involvement of key Māori staff should not be underestimated. . . . Consultation is often a matter on which more could have been done.<sup>63</sup>

Counsel conceded that greater consultation could have taken place, including with staff practitioners and experts, to enhance macRNS' construct validity. However, he submitted, it was questionable whether this would have provided additional data that would have led to significant modifications of the tool. More importantly, he explained that the department felt that extended consultation would have meant implementing the CNI without a component that addressed needs unique to Māori. Counsel maintained that this could have invited further criticism and had a negative impact on Māori.<sup>64</sup>

Counsel also referred to the department's view that general consultation with iwi on macRNS was not warranted.<sup>65</sup> Explaining this further, he stated that the macRNS concept was:

one aspect of the larger change process represented by IOM, and is about relatively detailed matters of administration rather than the setting of strategic direction or overall policy. As an assessment tool the CNI, including macRNS, is an internal mechanism to help the Department assess and (subsequently) treat offenders consistently/uniformly. This is not to rule out consultation about administrative matters but to indicate that in this instance the Department did not consider it would be better informed through having consulted tribes generically.<sup>66</sup>

### 5.3.3 The development of macRNS according to a kaupapa Māori framework

Ms Maynard stated that macRNS were developed according to a separate process, one based on Māori research methodologies, research, and expertise, that was consistent with a kaupapa Māori framework. She said that this was viewed as essential to maintaining macRNS' cultural integrity (see sec 3.7.3).<sup>67</sup> During the hearing, Dr Kingi maintained that the research process followed by the macRNS developers was consistent with a kaupapa Māori approach.<sup>68</sup>

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61. Document A10, para 27

62. Maynard, oral evidence, 16 December 2004

63. Paper 2.36, paras 61, 62

64. Ibid, paras 85–86

65. Ibid, para 55

66. Ibid, para 56

67. Document A7, paras 35, 40; doc A8, para 48; Maynard, oral evidence, 16 December 2004

68. Kingi, oral evidence, 16 December 2004

## 5.3.4

In closing, Crown counsel stated that the department did not consider that it was applying a kaupapa Māori framework as described by Dr Cram and Dr Love.<sup>69</sup> He also said that it was ‘unrealistic to suggest that a kaupapa Māori approach would only adopt a strengths-based approach because it implies there is a (revealed) single “kaupapa Māori” methodology’.<sup>70</sup>

In support, counsel referred to Dr Kingi’s evidence about kaupapa Māori approaches used in the mental health field, which suggested that both strengths and weaknesses were relevant to assessment processes.<sup>71</sup>

#### 5.3.4 Adequate testing of the macrns concepts

##### (1) *The pre-test, reliability test, and roll-out of macrns*

Dr Kingi stated that, although the department acknowledged that the pre-testing of the macrns question on 12 inmates was limited, it did utilise a number of accepted mechanisms to minimise threats to validity.<sup>72</sup> By this, we take him to be referring to the various presentations or published articles that detail macrns, and the methods of evaluation and trialling procedures undertaken during macrns’ development. Ms Maynard acknowledged that the macrns had to be ready for roll-out with the CNI within a relatively tight timeframe and that the designers had very little, if any, control over the implementation and roll-out phase.<sup>73</sup> She said that the department weighed up the risks of rolling macrns out when they had only face validity against the need to roll them out with the CNI. Ms Maynard would have been upset, she said, if the CNI had been rolled out without the macrns component, since then it would have been a purely Western model. At the time, she understood that a predictive validity study was pending. Ms Maynard acknowledged claimant counsel’s idea of rolling macrns out as a nationwide operational pilot for the purpose of data gathering and resource allocation but not for reporting in pre-sentence reports. She commented that this was ‘quite a good idea’, that in hindsight she would have liked to have done this, and that it was a ‘pity no one thought of it’.<sup>74</sup>

In response to other claimant criticisms of the limitations of the macrns’ testing, Dr Coebergh stated that the reliability pilot of the CNI and macrns on 30 inmates was large by international standards and showed a high degree of reliability.<sup>75</sup> He also contended that to test macrns on a non-Māori control group was more difficult than might appear because of issues surrounding the translatability of macrns’ content and mainstream Pākehā culture. As for Dr Cram’s idea of piloting macrns instead of rolling them out nationwide, Dr Coebergh

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69. Paper 2.36, para 49

70. Ibid, para 48

71. Ibid

72. Document A10, paras 20–26

73. Document A7, paras 34, 68

74. Maynard, oral evidence, 16 December 2004

75. Document A8, para 103; Coebergh, oral evidence, 15 December 2004

replied that a pilot study would not have provided the same amount of data and would have reduced the department's ability to get the necessary amount of information quickly enough to provide benefits to Māori offenders.<sup>76</sup>

Crown counsel summarised the department's position when he submitted that, 'in the assessed absence of risk and with the prospect of immediate benefit to offenders, there was sufficient validity to proceed to make operational the assessment tool'.<sup>77</sup> He also referred to the staged implementation of MACRNS throughout New Zealand as allowing for, in his words, an 'operational pilot process', which meant that 'feedback from the initial CPS assessment training and implementation [would lead] to improvements in the guidelines and training material'.<sup>78</sup>

## **(2) *MACRNS' construct validity***

A September 2001 departmental paper records that the reliability testing of MACRNS did not establish their validity:

The basis of the MACRNS is therefore a working hypothesis rather than a tested relationship. The MACRNS were tested for the inter-rater reliability, and results indicated that the concept could be measured reliably. However, the validity of MACRNS has not been tested. The MACRNS do need to be validated before the Department can feel confident of the appropriateness and utility of MACRNS.<sup>79</sup>

As to the reasons why MACRNS' validity had not yet been established, Dr Coebergh said:

Establishing the validity of the MACRNS requires more time and assessments than have been operationally undertaken to this point. The MACRNS are a ground-breaking and exploratory initiative and it was always recognised that their design was a starting point that would have to be thoroughly evaluated over time to support their validity and continual improvement.<sup>80</sup>

In response to the MACRNS review finding that MACRNS lacked construct validity, Dr Coebergh contended that the finding appeared to be based on the reviewers' antipathy towards integrating Western psychological and kaupapa Māori frameworks.<sup>81</sup> He also contended that the MACRNS review mixed the concepts of validity and drift, arguing that it was one thing to conclude that a construct lacks validity but another to conclude that a solid construct had drifted in its application.<sup>82</sup> While Dr Coebergh acknowledged that there had been

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76. Coebergh, oral evidence, 15–16 December 2004

77. Paper 2.36, para 92

78. Ibid, fn 37

79. Document A3, app B, app 1, para 5

80. Document A8, para 103

81. Ibid, paras 100.1–100.18

82. Ibid, app 2, para 27

no time to test the macRNs for construct validity before they were rolled out, he maintained nevertheless that they had some construct validity as a result of Ms Maynard's development process. He also contended that macRNs had good face validity.<sup>83</sup>

In closing submissions, Crown counsel summarised the evidence that he said supported macRNs having construct validity. First, macRNs were developed through research and consultation with a wide range of relevant parties.<sup>84</sup> Secondly, although not a test of validity, the positive results of the reliability study were 'a necessary first step in the investigation of validity. Without evidence of reliability no case for investigating validity exists.'<sup>85</sup> Thirdly, articles on macRNs had been published in two peer-reviewed journals.<sup>86</sup> Counsel also submitted that there was no clear consensus about the nature of construct validity or the standards by which it should be measured and that it was a judgement call rather than a precisely testable concept.<sup>87</sup>

### 5.3.5 Clarity surrounding what macRNs measure and the appropriate use of Māori culture

#### (1) *What macRNs measure*

In opening the Crown's case, counsel stated that macRNs were a 'working hypothesis of potential connections between criminogenic needs and cultural factors'.<sup>88</sup> He said the department maintained that macRNs were an important step in addressing the over-representation of Māori in the criminal justice system by exploring whether some offenders were disconnected from or had distorted views about Māori culture. It considered that any such people were most in need of available cultural interventions.<sup>89</sup>

When closing the Crown's case, counsel stated that the CNI assessed generic criminogenic needs for all offenders, while macRNs assessed the cultural dimension of the generic criminogenic needs (see sec 5.3.6).<sup>90</sup> More specifically, department witnesses maintained that macRNs attempted to measure the impact on Māori offenders today of acculturation, colonisation, urbanisation, and any associated negative perceptions about Māori culture.<sup>91</sup> Dr Coebergh explained that it was theorised that the consequences of acculturation over the last 150 years due to colonisation and urbanisation presented Māori with thoughts and feelings that were different to those of non-Māori, which might explain why rehabilitative interventions had

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83. Coebergh, oral evidence, 15 December 2004

84. Paper 2.36, para 77.1; transcript 4.1, p 6

85. Paper 2.36, para 77.2

86. Document A8, para 51; paper 2.36, para 77.3; transcript 4.1, p 7

87. Paper 2.36, paras 73–74; transcript 4.1, p 6

88. Paper 2.25, para 13

89. Ibid, paras 13–14

90. Ibid, para 83

91. Document A7, para 55; Maynard, oral evidence, 15 December 2004; doc A8, paras 57, 58

failed to adequately address the over-representation of Māori in the criminal justice system.<sup>92</sup> Thus, Mr Robson, Mr Riley, and Dr Bakker stated that macrns assumed that some Māori offenders had specific and unique cultural needs, characterised by their culture and its place in New Zealand society. They contended that a failure to recognise those needs could contribute to an inadequate assessment of Māori offenders' rehabilitative needs and responsivity factors. They argued further that, in order to identify and pursue interventions that more holistically addressed reoffending by Māori, assessment tools had to examine those cultural needs.<sup>93</sup> Ms Maynard maintained that evidence suggested that potential culture-related factors could assist with a better understanding of the types of interventions most likely to be effective for promoting behavioural change among Māori offenders.<sup>94</sup>

**(2) *macrns' applicability to other cultures***

Dr Coebergh noted that the cultural concepts and values underpinning macrns were sometimes shared with other cultures. However, he said, the assumption was that contemporary Māori were more likely to be affected by the breakdown of traditional cultural values than non-Māori New Zealanders, who were not subject to the deleterious effects of colonisation and so were not as susceptible to the associated consequences that macrns measured (with the possible exception of immigrants from other indigenous cultures that were historically subject to colonisation).<sup>95</sup> In summary, Crown counsel stated that 'The criminogenic needs assessed are generic to people. macrns assesses for cultural dimensions to those generic needs that are uniquely Māori and that may benefit from targeted rehabilitative treatment.'<sup>96</sup>

**(3) *macrns do not stigmatise Māori culture***

Mr Tawhiao commented that the department viewed Māori culture as an essential part of the solution for addressing offending, not as a problem causing offending. However, it recognised that, in acknowledging Māori culture as a key element in reducing criminal offending, there had been a tendency to suggest that there was a causal relationship between the two.<sup>97</sup> In his submissions, Crown counsel maintained that 'macrns do not stigmatise Māori culture but instead seek to use Māori culture in a pro-social way to address possible distorted interpretations of and disconnections from that culture'.<sup>98</sup>

Counsel contended that, with the exception of Mr Walker's criticisms of whānau-related macrns, neither claimant witnesses nor the review team had criticised the content of the

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92. Document A8, para 39

93. Document A3, paras 51–52

94. Document A7, para 7.4; Maynard, oral evidence, 15 December 2004

95. Document A8, paras 59, 104, 127

96. Paper 2.36, para 241

97. Document A6, para 30

98. Paper 2.36, para 229

**5.3.5(4)**

MACRNS constructs, suggested other cultural factors that MACRNS did not cover, made specific suggestions as to how MACRNS should be modified, or offered meaningful alternatives to MACRNS.<sup>99</sup>

**(4) *MACRNS' focus on deficits***

Dr Coebergh stated that the approach taken by the PCC focused on deficits rather than strengths. He said that this emphasis:

has the practical purpose of identifying factors, or indeed the absence of factors, which contribute to offending. Mixing the focus at assessment so that strengths and deficits are blurred runs the risk of missing the key issues that constantly pull an individual back to offending.<sup>100</sup>

Dr Coebergh stated that, no matter what an offender's strengths were, they did not stop him or her from offending. Also, he said, once criminogenic needs were identified, a treatment provider could assess those of an offender's strengths that might assist in treating deficits.<sup>101</sup>

In closing, Crown counsel reiterated Dr Coebergh's evidence that assessing deficits in a corrections environment was critical to making decisions about how to intervene appropriately with offenders.<sup>102</sup> He further highlighted how Dr Coebergh and Ms Mackie had maintained that the assessment of an offender's strengths was also important in making decisions about appropriate interventions and that such an assessment did occur in the overall CNI assessment process by the CPS before a pre-sentence report was filed with the court.<sup>103</sup> Counsel stated that any strengths that might assist with rehabilitation should be reported in the pre-sentence report, as was illustrated by several of the random sample of 30 anonymous pre-sentence reports submitted in evidence by the Crown at the Tribunal's request (see sec 5.3.12).<sup>104</sup>

**5.3.6 The appropriate integration of MACRNS into the CNI**

Ms Maynard said that a cautious approach was taken to integrating MACRNS into the CNI because there was some uncertainty as to whether integration could be achieved without compromising the integrity, focus, and value of the MACRNS.<sup>105</sup> However, she and Dr Coebergh were confident that MACRNS could be, and had been, integrated into the CNI without such compromise.<sup>106</sup> An advantage of integration that departmental witnesses emphasised was that MACRNS could not be perceived as a 'tack-on' to, but gained comparable status with,

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99. Paper 2.36, para 80

100. Document A8, para 23

101. Ibid; Coebergh, oral evidence, 15 December 2004

102. Coebergh, oral evidence, 15–16 December 2004

103. Ibid; Mackie, oral evidence, 15 December 2004

104. Paper 2.36, paras 36–38

105. Document A7, para 48

106. Coebergh, oral evidence, 15–16 December 2004; Maynard, oral evidence, 15–16 December 2004

criminogenic needs.<sup>107</sup> Ms Mackie added that the CNI and MACRNS integration also demonstrated that the department expected its staff to obtain cultural competency to administer MACRNS and to recognise the value of Māori culture in the treatment of offenders.<sup>108</sup>

Dr Kingi submitted that the integration of MACRNS into the CNI was complex, with cultural, technical, philosophical, and logistical implications.<sup>109</sup> He maintained that the prime issue of contention concerned the appropriateness of integrating cultural questions or perspectives within a Western philosophical framework. He said that questions also surrounded the appropriateness of linking an instrument designed to identify cultural deficits to a tool that considered criminogenic need. However, he noted several examples in the health and education fields, as well as the MFUS in the corrections sector, that illustrated that cultural concepts could be successfully integrated, both conceptually and methodologically, into a Western psychological model without having their cultural integrity compromised.<sup>110</sup> During the hearing, Dr Coebergh contended that the idea that Western scientific models were incompatible with kaupapa Māori frameworks ran counter to the available evidence, including the evaluation of the Te Piriti programme.<sup>111</sup> This found that a blended approach using cognitive behavioural therapy and kaupapa Māori was more effective at reducing reoffending by Māori (and non-Māori) than a comparable programme with less of a kaupapa Māori emphasis.<sup>112</sup> Mr Riley stated that the department had a limited amount of information on bicultural approaches to offender rehabilitation. He commented that Te Piriti was set up at ministerial request in 1994, as the northern counterpart to the proven programme operating in Christchurch. Because of the need to respond to a comparatively larger Māori population in the region, planners had, 'on faith,' bedded in a real appreciation for Māoritanga into the management and running of the Te Piriti Centre. Mr Riley said that they had only recently gathered enough reliable data on the programme, but that this had demonstrated its benefits, including reduced costs in terms of reoffending.<sup>113</sup> Crown counsel also stated that Te Piriti was 'certainly the best evidence' in terms of sustained results of a bicultural approach.<sup>114</sup>

In closing submissions, counsel submitted that:

The Department's attempt to align or integrate the MACRNS assessment alongside the criminogenic needs assessment within the overall CNI assessment tool is another practical demonstration that it is prepared to act to try to combine approaches to be more effective for Māori.<sup>115</sup>

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107. Document A8, paras 36, 37

108. Mackie, oral evidence, 15 December 2004

109. Document A10, para 44

110. Ibid, paras 52, 56–68

111. Coebergh, oral evidence, 15 December 2004

112. Lavinia Nathan, Nick Wilson, and David Hillman, *Te Whakakotahitanga: An Evaluation of the Te Piriti Special Treatment Programme for Child Sex Offenders in NZ* (Wellington: Department of Corrections, 2003)

113. Riley, oral evidence, 15 December 2004

114. Crown counsel, oral submission, 14 January 2005

115. Paper 2.36, para 46

Counsel also stated that administering the macRNs separately from the CNI would create practical difficulties in expanding the offence chain to reflect cultural factors. He said that it would also require extra interview time for the separate set of questions, which would be impractical in the pre-sentence context without seeking further remand time. Counsel commented that the judiciary was unlikely to grant this during periods of greater volume through the courts.<sup>116</sup>

### 5.3.7 The nature of the relationship between macRNs, offending, and criminogenic needs

#### (1) *macRNs as cultural dimensions of criminogenic needs*

Dr Coebergh stated that macRNs attempted to measure offender behaviour indicative of any distortions about Māori cultural values and beliefs resulting from the long-term effects of acculturation (see sec 5.3.4).<sup>117</sup> He commented that macRNs:

provide an additional cultural dimension to the assessment process. It is assumed that targeting criminogenic needs for offenders who identify as Māori will be more successful if culture-related needs are also assessed and addressed in treatment by appropriate Māori providers.<sup>118</sup>

Dr Coebergh added that ‘macRNs are not conceptualised as criminogenic needs but culture-related needs that, if ignored, could reduce the effectiveness of treatment’.<sup>119</sup> Further clarifying this, he maintained that:

... Māori and non-Māori have the same criminogenic needs but offending by some Māori may have a cultural dimension that differs from that of non-Māori. If this is the case, then treatment that ignores this dimension (described by the CNI as Māori culture-related needs) risk not properly assisting Māori offenders to identify all the relevant aspects of a problem behaviour and all of the relevant strategies for managing it.<sup>120</sup>

Dr Coebergh also said that the notion of a different cultural dimension of a criminogenic need seemed consistent with two things: first, that Māori have traditional values and practices that are different from Western ones and, secondly, that Māori have unique historical experiences relating to colonisation, the contemporary effects of which macRNs attempted to measure.<sup>121</sup> He commented that the department was ‘prepared to assume that a relationship

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116. Paper 2.36, para 44

117. Document A8, paras 57–58

118. Ibid, para 61

119. Ibid, para 108

120. Document A21, para 16

121. Ibid, paras 17–18

exists between MACRNS as a measure of Māori cultural needs deficits and offending by some Māori'.<sup>122</sup>

During the hearing, Dr Coebergh acknowledged that the developmental work on MACRNS did conceptualise MACRNS as additional culture-related criminogenic needs. However, he said that during what he referred to as the 'piloting' of the CNI, the department came to conceptualise MACRNS as the cultural dimension of a generic criminogenic need. He commented that MACRNS were not additional or stand-alone criminogenic needs and that you could not have a MACRN without a corresponding criminogenic need. Rather, MACRNS were designed to give a fuller description and explanation of criminogenic needs assessed by the CNI.<sup>123</sup>

In opening submissions, Crown counsel stated that the department viewed MACRNS as 'experimental and a working hypothesis of potential connections between criminogenic needs and cultural factors'.<sup>124</sup> In closing, counsel said that the CNI assessed generic criminogenic needs for all offenders, while MACRNS assessed the cultural dimension of the generic criminogenic needs.<sup>125</sup> Referring to a newly compiled document appended to his closing submissions, counsel outlined the relationship between each MACRN and its corresponding criminogenic need,<sup>126</sup> which, he said, provided real assistance in understanding how MACRNS were cultural dimensions of criminogenic needs.<sup>127</sup> Counsel contended that it was because of weaknesses in departmental written evidence that the appendix setting out those relationships had to be compiled. However, he said, the link between MACRNS and related criminogenic needs was made in Dr Coebergh's and Ms Maynard's presentation during the hearing. While he accepted that this link was not explained in MACRNS training manuals, counsel said that it did not mean that staff were not trained in using MACRNS in that way.<sup>128</sup>

## **(2) *Confusion as to whether MACRNS are criminogenic needs***

Ms Maynard stated that MACRNS attempted to measure the impact of socio-historical processes on Māori offenders today, theorising that a lack of both cultural pride and knowledge of whakapapa was related to a greater chance of reconviction (see sec 5.3.4).<sup>129</sup> During the hearing, she maintained that any such cultural factors were conceptualised as responsivity issues surrounding offending and not as criminogenic needs. However, she acknowledged that she had difficulty with the distinction between criminogenic and non-criminogenic needs, commenting that some cultural factors might be criminogenic needs and some might not be. She added that MACRNS were conceptualised as the cultural dimension of a generic

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122. Ibid, para 19

123. Coebergh, oral evidence, 15 December 2004

124. Paper 2.25, para 13

125. Paper 2.36, para 83

126. Ibid, paras 22–24

127. Transcript 4.1, p 5

128. Ibid, p 4

129. Document A7, paras 55, 58; Maynard, oral evidence, 15 December 2004

## 5.3.7(2)

criminogenic need.<sup>130</sup> Ms Maynard also commented that she did not find the labels ‘criminogenic needs’ and ‘non-criminogenic needs’ very helpful, that they ‘grated’ with her as a Māori, and that the reason that Dr Coebergh did not refer consistently to MACRNs as potential criminogenic needs was because of her discomfort with that terminology. Nevertheless, Ms Maynard said that it was always clear that they were looking at factors that related to offending and that MACRNs described factors that were potentially linked to offending. She acknowledged that the labels used and the way in which the MACRNs’ developers had described the factors was difficult to understand and that she could see how people were confused about whether MACRNs were criminogenic needs or not.<sup>131</sup> In closing, Crown counsel summarised that, although Ms Maynard felt some discomfort with the labels used, she was comfortable with the content of the MACRNs constructs.<sup>132</sup>

Dr Coebergh acknowledged the confusion surrounding whether MACRNs were criminogenic needs or not, commenting that:

the inclusion of the MACRNs in a tool called the CNI has served to confuse some people who make the (not unreasonable but mistaken) assumption that MACRNs are considered to be criminogenic. In hindsight, it may have been better to call the overall assessment something other than the Criminogenic Needs Inventory. The term ‘cultural anchors’ as suggested as an alternative [to] Māori culture-related needs by Moana Jackson has considerable merit. At the time however, the overriding aim was to produce a single, integrated approach to assessment that was responsive to the needs and issues reflected in a significant number of offenders with whom the tool would be used: Māori.<sup>133</sup>

During the hearing, Dr Coebergh commented that the use of the word ‘criminogenic’ near the word ‘culture’ created problems and that, to avoid misunderstanding, emphasis was placed on culture-related needs. He said that in hindsight this was not a good strategy and that it ‘added to the confusion’.<sup>134</sup>

Crown counsel submitted that the confusion about whether MACRNs were criminogenic needs or not was difficult to avoid, given their exploratory nature. He also maintained that confusion may have arisen from describing MACRNs as ‘potentially’ criminogenic, but that this language should not be criticised because a causal link had not been established. However, the department acknowledged that it had not been entirely successful in conveying the essence of MACRNs to employees and some stakeholders and that MACRNs needed to be

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130. Maynard, oral evidence, 15 December 2004

131. Ibid

132. Paper 2.36, para 29

133. Document A8, para 38

134. Coebergh, oral evidence, 15 December 2004. In an email of September 2002, Dr Coebergh stated, ‘I think the best way of capturing the CNI’s definition of MACRNs is to describe them as the Māori cultural dimension of criminogenic needs that if ignored could make treatment less effective’ (doc A43).

better communicated.<sup>135</sup> Counsel submitted that the point of the Tribunal's inquiry was to decide not whether MACRNS were criminogenic needs or not but whether they were useful and complied with the Treaty of Waitangi. Counsel stated that, regardless of whether MACRNS were criminogenic needs or cultural dimensions of criminogenic needs, neither understanding assumed that Māori culture caused crime. Put simply, he said, MACRNS were based on the hypothesis that it was 'the *absence* of culture that can help explain offending by Māori' (emphasis in original).<sup>136</sup>

### 5.3.8 The adequacy of the MACRNS training

#### (1) *Training the MACRNS trainers*

Dr Coebergh was responsible for designing the non-MACRNS component of the CNI training. In this role, he worked with Terry Huriwai, the Māori probation officer involved in the development of MACRNS, to ensure that Māori processes and protocol were incorporated into the MACRNS training. Dr Coebergh said that, during the CNI and MACRNS training, trainers were paired with someone who specialised in MACRNS, thus ensuring that cultural and scientific integrity were maintained during the training. During the training, he and Mr Huriwai provided supervision to the trainers and their supervisors via telephone calls and emails, the latter being sent to all trainers and their supervisors to promote consistency of practice. When Mr Huriwai left the department, Malcolm Robson replaced him.<sup>137</sup>

Mr Robson, a specialist Māori cultural trainer responsible for delivering training on the CNI and MACRNS assessments, was trained over three weeks in early 2000. He said that MACRNS trainers were taken through the training material to enable them to identify issues that might arise for employees who were undertaking the training. Mr Robson said that the trainers developed their facilitation and delivery skills, and their knowledge of the CNI and MACRNS, through practising operational assessments, which increased their understanding of how to apply the tools across offenders and offence types. He also said the training emphasised that trainers would be required to discuss, from a Māori perspective and in a confident and competent way, issues that may arise from the inclusion of MACRNS in the CNI. This was especially important, Mr Robson commented, because most of the staff being trained were non-Māori. He said that trainers were also required to adhere to the training format, including the clear modelling of tikanga and te reo. Mr Robson maintained that the training manuals, which were provided to participants with a cultural resource manual, clearly outlined the processes and content that MACRNS trainers were to follow.<sup>138</sup>

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135. Paper 2.36, paras 27–28

136. Ibid, paras 30–31

137. Document A8, paras 75, 77, 79

138. Document A11, paras 22–28

## 5.3.8(2)

**(2) *Training the macrns assessors***

The purpose of macrns assessors' training, Mr Robson said, was to ensure that all the participants, who were mainly CPS employees, understood the philosophy behind the assessment tools, as well as their format and process. Participants were trained in how to conduct an interview and complete an assessment, pre-sentence report, and sentence planning indicator, and in how the CNI and macrns assessments contributed to decisions surrounding responsiveness, motivation, and referral to programmes. Participants were also schooled in how to use the IOM computer system, within which reports were written.<sup>139</sup> Mr Robson said that, at the end of the training, trainers were required to confirm whether participants demonstrated an understanding of the training material and could complete reports to the required minimum standard. If this was not the case, a report was sent to the participant's line manager, outlining the support that person needed at his or her local area office. He said that participants were informed that every effort would be made for a psychologist supervisor to assist them in preparing for their first assessment and to attend and give them feedback on it. Mr Robson commented that psychologist supervisors would either check this assessment with a cultural supervisor or refer the assessor to the supervisor.<sup>140</sup>

Mr Robson stated that the trainers reviewed their training sessions throughout the day, and at the end of the day they had a 'final round' where each participant was asked for his or her views of the day and was given the opportunity to ask further questions. He said that trainers would then usually have a debrief and review any issues that had arisen during the day, consider how to deal with them, and prepare for the next day's training.<sup>141</sup> With regard to the 'waka journey', Mr Robson said that it was an experiential exercise, central to understanding macrns, that enabled participants to explore concepts such as whānaungatanga, identity, whakapapa, iwi, whānau, and hapū. He said that staff who did not actively participate in this exercise were generally unable to understand and identify macrns. He also said that the waka journey explained that macrns incorporated a traditional perspective, that Māori offenders had some specific and unique needs characterised by their culture and the place of that culture in New Zealand society, and that, while macrns were administered only to Māori, some of the constructs could be identified in other peoples.<sup>142</sup> Mr Robson estimated that fewer than 5 per cent of approximately 500 people he had trained found the waka journey to be a 'pleasant outdoor exercise', while 90 per cent found it to be helpful.<sup>143</sup>

Mr Robson said that, during the training, issues sometimes arose that required the trainers to refer back to the national office for advice. He maintained that these issues were generally about the process rather than the content of the training, but he admitted that the department

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139. Document A11, paras 29, 33–35, 44–45

140. Ibid, paras 46–49

141. Ibid, paras 54–56

142. Ibid, paras 58–62, 65–68

143. Robson, oral evidence, 16 December 2004

had underestimated the extent of opposition from operational staff to the new assessments, which contributed to and reinforced employees' misunderstandings about macRNs.<sup>144</sup> He acknowledged that the training communicating macRNs' purpose and use could have been improved, and he attributed the resistance to the training shown by some course participants, including Mr Hemopo, to their belief that macRNs were detrimental to Māori offenders.<sup>145</sup> He said that this meant that the trainers became the 'meat in the sandwich', ostensibly becoming responsible for 'managing change' and bearing the brunt of participants' frustration and anger at wider change processes occurring within the department.<sup>146</sup> However, Mr Robson believed that only a small percentage of course participants were unhappy about the change process and the new assessment tools. Most of the resistance, he said, was addressed during the training, and overall feedback on the course showed that, despite initial resistance, it was a positive experience, especially for newer staff.<sup>147</sup>

Mr Robson said that there was a connection, especially among staff in Auckland, between some of the concerns about wider change in the department and training that had been conducted quite recently on the LSI-R assessment tool. Mr Robson described that training as 'abusive', and referred to the fact that participants had been assessed as passing or failing the training. This had a flow-on effect, he said, for some people during the macRNs training who mistakenly believed that it was connected to the earlier training in content or style.<sup>148</sup> Mr Robson reiterated that the attitudes of Messrs Hemopo and Balfour towards training were not representative of course participants, that no major issues were raised about macRNs, and that participants were quite positive about the training. He disagreed with Mr Balfour that a trainer lost her temper, commenting that the trainer reiterated that the training was compulsory and that failure to complete it could result in disciplinary action. Mr Robson also disagreed that the trainers were unable to explain the macRNs constructs and said that they were not annoyed at being asked questions but felt that constant questioning was interrupting the training. Mr Robson also stated that participants were told that macRNs could potentially identify offenders who were culturally disconnected.<sup>149</sup>

Mr Robson did not recall advising participants undertaking macRNs training that they could not discuss the purpose of macRNs questions. He commented that the macRNs screening questions were to be asked in a respectful manner, as written, and that no discussion was to be entered into at that point in order to establish a rapport with the offender and because the assessment process takes time. However, Mr Robson said, nothing prevented assessors from entering into a discussion as to why the questions were being asked and, during the macRNs training, it was suggested to participants that they could discuss the issue at the end

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144. Document A11, para 72

145. Ibid, paras 6.3, 87–88

146. Ibid, paras 73–74

147. Ibid, para 77

148. Robson, oral evidence, 16 December 2004; see also paper 2.36, fn 38

149. Robson, oral evidence, 16 December 2004

of the assessment.<sup>150</sup> Similarly, Ms Mackie said that the process was not about withholding information and that, if they asked, offenders were informed of the reasons for the macRNs assessment. Regarding the training video's instruction that the macRNs screening questions were asked in order to check information on an offender's file, she commented that it was important to check any assumptions that may be contained in file information.<sup>151</sup> Dr Coebergh stated that the first time he realised there was a fault in the training video, in that it said that an offender's file information was being checked, was when it was mentioned at the hearing. He acknowledged that the video may give the wrong impression in this respect, but said later in the hearing that the department had circulated a memorandum clarifying this issue.<sup>152</sup>

### 5.3.9 The proper, consistent, and increasing use of macRNs by the cps and the pps

#### (1) *The proper use of macRNs screening questions*

The macRNs review found that most Māori staff and just over 50 per cent of non-Māori staff were comfortable asking the macRNs screening questions, while 25 per cent of non-Māori staff reported feeling uncomfortable asking the questions.<sup>153</sup> Ms Mackie said that the department expected all employees to attain competency at administering the macRNs screening questions in a constructive way.<sup>154</sup> Mr Tawhiao commented that it was preferable to ask an offender about his or her ethnicity in a direct manner than to skirt a difficult question or to make assumptions about that person's ethnicity.<sup>155</sup> Several departmental witnesses commented that offenders did not hesitate to answer the macRNs screening questions.<sup>156</sup>

Dr Coebergh said that he was not aware of any concerns about informed consent until they were raised at the hearing. He said that the department wanted to be open about the assessment process but did not want to influence the process by giving offenders too much information. This was standard clinical assessment practice, he said, which was particularly important in a pre-sentence setting where offenders might modify their responses to gain a more favourable assessment, and thus sentencing outcome.<sup>157</sup> Crown counsel reiterated this in closing submissions but acknowledged that the staff training video might give a misleading impression that the rationale for the assessment could not be discussed with the offender.<sup>158</sup> As a result, the department had instructed supervisors and trainers to tell assessors that, if

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150. Robson, oral evidence, 16 December 2004

151. Mackie, oral evidence, 15 December 2004

152. Coebergh, oral evidence, 15 December 2004

153. Document A4, app B, p 21

154. Mackie, oral evidence, 15 December 2004

155. Tawhiao, oral evidence, 14 December 2004

156. Ibid; Maynard, oral evidence, 15 December 2004; Coebergh, oral evidence, 15 December 2004; Robson, oral evidence, 16 December 2004

157. Coebergh, oral evidence, 15 December 2004

158. Paper 2.36, paras 99, 100

offenders asked about the reasons for the assessment, then a statement such as the following would communicate that it could be discussed at the end of the assessment:

We consider a number of things when doing this assessment including whether someone identifies as Māori or not. At this point it is necessary for me to continue stepping you through the assessment but once the assessment is completed I'm happy to discuss with you the reasons for these questions.<sup>159</sup>

Crown counsel stated that this maintained offender engagement in a respectful way without risking offenders modifying their responses because of information received about the assessment process before its completion.<sup>160</sup>

**(2) *The proper and increasing use of mācrns***

Dr Coebergh stated that the mācrns assessment tool was being properly applied by staff, most of whom were non-Māori and had no academic or professional background in psychological or Māori cultural assessment.<sup>161</sup> Ms Mackie's evidence revealed that, to date, few Māori offenders had been assessed as having mācrns. Within the cps:

- ▶ 74 per cent of Māori offenders had been assessed as having no mācrns;
- ▶ 12 per cent had been assessed as having one mācrn;
- ▶ 10 per cent had been assessed as having two mācrns; and
- ▶ the remaining 4 per cent had been assessed as having between three and seven mācrns.

Within the pps:

- ▶ 46 per cent of Māori offenders had been assessed as having no mācrns;
- ▶ 18 per cent had been assessed as having one mācrn;
- ▶ 19 per cent had been assessed as having two mācrns;
- ▶ 9 per cent had been assessed as having three mācrns;
- ▶ 5 per cent had been assessed as having four mācrns; and
- ▶ the remaining 3 per cent were assessed as having between five and seven mācrns (see sec 3.7.7).<sup>162</sup>

Ms Mackie said that the department had made no assumptions about how many Māori offenders would be identified with mācrns but estimated that perhaps 25 per cent of Māori offenders would be.<sup>163</sup> Crown counsel commented that, as would be expected, most offenders who were assessed did not disclose possible vulnerabilities about, disconnection from, or distorted views of, Māori culture.<sup>164</sup>

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159. Ibid, para 101

160. Ibid

161. Coebergh, oral evidence, 15 December 2004

162. Document A13(a), pp 2–3

163. Mackie, oral evidence, 15 December 2004

164. Paper 2.25, para 15

Ms Mackie also commented that Psychological Service monitoring of CNI and maCRNS assessments revealed that compliance in administering the assessments had improved remarkably and that non-compliance was not a big issue.<sup>165</sup> Dr Coebergh said that the monitoring indicated that compliance was improving on all maCRNS items monitored: namely, the completion of screening questions, the accurate recording of maCRNS, the evidencing of maCRNS in the offence chain, and the provision of evidence with regard to each maCRN to support the assessment of an offender's motivation to change.<sup>166</sup>

Mr Tawhiao acknowledged that a particular shortcoming was the lack of best possible support for the large-scale implementation and management of issues as they arose during maCRNS' implementation.<sup>167</sup> Dr Coebergh also acknowledged that there had been issues in the field regarding the use of maCRNS, including lower levels of compliance in using the maCRNS screening questions, but he considered that these were due to operational and implementation factors rather than because the maCRNS themselves were flawed. The department, he said, believed that these issues were likely to arise whatever strategy was developed to address offending by Māori, and he stated that improved training, supervision, management oversight, communication, and employee support were required, as had been outlined in Mr Tawhiao's evidence examining how the department planned to improve the implementation of maCRNS.<sup>168</sup>

#### 5.3.10 maCRNS and available interventions for Māori offenders

According to department witnesses, ROC\*ROI ensured that high-risk offenders got an in-depth assessment of their needs, through the CNI and maCRNS assessments, which in turn ensured that they received the right programmes.<sup>169</sup> Mr Riley stated that the CNI assessment, including maCRNS, assessed 'the degree to which any given individual presents with treatment needs, the severity of those treatment needs, and responsivity barriers which may exist in relation to how those needs may be addressed'.<sup>170</sup> Mr Tawhiao emphasised the importance of acknowledging that there was no 'one size fits all' solution.<sup>171</sup> He described ROC\*ROI as ensuring that the right people were selected for treatment, and maCRNS as ensuring that the right person received the right intervention.<sup>172</sup> Mr Tawhiao said that probation officers and sentence planners used information gathered from the maCRNS assessment to plan for interventions for inmates and other offenders (see sec 3.7.7).<sup>173</sup>

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165. Mackie, oral evidence, 15 December 2004

166. Document A8, app 2, para 38

167. Document A6, para 63

168. Document A8, app 2, para 35

169. Document A5, paras 55–58; doc A3, para 18

170. Document A5, para 56

171. Document A6, para 25; Tawhiao, oral evidence, 14 December 2004

172. Document A6, para 26

173. Ibid, para 32; doc A13, paras 30–35

Mr Tawhiao contended that the development of macRNs informed many of the interventions that had been developed specifically for Māori offenders.<sup>174</sup> Had it not been for macRNs' conceptual focus on Māori culture as an agent for positive change, he said, it was likely that the subsequent development of tikanga-based interventions would not have occurred. He expressed concern that, if macRNs were found to be culturally invalid, such interventions targeting Māori might be compromised. While acknowledging that the TMP concept predated macRNs, Mr Tawhiao said that the programme had become systematised since the development of macRNs. He commented that, while those programmes were not designed in response to macRNs, they did respond to macRNs.<sup>175</sup>

Ms Mackie explained that in the PPS the supply of programmes under the Māori interventions pathway currently exceeded demand. She added that she was disappointed with the number of CPS offenders who had attended TMPs but fully expected this to improve the next year. Ms Mackie commented that a lot depended on how an offender's sentence meshed with the timing and location of the programmes.<sup>176</sup> Dr Coebergh later added that PPS offenders needed to be motivated to change and to overcome any barriers to responsivity, and that the key reason for lower attendance on the programmes pertained to offender motivation. He also said that TMPs were often undertaken at the end of sentences so that offenders could take any lessons learnt with them as they departed. Finally, Crown counsel stated that the fact that there were fewer referrals than programmes on offer in the PPS was not a fault of the macRNs assessment tool but did point to the need for better management of the links between an offender's needs and sentence planning.<sup>177</sup> Because of this situation, Mr Tawhiao said that current business rules did not require macRNs as a prerequisite for entry to programmes in the Māori interventions pathway.<sup>178</sup>

Mr Tawhiao said that it could take time to implement new interventions properly in a large operational system and that there were invariably teething problems turning policy into practice. He stated that the majority of interventions that currently targeted Māori offenders were established following the creation of the Cultural Perspectives Unit in 1995. Looking back, he said that the department's capacity to generate new interventions over that time had outstripped its ability to successfully implement many of them. Mr Tawhiao commented that, in part, this might have led to some of the difficulties experienced with macRNs. However, he stated that over the last seven years the department had made significant progress in developing policies and interventions that were more effective with Māori offenders, and that this was beginning to be reflected in the reduction of the numbers of Māori offenders returning to the corrections system.<sup>179</sup>

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174. Document A6, para 39

175. Tawhiao, oral evidence, 14 December 2004

176. Mackie, oral evidence, 15 December 2004

177. Crown counsel, oral submission, 14 January 2005

178. Tawhiao, oral evidence, 14 December 2004

179. Document A6, paras 41, 65; doc A38, para 15

**5.3.11 The macrns review and the ongoing evaluation of macrns**

Dr Coebergh stated that in 2003 the department had commissioned a review of macrns in order to examine their construct and predictive validity and their usage in the field. However, it thought that the resultant draft report was conceptually and methodologically flawed.<sup>180</sup> A departmental memorandum dated 27 November 2003 stated that the review did not clearly address the factors that were the focus of the review and that, given the pervasive poor quality and lack of accuracy of the draft report and the scale of change that would be required, it was not practicable to finalise it.<sup>181</sup>

Ms Maynard's key concerns with the draft report were that:

- ▶ the research method did not generate sufficient or robust data to assess the utility of macrns;
- ▶ the analysis was confusing, at times contradictory, and the conclusions appeared to be based on selective aspects of the research;
- ▶ many of the reviewers' negative findings about the utility of macrns were largely derived from what appear to be process, practice, and system limitations and perception issues; and
- ▶ it did not offer any meaningful improvements or alternatives to macrns or suggest a reasonable way forward.<sup>182</sup>

Dr Coebergh said that the results of the predictive validity study of macrns that was commissioned by the department as part of the review were qualified because of problems with the iom database. However, the study indicated a statistically significant relationship between risk of reoffending and certain macrns.<sup>183</sup> In closing, Crown counsel noted that the department was currently working on problems with the iom database and intended to undertake the predictive validity study in this financial year. He said that this would be an important contribution to evaluating construct validity. Crown counsel also submitted that the department's willing participation in the Tribunal's inquiry had contributed to the ongoing evaluation of macrns.<sup>184</sup>

**5.3.12 Information for the judiciary and the limited and non-prejudicial influence of macrns on the sentencing process****(1) Information provided to the judiciary**

Ms Maynard stated that the macrns developers had advised the department to develop guidelines for the writing-up of macrns in pre-sentence reports for the judiciary, parole

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180. Document A8, paras 98–99

181. Document A4, app H

182. Document A7, para 69.3; doc A15(n)

183. Coebergh, oral evidence, 15 December 2004

184. Paper 2.36, paras 66.1, 66.3; transcript 4.1, p 9

boards, and district prison boards in order to ensure 'that these bodies understand that the macRNs were to be treated differently from criminogenic needs and that they were assessed to help identify the type of intervention most effective for the individual'.<sup>185</sup>

David Wales, of the Psychological Service, collaborated with other parts of the department to develop information on IOM, including the CNI and macRNs, for the judiciary and other stakeholders.<sup>186</sup> The information given to the judiciary on macRNs is summarised below.

- ▶ In March 2000, the department prepared an outline of the CNI for the judiciary and parole boards, which included a brief discussion of macRNs.<sup>187</sup>
- ▶ In January 2001, Mr Wales sought and received approval for an IOM judiciary stakeholder management plan outlining a communications strategy involving presentations to and meetings with the judiciary about IOM.<sup>188</sup>
- ▶ During the implementation of the IOM's assessment phase, the judiciary in each region was given a presentation on IOM, including an outline of the CNI and macRNs assessment processes, by senior managers of the CPS and PPS and the principal psychologist in the area.<sup>189</sup> The judges were also given the booklet *Integrated Offender Management – An Explanation*, which included definitional information about macRNs, and IOM information packs, which included a sample level 1 (low risk) pre-sentence report.<sup>190</sup>
- ▶ The February 2001 issue of *Judges' Update* briefly discussed the CNI.<sup>191</sup> Although this publication has not yet discussed macRNs, this is a definite possibility for the future. Mr Wales noted that the May 2004 issue discussed enhancements to the CPS's offender intervention referral process and was accompanied by a CPS flowchart.<sup>192</sup> The flowchart was used by staff when referring offenders to interventions and showed how macRNs were incorporated into the intervention referral process.<sup>193</sup>

## **(2) The limited influence of macRNs on sentencing**

In response to the concern that the judiciary might judge Māori offenders as higher risk because they had more needs assessed than non-Māori, Dr Coebergh and Ms Maynard said:

This is a concern that was addressed by the IOM project in consultation with the Cultural Advisory Team. It was decided that reports to the judiciary that identified assessed needs had to separate out the description of criminogenic needs (or key factors) from those of macRNs.

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185. Document A7, para 68.6

186. Document A45, paras 1–2

187. Ibid, para 7; doc A45(b)

188. Document A45, para 8

189. Ibid, paras 9–10; doc A45(d)

190. Document A45, paras 11, 12; doc A45(e), paras 9, 17, 23; docs A45(f), (g)

191. Document A45, para 14; doc A45(h)

192. Document A45(i)

193. Document A45, para 15; doc A45(j)

## 5.3.12(2)

In addition, set text would populate the macrns section of pre-sentence reports that emphasised that they were not criminogenic needs but the cultural dimension that should be taken into account when considering how to best intervene with some offenders.<sup>194</sup>

Dr Coebergh maintained that, for judges to conclude that Māori with macrns were more serious offenders than Māori without macrns, or than non-Māori, macrns needed to be interpreted as being the same as criminogenic needs. However, he stated, pre-sentence reports specifically separated out the assessment section, which describes CNI-assessed criminogenic needs, from the 'social factors' section, which describes non-criminogenic factors, including assessed macrns. Moreover, Dr Coebergh said, when reporting macrns, staff were instructed to use a set statement clarifying that macrns provided useful information for identifying the most appropriate interventions for Māori offenders assessed with them. In this way, macrns were explicitly presented as being different from criminogenic needs in pre-sentence reports and this separation was introduced to reduce the risk of macrns being inadvertently judged as additional criminogenic needs.<sup>195</sup> Dr Coebergh maintained that, if they were understood as a cultural dimension of a criminogenic need, macrns did not subject Māori offenders to 'double jeopardy'.<sup>196</sup> Further, he contended that reporting macrns in the 'social factors' section of the pre-sentence report was a reporting convention, but where macrns were described had no direct bearing on an offender's assessment at interview or on macrns' analysis and interpretation.<sup>197</sup> Rather, macrns were used to inform the judge of an offender's rehabilitative needs and their willingness and ability to change those needs.<sup>198</sup>

Crown counsel submitted that, while the *Keil* sentencing decision may have been premised on the view that the department legitimated offending by relying on macrns, that was not the department's intention. He acknowledged, however, that the decision may reveal that there are communication issues surrounding the macrns constructs that need to be addressed.<sup>199</sup> Counsel also commented that the reporting of macrns in pre-sentence reports was a succinct summary, one which could not cover the detail of the offence chain assessment and why the assessor had identified possible culture-related needs to be taken into account in sentence management.<sup>200</sup>

Dr Coebergh stated that, although the claimant contended that the assessment of macrns was having a prejudicial and discriminatory effect on the sentencing of Māori offenders, he had not provided an explanation or specific evidence to support this. He also commented

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194. Document A47, p 7

195. Document A8, paras 110–111; Coebergh, oral evidence, 15 December 2004; doc A14, paras 98, 109

196. Coebergh, oral evidence, 15 December 2004

197. Document A14, para 116

198. Document A8, para 122

199. Transcript 4.1, pp 15

200. Paper 2.36, para 111

that Mr Hemopo seemed to infer that Māori offenders received more severe sentences as a consequence of the MACRNS assessment. Dr Coebergh contended that there was no evidence to support this inference because the relevant data had not been analysed. He also stated that MACRNS did not indicate that 'a Māori offender with MACRNS is more serious than one without MACRNS or than a non-Māori offender. Rather, they provide information about how to best rehabilitatively intervene with offenders who possess them.'<sup>201</sup>

Dr Coebergh stressed that there was no evidence that the reporting of MACRNS in pre-sentence reports had altered sentencing patterns or prejudiced Māori.<sup>202</sup> In closing, Crown counsel said that this was consistent with the fact that the assessment of social or dynamic factors was but one matter considered by the judiciary when sentencing. Counsel submitted that the offence tariff and case law had the greatest influence on sentencing patterns. Acknowledging that some of the random sample of 30 pre-sentence reports listed MACRNS not in the 'social factors' section but elsewhere, he submitted that these deficiencies reflected workplace competencies that needed to be addressed through training and cultural supervision. They did not, he argued, provide evidence to suggest that the policy was unsound or that Māori were being prejudiced in the sentencing process as a result of assessed MACRNS being reported.<sup>203</sup>

Crown counsel also stated that the listing of MACRNS in pre-sentence reports did not focus solely on the negative aspects of Māori culture but included positive aspects or strengths. He noted that several of the random sample of 30 pre-sentence reports provided to the Tribunal noted cultural strengths, whānau support, and iwi affiliation, as well as personal character and educational strengths.<sup>204</sup> The CPS training on OCNs also covered the types of questions to be asked as prompts for gaining information about social and employment factors and community and cultural links.<sup>205</sup> Counsel contended that all 30 pre-sentence reports addressed the offender's motivation and readiness to change, and that sections 27 and 28 of the Sentencing Act 2002 were extremely relevant to the issue of information about an offender's strengths being put before the court by their whānau, cultural supporters, and other advocates.<sup>206</sup>

Crown counsel contended further that the reporting of MACRNS in pre-sentence reports did not mean that the courts could not take account of the cultural background of all offenders, as required by section 8 of the Sentencing Act. Similarly, he said, the reporting of social and cultural factors for Māori offenders did not mean that the courts could not take account of such matters for all offenders.<sup>207</sup> Counsel submitted that it was not the role of pre-sentence

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201. Document A8, paras 107–110, 126

202. Coebergh, oral evidence, 15 December 2004

203. Paper 2.36, paras 112, 113

204. Transcript 4.1, pp 12–13

205. Document A16(b), pp 26–27

206. Transcript 4.1, pp 13–14

207. Paper 2.36, paras 149–150

**5.3.12(2)**

reports to make a plea in mitigation on behalf of an offender and that there were ‘very well established legal processes to enable matters of mitigation to be put before someone is sentenced’.<sup>208</sup> Finally, counsel reiterated that sentencing judges had to sentence offenders according to all the criteria in the Sentencing Act and that, as noted, ‘policy must follow the law’.<sup>209</sup>

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208. Transcript 4.1, p 14

209. Crown counsel, oral submission, 14 January 2004

## CHAPTER 6

### THE TRIBUNAL'S ANALYSIS AND FINDINGS

#### 6.1 THE TRIBUNAL'S TASK

The Waitangi Tribunal has two tasks. First, to determine whether the Crown conduct and policies complained about are inconsistent with the principles of the Treaty of Waitangi. Secondly, if they are, whether prejudice has been or is likely to be caused to the claimant or to any Māori group to which the claimant belongs. If Treaty breach and resulting prejudice are established, the Tribunal may then make recommendations to the Crown to compensate for or to remove the prejudice, or to prevent others from being similarly affected in the future.<sup>1</sup>

In this chapter, we make findings on the facts relevant to the claim and then consider whether the facts as found reveal that any policy or conduct of the Department of Corrections is inconsistent with Treaty principles. We consider the ROC\*ROI tool (sec 6.2) first, then the maCRNS tool (sec 6.3).

#### 6.2 THE DEVELOPMENT, USE, AND EFFECTS OF ROC\*ROI

##### 6.2.1 Introduction

The ROC\*ROI tool provides the Department of Corrections with a New Zealand-specific measure of the risk of reconviction and imprisonment that is used to assess all offenders.<sup>2</sup> The tool was developed:

- ▶ to enable the targeting of limited resources to high-risk offenders;
- ▶ to compare the risk of reoffending between offenders who have and have not received interventions in order to evaluate rehabilitative programmes; and
- ▶ to enable the calculation of an offender's risk to be based on statistics, rather than human judgement alone.<sup>3</sup>

The ROC\*ROI tool is based on over 30,000 criminal histories from 1988 data in the LES,<sup>4</sup> which was subsequently validated on data from four other years within a 15-year range.<sup>5</sup>

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1. See the Treaty of Waitangi Act 1975, s 6(1),(3)

2. Document A5, paras 3–4

3. Ibid, paras 6–17; doc A3, paras 11–12

4. Document A5, para 25

5. Document A46, para 19

**6.2.2**

Following social, demographic, and legislative changes, ROC\*ROI was reviewed in 1998. A further review in late 2003 revealed that the model's predictive accuracy had not decreased. In fact, after the last review, ROC\*ROI's accuracy had increased by 2 per cent.<sup>6</sup> As a result of that review, the department reduced the ethnicity variable to zero in February 2004.

One of the limitations of the ROC\*ROI tool is that the variables in the data set are static and do not explain the causes of offending.<sup>7</sup> Efforts to incorporate dynamic individual factors in the ROC\*ROI data set were abandoned due to missing data, uncertainty as to the accuracy of the existing data,<sup>8</sup> the enormous amount of resourcing required, and the desire to have a prediction tool available in the shorter term.<sup>9</sup>

We turn now to our findings on the major points at issue between the claimant and the Crown concerning ROC\*ROI.

**6.2.2 Relevance to Māori**

We do not accept the claimant's argument that the risk principle, and therefore ROC\*ROI, is irrelevant to Māori. The assertion that the principle has not been proven to be relevant to indigenous peoples is, we consider, negated by Department of Corrections' evidence that:

- ▶ over 30 meta-analyses on treatment effectiveness, referring to over 2,500 individual treatment evaluations, consistently affirm the relevance of the risk, need, and responsiveness principles;<sup>10</sup>
- ▶ those results provide a very strong basis for assuming the principles' relevance in New Zealand;<sup>11</sup>
- ▶ ROC\*ROI is an actuarial tool that measures rather than explains offending, which makes it as relevant for Māori as for other ethnic groups;<sup>12</sup> and
- ▶ ROC\*ROI is a very accurate predictor of the probability that an offender will become part of a group of people who will be reconvicted and imprisoned in the future.<sup>13</sup>

**6.2.3 Lack of consultation with Māori in ROC\*ROI's development**

The department did not seek or obtain any input from Māori individuals or groups during the development of the ROC\*ROI tool, nor during its subsequent validation and updating.<sup>14</sup> Mr Riley acknowledged that consultation could have occurred during the development

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6. Document A5, paras 66–69

7. Document A3, paras 35–36

8. Ibid, paras 20–21

9. Document A5, paras 21–22

10. Riley, oral evidence, 15 December 2004; doc A8, para 20

11. Coebergh, oral evidence, 15 December 2004; paper 2.36, paras 12–13

12. Document A5, para 44

13. Document A46, paras 92–93

14. Riley, oral evidence, 15 December 2004

of ROC\*ROI but suggested that it was not done because the department was not as sensitive in the mid-1990s as it is now to consultation issues.<sup>15</sup> The department's stance may also have been influenced by the very nature of the tool that was developed –an actuarial model that employs static variables is a specialised and technical task that may seem ill-suited to a community-based consultation process. Another possible reason contributing to a lack of consultation about the changes it was working towards was that it did not need to obtain additional funding, and thus Cabinet approval, for those changes. Had the department's plans for change required Cabinet approval, other Government departments, including Te Puni Kōkiri, would have been alerted and may well have advised that consultation with relevant communities should be conducted so as to test the changes' merits.

Relevant to the matter of consultation is the evidence of departmental witnesses that the development and implementation of the IOM system, of which ROC\*ROI is a critical part, was driven by a marked ideological shift within the department, from a social work to a psychological model. This caused major change in the methods of assessing offenders' risks and needs. Dr Coebergh underscored its magnitude when he described the introduction of IOM as the 'biggest change to the way the Department of Corrections works since probation was introduced in the 1880s'.<sup>16</sup> This evidence, together with the fact that ROC\*ROI is used to assess all offenders, Māori and non-Māori, reveals that this tool has considerable operational significance. Further, given that Māori are massively over-represented in the corrections system, the cumulative result is that the department should have been alert, when developing ROC\*ROI, to the wisdom of consulting relevant Māori communities about the proposed nature and effects of this tool and the broader system of which it is a part. Whether the department also had a Treaty responsibility to consult with Māori about the development of ROC\*ROI is a further question, addressed in section 6.2.7.

#### **6.2.4 The accuracy of ethnicity data and effects of inaccuracies**

Mr Riley stated that the accuracy of the data held in the LES, from which the ROC\*ROI data set is derived, is very accurate by international standards and that processes are in place to correct errors and enhance the quality of the data in terms of reducing multiple identities. He also stated that ROC\*ROI's predictive accuracy is considered exceptional.<sup>17</sup> We balance this with research by the Ministry of Justice which found that data on the LES, which records the court processing of charges, are not absolutely exact. This research suggests that, given the enormous number of charges the system deals with, it is impossible to guarantee perfect accuracy of the data, even in the best of circumstances. Occasionally, incorrect codes are entered on the computer and duplications also sometimes arise. Despite these problems,

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15. Ibid

16. Document A8, para 8; Coebergh, oral evidence, 15 December 2004

17. Document A46, paras 91, 93

however, the research found that the LES is sufficiently accurate to indicate trends in prosecutions, convictions, and sentencing.<sup>18</sup>

Any errors in the recording of offenders' ethnicity must have had a detrimental effect on the accuracy and quality of the ethnicity data relied on by ROC\*ROI before the ethnicity variable was reduced to zero. Ministry of Justice research found that data on the ethnicity of offenders are usually recorded by the prosecuting authority at, for example, the time of arrest. It found that, although official police practice is for offenders to self-identify their ethnicity (and then for police to code it on the LES into the 'race' categories of Caucasian, Māori, Pacific Island, Negro, Indian, Asian, and other), in practice ethnicity is likely to be recorded by a combination of self-identification and recorder judgement. The research also found that, of offenders convicted in 2003, ethnicity data was available for 86 per cent of cases.<sup>19</sup> The research concluded that:

- the recording of ethnicity other than by self-identification could lead to people being classified in incorrect ethnic groups; and
- the recording of ethnicity by means of the seven categories (listed above) does not allow people to identify with more than one ethnic group.<sup>20</sup>

Mr Riley stated that inaccuracies in the recording of ethnicity data will not seriously skew a model but merely 'blur' the relationship between variables and outcome. Further, he observed that the relationship between predictor variables (including ethnicity) and other variables has remained relatively constant, which would not have been the case had the recording of any information surrounding any variable been inaccurate.<sup>21</sup> However, if it is assumed that the recording of ethnicity involves a relatively stable margin of error across time (for the reasons discussed above), then, before the ethnicity variable was reduced to zero, there would have been a relatively constant relationship between ethnicity and other variables, even though the ethnicity data contained inaccuracies.

One matter that it was acknowledged would affect the accuracy of the ROC\*ROI data set is the presence of any institutional bias in the criminal justice system that has resulted in certain ethnic groups being over-represented in the offender data set that underpins ROC\*ROI.<sup>22</sup> For example, if police institutional bias against Māori has contributed to higher prosecution and conviction rates for Māori, the data set will simply reflect the consequences of such bias without highlighting, let alone correcting, its distorting effect. In response to concerns about this possibility, Mr Riley emphasised that ROC\*ROI predicts reconviction and imprisonment

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18. Philip Spier and Barb Lash, *Conviction and Sentencing of Offenders in New Zealand: 1994 to 2003* (Wellington: Ministry of Justice, 2004), pp 25–26

19. Cases where ethnicity was not recorded generally involved minor traffic offences or 'miscellaneous' offences, for which the police are not usually the prosecuting authority (Spier and Lash, p 26).

20. Spier and Lash, p 26

21. Document A46, para 19

22. Riley, oral evidence, 15 December 2004

extremely well and that ROC\*ROI ratings are likely to be significantly less biased than human judgements about risk.<sup>23</sup>

While the Tribunal accepts Mr Riley's evidence, it does not provide a complete answer to the possible problem. After all, the human judgements that are made in detecting and processing offenders, and which research suggests may be subject to biases (see sec 2.2.1), become part of offenders' criminal histories and so part of the ROC\*ROI data set. Therefore, to the extent that systemic bias on the basis of ethnicity occurs in the detection and processing of offenders, it will result in a biased data set. If there is bias against Māori, for example, the data set could exaggerate the rate of Māori offending, or its level of seriousness, or both.

When considering the possible effect of such bias on Māori offenders, it is important to remember that ethnicity data are no longer relied on directly by the ROC\*ROI tool. This means that any inaccuracies or systemic bias in those data will affect ROC\*ROI's predictive ability only to the extent that the small unique effect of ethnicity, as gauged on those data, has been reapportioned to other variables. The possible effects of any such deficiencies in the data depend on the use made of ROC\*ROI. As we discuss shortly, we accept that offenders' ROC\*ROI scores are used to determine their suitability for CNI assessment and that probation officers can override reliance on the score for this purpose. It is also accepted that offenders' ROC\*ROI scores are not seen by the courts when sentencing (see sec 6.2.8). In section 6.2.9, the question of whether the use of ROC\*ROI is, or is likely to be, causing prejudice to Māori offenders is considered.

#### **6.2.5 The ethnicity variable before 2004**

Before its reduction to zero, the ethnicity variable had a maximum unique effect of 2 per cent in any ROC\*ROI score. We are satisfied that the claimant overestimated the possible effects of such a small unique contributor to an offender's ROC\*ROI score. In particular, we accept that it would be rare for the ethnicity variable's effect to cause an offender to move from the medium-risk to the high-risk category of offenders, who are routinely referred to level 2 CNI assessments.

We do not doubt the sincerity of the claimant's belief that, during the time that ROC\*ROI was used before February 2004, the ethnicity variable caused a disproportionate number of Māori offenders to be classified as high risk by the tool. Mr Riley's evidence states that the use of ROC\*ROI should produce fewer high-risk classifications than were previously produced as a result of probation officers' judgements, which are susceptible to human prejudices.<sup>24</sup> The two positions can be reconciled if, for example, before ROC\*ROI, probation officers generally overestimated the number of high-risk Māori offenders but Mr Hemopo personally did

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23. Document A46, paras 19, 86

24. Document A5, para 8; doc A46, para 86

not do that. In that event, ROC\*ROI's risk scores for particular Māori offenders known to Mr Hemopo might be higher than his own risk judgements about those offenders, leading him to question ROC\*ROI's possible bias. The department could have pre-empted any such misunderstandings among staff by providing more detailed information about, for example, the pre-ROC\*ROI levels of high-risk assessments and the actuarial nature of ROC\*ROI and what it was predicted to achieve, as well as the high level of correlation between ethnicity and other variables in the tool.

#### **6.2.6 Reasons for the reduction of the ethnicity variable to zero**

The review of ROC\*ROI that led to the reduction of the ethnicity variable to zero was planned before the present claim was made. It occurred late in 2003, before the grant of the claimant's second application for an urgent hearing. It was the wording of an email about the ethnicity variable, sent by Dr Bakker to Dr O'Malley, that caused the claimant to disbelieve Mr Riley's explanation that the variable's effect was reduced to zero purely for statistical reasons.<sup>25</sup>

Crown counsel acknowledged in closing submissions that there was a public relations dimension to the department's decision to reduce the ethnicity variable to zero: it was felt that this would alleviate the discomfort felt about the variable by some department employees and stakeholders.<sup>26</sup> The other aspect of the decision, which Crown counsel said was the primary reason for it, was statistical: the ethnicity variable no longer contributed to the predictive accuracy of the tool.<sup>27</sup> Dr Bakker maintained that, had it been found that the variable did contribute to ROC\*ROI's predictive accuracy, it would not have been removed.<sup>28</sup>

From the evidence on this complex matter, we understand that the ethnicity variable would have remained in ROC\*ROI but for the fact that the concerns raised about its negative connotations caused a re-examination of its particular contribution to the tool's predictive accuracy. It was then found that, because of the high correlation of ethnicity with other variables, the predictive accuracy of ROC\*ROI could be maintained by recalibrating other variables and reducing the effect of the ethnicity variable to zero. This is what was done. Had it been found, however, that the effect of the ethnicity variable on ROC\*ROI's accuracy could not be replicated by such changes, it would have remained.

The immediate impetus for the re-examination of the ethnicity variable was the fact that concerns had been raised about its discriminatory connotations. The department's decision to amend ROC\*ROI to reduce the effect of the ethnicity variable to zero was thus taken, as Crown counsel acknowledged, not only for statistical reasons but also to allay those concerns.

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25. Document A5, para 72

26. Paper 2.36, para 134.2

27. Ibid, para 134.1

28. Bakker, oral evidence, 15 December 2004

While the department's position that the concerns raised seemed not to take account of the purpose and use of ROC\*ROI is accepted, we also consider that it must take some responsibility for that misunderstanding. More effective staff training, for example, could have allayed at least some of the doubts about the reasons for and effect of ROC\*ROI's partial reliance on offenders' ethnicity. Further, we consider that the department did not help the situation, and probably compounded it, when it altered ROC\*ROI without acknowledging the dual reasons for the change. An open explanation at that point may have been a catalyst for improved understandings among those who promoted and those who remained sceptical about ROC\*ROI and MACRNS. But it seems that a failure in communication between the two departmental officers most directly concerned with the review obscured its immediate impetus.

In summary, the claimant achieved a moral victory by being at least partly responsible for the reduction of the ROC\*ROI ethnicity variable to zero. In addition, we consider that the removal of the variable's effect answered most of the claimant's original concerns about ROC\*ROI.

#### **6.2.7 No consultation with Māori or external evaluation in reviews of ROC\*ROI**

Since the introduction of ROC\*ROI in the late 1990s, the department's awareness of and commitment to the Crown's Treaty responsibilities has been the subject of wide-ranging consultation and strategic planning. But it appears that there has been no consultation at all with Māori about the operation of ROC\*ROI, despite the reviews of its accuracy that have been undertaken in the meantime.

In addition, the reviews of ROC\*ROI have been conducted 'in-house' in the sense that they have involved only those who were among the original designers of the tool. They have not involved independent evaluation of either the data on which ROC\*ROI relies or the model that it employs. As for the data, we accept that, by international standards, the LES data are considered to be high quality. But the limited accessibility of the system's data prevents widespread scrutiny of that claim. As for the ROC\*ROI model itself, we understand that the trial and error process involved in its design and modification may not be well-suited to subsequent independent evaluation. That would not, however, prevent any future reviews of the model being undertaken with independent monitoring. There is also some lack of clarity in the department's explanation of the manner and effect of the reduction of the ethnicity variable to zero. The lingering questions about these issues are likely to be well-suited to being answered by independent statistical analysis.

During the hearing, the claimant suggested that the time is ripe – now that the department has applied ROC\*ROI to all offenders for approximately eight years and has conducted several successful in-house reviews – for the tool to be subjected to independent scrutiny. The claimant envisaged an independent review team assessing 'the formulation, validation

and updating of ROC/ROI including whether Māori are prejudiced by the use of the model notwithstanding the removal of the ethnicity variable’.<sup>29</sup>

#### 6.2.8 The use of ROC\*ROI

On the basis of the 30 randomly selected pre-sentence reports made available to the Tribunal, we are satisfied that the ROC\*ROI score that is calculated for an offender is not included in the pre-sentence report that a probation officer prepares for the court. Where an assessment of an offender’s risk of reoffending is included, it is made on the basis of all the relevant information available to the probation officer at the time, including, where it has been conducted, the CNI assessment. This is discussed further at section 6.2.9. It suffices to note here that, to the extent that a ROC\*ROI score influences a probation officer’s assessment of an offender’s risk of reoffending, we are not persuaded that there is anything inappropriate in that situation. The further question – whether sentencing courts may be relying inappropriately on probation officers’ risk assessments – is discussed in section 6.3.4, but we conclude that there is no evidence of such reliance.

The ROC\*ROI risk assessment is used to guide the department’s application of CNI assessments to offenders considered to be sufficiently high risk to warrant such assessment. The ROC\*ROI score alone, however, does not guarantee that an offender will or will not be referred to a CNI assessment. This is because, in every case, a probation officer can override the ROC\*ROI score and either refer or not refer an offender to a CNI assessment. There are also circumstances in which an automatic override of an offender’s ROC\*ROI score occurs. For example, a low- or medium-risk ROC\*ROI score will be automatically overridden when an offender is charged with certain offences, including serious violent or sexual offences. And a high-risk score will not lead to a CNI assessment for offenders who have committed an offence of low seriousness or who have recently had a CNI assessment.<sup>30</sup>

The fact that an individual offender’s ROC\*ROI score may be overridden means that, although the tool is based on data from many thousands of offenders, its actual use is ‘personalised’ to the particular offender. The evidence presented to the Tribunal suggests that reliance on an offender’s ROC\*ROI score as the basis for referral to a CNI assessment is overridden on more occasions than not.<sup>31</sup> A resulting concern is that different probation officers may be exercising their professional judgement so differently that, overall, the referral of offenders to CNI assessments is not being done equitably. While the evidence presented to the Tribunal does not add particular weight to such concerns, neither does it dispel them.

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29. Paper 2.37, para 76.2

30. Document A5, para 57; doc A13, paras 5–7

31. Document A13, para 7

**6.2.9 Treaty breach and prejudicial effect?**

As mentioned, the Tribunal's jurisdiction requires us to be satisfied that any Treaty inconsistency has caused prejudice to the claimant or a group to which the claimant belongs. Logically, if the Tribunal is satisfied that there is no prejudice caused to Māori by the use of the ROC\*ROI tool, it would not be necessary to examine the conduct of the department for its consistency with Treaty principle in developing, operating, and reviewing ROC\*ROI. But such an approach would not highlight for reflection any conduct that the Tribunal considers to be plainly inconsistent with Treaty principle even though it has not caused prejudice in a particular situation.

This analysis of the department's conduct in connection with ROC\*ROI has been guided by the above-mentioned matters because the conclusion reached is that there is no evidence that the operation of the tool causes prejudice to any Māori individual or group. More than that, we are satisfied that there is only a negligible risk that the tool might be causing prejudice of an as-yet unknown type and extent. From the evidence before the Tribunal, we are satisfied that the only areas in which ROC\*ROI's effects are not yet fully certain are not areas that can be said, in the words of section 6 of the Treaty of Waitangi Act, to be 'likely' to cause any disadvantage to Māori offenders.

The most significant unanswered question raised about ROC\*ROI's operation is whether probation officers, when referring offenders to CNI assessments, might be overriding ROC\*ROI scores in an inconsistent manner. We conclude that it is not credible to suppose that any such inconsistency is likely to be prejudicing Māori offenders. Our findings in previous sections counter most of the claimant's concerns about the effects of ROC\*ROI. The claimant's remaining concern is that ROC\*ROI could be causing prejudice to Māori offenders by exposing them to CNI assessments which themselves have prejudicial effects (see sec 6.3.4). Our analysis of the MACRNS element of the CNI assessment tool does give rise to more serious doubts about the possibility of prejudice than arise in connection with the ROC\*ROI tool. We do not, however, agree with the claimant that any prejudicial effects of the CNI assessment should be attributed as well to the ROC\*ROI tool, whose score is used, but often overridden, in the process of referring offenders to CNI assessments.

One further fact supporting a conclusion that ROC\*ROI is not likely to cause prejudicial effects is that, since the implementation of the IOM system, there has been a small decline in Māori imprisonment rates. While we accept that a causal link between those two elements cannot be established, the fact of the decline in Māori imprisonment rates does tend to counter the claimant's assertion that Māori offenders are being prejudiced by the use of the ROC\*ROI and CNI tools. The short point is that the claimant has been unable to provide conclusive evidence to support this limb of the claim.

Having concluded that it has not been established, in terms of the Treaty of Waitangi Act 1975, that prejudice flows from the operation of ROC\*ROI, we have limited our scrutiny of the

Treaty consistency of the department's conduct in developing, operating, and reviewing the tool. Accordingly, highlighted here are only those acts or omissions considered to be most plainly inconsistent with Treaty principle. There is but one such omission: the department's failure to consult with Māori during the development of the ROC\*ROI tool.

This conclusion stems from a view of the circumstances that surrounded the development and implementation of ROC\*ROI. In essence, the department embarked on a major shift in its approach to the assessment of all offenders' risks of reoffending. It intended that the new form of assessment would be influential in prioritising offenders for rehabilitative programmes. In so doing, the department was clearly aware that nearly half of all known offenders are Māori and consequently was particularly concerned to improve its services to those offenders. In those circumstances, the Crown's Treaty responsibility to inform itself of relevant Māori views required it to consult with Māori. We cannot imagine any other way by which the department could have informed itself of such views.

As to the extent of the required consultation, at the very least the department should have consulted a selection of Māori researchers, elders, and its own Māori staff, as it did when it was developing MACRNS. Had such consultation occurred, the issues that later emerged about ROC\*ROI's ethnicity variable may well have been uncovered at the outset. Then pre-emptive remedial steps could have been devised, such as changes to the ROC\*ROI tool itself or to the quality and quantity of the information disseminated about it. We do not consider it necessary to explore the further question of whether the Crown's Treaty responsibility also required the department to consult Māori communities about ROC\*ROI's development. As will be seen, we do explore that extra question in connection with MACRNS' development (see sec 6.3.2). The material difference between the two situations is that MACRNS' use of Māori cultural concepts automatically means that Māori communities hold uniquely relevant knowledge.

In conclusion, the genesis of the ROC\*ROI and CNI tools in the disciplines of mathematics and psychology means that they are beset with specialised terminology that is difficult for anyone not highly trained in those disciplines to understand. Therefore, when the department seeks to communicate with non-specialists about those tools, it is critical that it uses language whose meaning is clear to the other party. That is not an easy task but the risk of alienating those who will inevitably come in contact with ROC\*ROI and CNI/MACRNS – including offenders, Department of Corrections staff, and interested community groups – remains high if this is not done. Responses based on anger, stress, confusion, or some other negative reaction will not therefore be surprising – hardly a situation the department should countenance. And that risk will be even greater when the department communicates with Māori about ROC\*ROI and CNI/MACRNS, because of the added danger of cross-cultural miscommunication which, by its very nature, can distort each party's understandings.

The point is that the department's awareness of the problems inherent in the task of explaining the purpose and effect of its specialised offender assessment tools must not deter it from consulting Māori about them. In fact, it should have the opposite effect because the

difficulties highlight the importance of the department being slow to assume that it already knows what affected Māori individuals and groups think about the tools. The department should bear this in mind in its future communications.

### 6.3 THE DEVELOPMENT, USE, AND EFFECTS OF MACRNS

#### 6.3.1 Introduction

The Tribunal accepts that those responsible for the development of macrns saw the incorporation of Māori culture in the cni assessment tool and in interventions as part of the solution to addressing offending by some Māori and not as the cause of offending.<sup>32</sup> There is little doubt that macrns represent an attempt by the Crown, in good faith, to address cultural deficits that may contribute to offending by developing a needs assessment tool that is informed by Māori culture and specific to Māori offenders. We also accept that, if any such cultural deficits are ignored, there is a risk that the Crown will fail to assist Māori offenders to identify issues linked to offending and, consequently, strategies for managing them.<sup>33</sup>

Department witnesses emphasised that the development and measurement of macrns was critical to the department's need to gather evidence to support the Government's investment in culturally appropriate interventions for Māori offenders.<sup>34</sup> This is borne out by a memorandum from the macrns developers to trainers, written sometime before May 2000, which states:

In order to argue for more resources for the targeting of Māori culture-related needs it is necessary to prove their relevance to our business through a standardised approach to assessment and evaluation. If the approach is not standardised then meaningful evaluation is not possible because you never know which way/version of the assessment is responsible for successes or failures. However, evaluation is a longer-term goal. In the meantime, we are now receiving useful information about how Māori culture related needs might be contributing to someones problem of offending.<sup>35</sup>

It was also evident that there was some history of scepticism within the department as to whether Māori offenders' treatment needs are in any way different from non-Māori offenders' needs. This meant that there was also scepticism about the value of Māori culture-based interventions (see sec 3.4).

In light of that explanation of the context within which macrns were introduced, the Tribunal accepts that their value will not be fully revealed merely by the facts that:

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32. Document A6, para 30; doc A8, para 56

33. Document A3, paras 51–52

34. Document A8, paras 33–35

35. Document A47, p7. The undated memorandum was co-authored by Kristen Maynard, who left the department in May 2000.

- ▶ much of the time that has passed since their implementation has been devoted to ‘rolling them out’ and improving the use made of them by staff;
- ▶ they are found in only a minority of Māori offenders;
- ▶ being assessed with macrns is not a prerequisite for the referral of Māori offenders to available Māori programmes; and
- ▶ their use to date has not led to the development of any new programmes for Māori offenders.

Of itself, that information sits uneasily with the consistent claims of witnesses that macrns are critical to the department’s commitment to reducing reoffending by high-risk Māori offenders. To understand those claims requires a broader overview to consider the effects on the department itself of the process of introducing macrns, located as they are within the CNI psychological assessment tool, to the large body of department staff whose role it is to apply them. The staff training in psychological methodology and Māori cultural concepts that has been required by that process, which knowledge they must then use in their assessments of Māori offenders, reveals a new dimension to the value of macrns in the work of the department. In short, macrns have served as the lever for instigating the fundamental change in approach that the most senior officers of the department considered was necessary if staff were to be equipped to implement effective responses to the needs of Māori offenders. For clarity, by ‘effective’ we mean – consistent with modern State-sector imperatives – responses that have empirically measurable beneficial effects whose nature and extent justifies their cost.

The department considers that macrns are part of a more comprehensive response to the needs of Māori offenders. With time and the proposed national availability of smcas, it believes that macrns will provide a rational basis for referring offenders for the in-depth assessment. A further, and immediate, effect of macrns assessments that was highlighted by the department is that the results are part of the body of information that is relied on by probation officers in their dealings with offenders. Accordingly, by knowing the results of particular offenders’ macrns assessments, probation officers who are knowledgeable about Māori cultural matters would be better equipped to decide how to assist those offenders.

This analysis of the department’s development and use of macrns has been conducted bearing in mind the magnitude of the changes undertaken in recent years. In summary, the introduction of the IOM system, which includes ROC\*ROI and the CNI/macrn tool, has challenged a fundamental premise upon which department policy has long been based. This in turn has required the teaching and learning of new information and procedures. The very size of the corrections system, with its many sites throughout the country, complicates the introduction to all relevant staff of complex new ideas and skills. And some of the new ideas are ground-breaking, so that new skills are being taught and learned in a novel context. The result is that there has been considerable scope for problems to emerge in the process of change for the department. While this does not excuse any conduct or policy that is inconsistent with

the Crown's responsibilities under the principles of the Treaty, it provides the backdrop to our analysis of what those principles require.

### 6.3.2 Preliminary research and consultation during development of MACRNS

The department acknowledged that 'further and more in-depth research was required into the relationship between Māori culture-related needs, responsivity and offending'.<sup>36</sup> We note too that in the late 1990s, when MACRNS were being developed, there was not a large pool of literature available on culture-related needs, offending, and offender rehabilitation. Notwithstanding this, we consider that the MACRNS' developers could have sourced more research in developing the MACRNS' constructs. In particular, they could have drawn on the small but growing body of literature on indigenous corrections in Canada and Australia referred to by Dr Cram.<sup>37</sup> That said, we recognise the limitations imposed by a lack of relevant quantitative evaluation, and the challenge of combining aspects of Western psychology with tikanga Māori.

Lastly, on the matter of reliance on relevant research, we add a point of clarification. During the hearing, several department witnesses mentioned, as supporting evidence for the tikanga Māori based interventions that offenders with MACRNS might be referred to, the evaluation of the New Zealand Te Piriti programme for child sex offenders. That international award-winning programme successfully reduced the reconviction rates for relevant offences by Māori (and non-Māori) men.<sup>38</sup> However, the Te Piriti evaluation was published in 2003,<sup>39</sup> which means that its value as supporting evidence for the rationale behind the development of MACRNS and tikanga Māori based interventions is purely retrospective.

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36. Document A7, para 30; Maynard, oral evidence, 16 December 2004. The department stated as much in 1992 when it noted the 'dearth' of research in this area: 'Responding to ethnic considerations is an important aspect of correctional interventions and an area in which more research is needed in order to clarify the role of culturally based interventions in reducing reoffending' (Kaye MacLaren, *Reducing Reoffending: What Works Now?* (Wellington: Department of Justice, 1992), pp 110–111). The MACRNS review cites Maynard in noting the 'dearth' of relevant literature (doc A4, app B, p 49; doc A15(f), p 27). Research in Australia and Canada also notes the lack of quantitative research, while acknowledging the value of socio-historical material: Kevin Howells, Andrew Day, Stuart Byrne, and Mitch Byrne argue that the gap requires 'urgent attention' (Howells et al, 'Risk, Needs and Responsivity in Violence Rehabilitation: Implications for Programs with Indigenous Offenders', paper given at Best Practice Interventions in Corrections for Indigenous People Conference, Adelaide, 13–15 October 1999, p 2). John-Patrick Moore's appraisal (and extensive bibliography) of the Canadian literature records the lack of quantitative (as opposed to qualitative or socio-historical) research (Moore, *First Nations, Metis, Inuit and Non-Aboriginal Federal Offenders: A Comparative Profile* (Ottawa: Correctional Service of Canada, 2003), pp 11, 37–41).

37. Document A26, para 31; Cram, oral evidence, 14 December 2004. Kelly Hannah-Moffat and Margaret Shaw discuss the need for a more tailored assessment process in Canada than the existing LSI-R tool in *Taking Risks: Incorporating Gender and Culture into the Classification and Assessment of Federally Sentenced Women in Canada* (Ottawa: Status of Women Canada, 2001).

38. Coebergh, oral evidence, 16 December 2004; Riley, oral evidence, 15 December 2004

39. Lavinia Nathan, Nick Wilson, and David Hillman, *Te Whakakotahitanga: An Evaluation of the Te Piriti Special Treatment Programme for Child Sex Offenders in New Zealand* (Wellington: Department of Corrections, 2003)

We turn now to the consultation with Māori stakeholders that occurred during the process of developing macrns. This was a crucial part of the development process, we consider, especially in light of the limited literature available and, as the FREMO review found, the narrow pool of Māori expertise engaged in the project and the lack of Māori involvement in macrns' initial scoping phase.<sup>40</sup> Consultation with people with relevant knowledge thus provided the primary means of investigating the theory and likely practicality of the novel concept of macrns.

The developers did consult a number of Māori experts and practitioners, both internal and external to the department,<sup>41</sup> although it is not clear whether 'iwi tohunga' were involved and, if they were, how they were involved.<sup>42</sup> One of the positive findings of the FREMO review of the CNI and macrns related to the involvement of Māori stakeholders in the development of the latter.<sup>43</sup> Ms Maynard readily acknowledged, however, that there should have been further consultation with particular Māori researchers, among them Mr Jackson, whose work was known to her at the time, and Dr Love, whose work was not known to her when macrns were being developed. As for the possibility of consultation with Māori communities, Ms Maynard advised that the department's Cultural Advisory Team did not deem it necessary to consult with iwi, and Dr Kingi said that it was questionable whether or not wider consultation 'would have provided additional data by which significant modifications to the tool would have been made'.<sup>44</sup> Dr Kingi also noted that the macrns development process utilised a number of accepted mechanisms to minimise threats to validity.<sup>45</sup> Crown counsel submitted that 'the Department did not consider it would be better informed through having consulted tribes generically' and that, by contrast to the high-level policy issues on which the department had properly consulted iwi, macrns represented 'relatively detailed matters of administration'.<sup>46</sup>

The Tribunal does not agree with the Crown on many of the points relating to the consultation that was conducted during the development of macrns. Our concerns stem from the fact that the CNI assessment tool was already under development according to a strict timetable when the concept of macrns was first mooted, and that very limited human and research resources were then allocated by the department to the ground-breaking work involved. These features of the situation can only have brought additional risk and pressure to that work. But more than that, the consultation undertaken with Māori within and outside the department was limited, as Ms Maynard acknowledged, in that it did not involve such well-known people as Mr Jackson, let alone other less familiar specialists. While the published articles

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40. Document A15(j), para 24

41. Document A7, para 40

42. See doc A15(j), para 11(c); paper 2.36, para 57.5; doc A7, paras 40–43, fn 22; doc A15(f), pp 27–28

43. Document A15(j), para 23

44. Maynard, oral evidence, 16 December 2004; paper 2.36, paras 55, 85; doc A10, para 27

45. Document A10, paras 20–26

46. Paper 2.36, para 56

and presentations to department staff about MACRNS were avenues for communicating the department's ideas, they did not provide genuine opportunities for informed engagement.

Surprisingly, the reason given for the lack of proper consultation with Māori communities about MACRNS and the more specific descriptions of them was the belief that the department would not be better informed by such consultation. In section 6.3.4, we weigh up the grounds for the department's view and determine whether it acted consistently with the Treaty principles' requirements for consultation.

### 6.3.3 Methodological issues, pre-testing, and evaluation of MACRNS

A point of contention between the parties was whether or not MACRNS were developed in accordance with what the claimant referred to as a 'kaupapa Māori framework'. We agree with the Crown that there is no one approach that can be described as a kaupapa Māori or, as we prefer, a tikanga Māori approach.<sup>47</sup> Further, there is no reason why such an approach should be purely strengths based, especially in the corrections context. In support of this conclusion, we note the mental health assessment processes referred to by Dr Kingi, which utilise both strengths and weaknesses.<sup>48</sup>

A more substantial point at issue concerns the integration of MACRNS, which were derived from a Māori theoretical model, into the CNI, a Western-based assessment tool.<sup>49</sup> From the evidence, we have concluded that the department took a measured approach to integrating the MACRNS into the CNI. Thus, in the initial stages of MACRNS development, staff from Policy Development undertook a separate research process to ensure that MACRNS were developed from a Māori perspective, and then worked with the CNI team to integrate the MACRNS into the CNI.<sup>50</sup> We also accept the Crown's argument that evidence from the health and education sectors suggests that Western scientific and Māori tikanga frameworks can be successfully integrated without the loss of cultural integrity.<sup>51</sup> That said, it is inherently more controversial to attempt to integrate Western scientific and Māori models in a criminal justice context for the purpose of examining the relationship between cultural deficits and offending. Indeed, that combination has been referred to as an 'uneasy marriage'.<sup>52</sup> As a consequence, it was particularly important that the department convey clearly to everyone affected by the CNI and the MACRNS assessment tool exactly what they were designed to measure. This matter is considered more in section 6.3.4. Lastly on this point, in response to the claimant's criticisms of MACRNS, including their integration into the CNI, the Crown argued that separating them

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47. Ibid, para 48

48. Kingi, oral evidence, 16 December 2004. Further information can be found in Mental Health Commission, *Delivery of Cultural Assessment for Māori* (Wellington: Mental Health Commission, 2004).

49. Document A8, paras 40, 48

50. Document A7, paras 35, 40; Maynard, oral evidence, 16 December 2004

51. Document A10, paras 50–68

52. See doc A38, pp 46–47

out from the CNI for independent administration would create practical difficulties involving extra interview time and, therefore, extra remand time.<sup>53</sup> We accept that it would be impractical to separate out macRNs from the CNI.

A further major issue raised by the claim is the adequacy of the testing of macRNs. From the evidence, we are confident that macRNs have face validity. As for their construct validity, although some dissent remained as to the extent of research, testing, and consultation that would establish it, both parties ultimately agreed that it had not yet been established. Certainly, no pilot was conducted to establish macRNs' construct validity before they were rolled out, and a departmental paper of September 2001 confirmed not only that their validity had not been tested but also that validation would be needed before the department could be confident of macRNs' appropriateness and utility.<sup>54</sup>

When explaining why no pilot study of macRNs had occurred, department witnesses emphasised the length of time that it takes for sample studies to produce sufficient data for reliable results. It was said to be very important for macRNs to be implemented with the CNI so that Māori cultural factors would be part of the routine assessment of offenders from the outset and not some later 'add on extra'. To leave macRNs out of the CNI would leave the department's Māori initiatives limited, at a time when there was commitment and energy to address that situation. Also in favour of macRNs' incorporation into the CNI from the outset were training, computer, and software issues.<sup>55</sup>

The Tribunal was told that, 'in the assessed absence of risk', it was decided that it would be far better for macRNs to be rolled out nationwide, because the much larger amounts of data gathered would enable the department to tackle more quickly the problem of Māori overrepresentation in the corrections system while also allowing offenders to benefit immediately from macRNs. Those immediate benefits included the routine consideration of cultural factors by department staff and the provision of better quality information about cultural factors to judges and those who work with offenders.<sup>56</sup> However, Ms Maynard acknowledged to claimant counsel that an idea he put forward at the hearing, one which was intended to negate the risk of macRNs assessments prejudicing sentencing decisions, was a good one.<sup>57</sup> The idea was that macRNs could have been implemented in all but one respect – their inclusion in pre-sentence reports – and this would still have served the department's purpose of data gathering to support resource allocations. We will return to the matter of macRNs' value in pre-sentence reports in section 6.3.4.

We note that no evidence was given about the nature of the risk assessment process employed by those who decided that macRNs, with only face validity, should be rolled-out

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53. Paper 2.36, para 44

54. Document A3, app B, app 1, para 5

55. Bakker, oral evidence, 15 December 2004; Coebergh, oral evidence, 15 December 2004; Maynard, oral evidence, 15 December 2004

56. Paper 2.36, para 93

57. Maynard, oral evidence, 16 December 2004

with the CNI rather than being subjected to further testing. Ms Maynard acknowledged that the MACRNS had to be ready for roll-out with the CNI within a relatively tight timeframe<sup>58</sup> and that the designers had 'very little, if any, control over the implementation and roll-out phase'. In light of the inflexibility of the timetable for rolling-out the CNI, as well as the desire of the department's senior managers to 'turn the oil tanker around' as quickly as possible (see sec 3.4), we think it unlikely that a rigorous risk assessment was conducted on the proposal to implement MACRNS as part of the CNI. Accordingly, we are inclined to believe that it was more a leap of faith than a considered step that led those responsible to decide to implement MACRNS in their barely tested form.

Some further points were raised in connection with MACRNS' immediate implementation that we wish to comment on. First, we accept that a pilot study involving the application of the CNI and MACRNS to a control group of non-Māori offenders may not have been valuable because of the transferability across cultures of at least some MACRNS' concepts. We also acknowledge that the department's commissioning of the MACRNS review, and its own planned predictive validity study, were important steps in the process of evaluating MACRNS' construct validity. The fact remains, however, that neither step was completed, which renders increasingly pressing the department's continuing need to establish MACRNS' construct validity. Research and evaluation is still needed. This work should not be circumscribed by resource constraints.

Turning to the matter of the MACRNS review, we note that the review team agreed to a financial penalty when submitting their draft report two months late, and we consider this to be an acknowledgement of some responsibility for the delay and weaknesses in the draft report. However, claimant evidence of the department's failure to meet its own conditions for the conduct of the review (including delaying prison and probation office site visits and being unable to conduct the predictive validity study because of software problems) leads us to conclude that the department shares responsibility for the unsatisfactory circumstances surrounding the conduct of the review. Further, and notwithstanding the weaknesses in the review team's draft report, we consider that the department's handling of that report was less than satisfactory and that it overreacted to the team's criticisms of MACRNS. At the Tribunal's hearing, Dr Love acknowledged that the draft report could have been better presented and could have included more positive messages from the review while still conveying its main criticisms.<sup>59</sup> Department witnesses too seemed prepared to acknowledge a greater area of common ground between the draft report and their own positions than was suggested by the department's formal response to the report.<sup>60</sup> In light of the ground-breaking nature of the MACRNS and the importance of examining their validity, we consider that the department

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58. Document A7, para 34

59. Love, oral evidence, 14 December 2004

60. Coebergh, oral evidence, 15 December 2004; Maynard, oral evidence, 16 December 2004

should have taken steps to assist the reviewers to finalise the review and present their recommendations to the department.

Finally, on the matter of the evaluation of MACRNS, we observe that the overriding impression we gained from the Crown's written evidence, submitted in advance of the hearing, was that the department regarded MACRNS as being 'part of the furniture' and so definitely here to stay. That evidence emphasised that MACRNS had been rolled-out nationwide with substantial upheaval to previous departmental practices – and at what, we imagine, was considerable expense – and that they were regarded as critical to the department's future plans for dealing with the serious problem of Māori reoffending. However, as the hearing proceeded and department witnesses supplemented their written evidence with oral presentations, much more emphasis was placed on the developmental nature of MACRNS and the possibility of their modification to reflect the lessons learned during the period of their early implementation. Thus, in closing, Crown counsel submitted that information gathered through the application of MACRNS will contribute to the evaluation of their validity and will be the basis for modifications and improvements.<sup>61</sup> Yet, apart from statistics about the proportion of offenders assessed with MACRNS and how many MACRNS had been identified, the department did not present us with any information gathered through their application. Instead, we heard that the electronic CNI database, holding key outcomes across all assessed offenders, has not yet been used in a fully operational sense because a number of implementation problems have reduced its accuracy.<sup>62</sup> Further, apart from the department's continuing intention to conduct the predictive validity study before mid-2005 if that were possible, we were not told of any studies or analyses of MACRNS information that were underway or were being planned. Instead, we were told that, with both the derailment of the MACRNS review and the continuing deferral of the predictive validity study, the department's involvement in the Waitangi Tribunal's hearing process represented, in effect, its sole current evaluative strategy for MACRNS. While we acknowledge that the department was a willing participant in our inquiry, we are under no illusions that our own process can substitute for the required scientific evaluative analysis of MACRNS' identification, reporting, and treatment.

#### **6.3.4 Training and implementation**

It is fundamental to the successful implementation of CNI and MACRNS that those responsible for administering them do so in a highly competent and consistent manner. On this point we note that DA Andrews and James Bonta, whose work helped inform the development of ROC\*ROI and the CNI, identified several issues with risk and needs assessment tools in general, including that the people making assessments (probation officers in the case of the CNI) may make errors. Andrews and Bonta cited United States research that suggests that, even

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61. Paper 2.36, para 88

62. Document A14, para 96

after highly structured training in the use of risk and needs assessment models, human error rates often remain high. Many are due to simple addition mistakes, but other errors concern misunderstandings regarding how some items are scored. Many jurisdictions do not monitor and correct these errors. There is also some evidence that staff may not fully utilise new risk and needs assessment instruments owing to a reluctance to change a process they have used for years. This can lead to errors and a resistance to use assessment results for case management. All of these matters highlight the need for a high degree of training, professionalism, and managerial supervision.<sup>63</sup>

During the hearing, the department witnesses responsible for the design of the CNI and MACRNS identified as the major obstacle to their ready understanding the fact that most staff tasked with applying them were neither Māori nor trained in psychology. We consider it plain that such a disjunction between the assessment tools' foundations and the skills and experience of their primary users made it particularly important that the information provided to probation officers about the tools was clear and consistent. However, the information provided about certain critical elements of MACRNS does not appear to have met that standard. While we accept unreservedly that the department conceptualised MACRNS in a way that was not intended to stigmatise Māori culture, this basic fact was not clearly communicated to all staff who needed to understand it. The claimant's view at the outset of the Tribunal's process – that MACRNS assume that Māori culture causes crime – is evidence, we believe, of a lack of clarity in the department's communication of the deficit-based nature of MACRNS.<sup>64</sup> The MACRNS review team's finding that most CPS employees interviewed perceived MACRNS as Māori criminogenic needs because of their location in the CNI also supports that conclusion.<sup>65</sup> Further evidence was provided by the department witnesses' acknowledgement of the merit of Mr Jackson's description of MACRNS as 'denied Māori cultural anchors'.<sup>66</sup> That phrase, we consider, conveys much more readily that what is being examined is the absence of experience, or a misunderstanding, of fundamental aspects of Māori culture.

Another basic element of MACRNS that has been the cause of more widespread confusion among Department of Corrections staff concerns their very nature: namely, are they criminogenic needs or not? The MACRNS review team flagged this problem, stating that MACRNS are treated as the 'cultural part of a criminogenic need' and that this may be construed as suggesting a link between Māori cultural factors and crime even though that may not have been intended.<sup>67</sup> The review team considered there to be 'a significant gap between the *ideal* of using Maori cultural constructs to develop positive Maori programmes as tools for the prevention of offending by Maori and the *actual* use of them to identify cultural needs relevant

63. DA Andrews and James Bonta, *The Psychology of Criminal Conduct*, 3rd ed (Cincinnati: Anderson Publishing, 2003), pp 437, 438

64. Mr Hemopo accepted at the hearing that this view was not correct.

65. Document A4, app B, p 38

66. Document A15(q), p 6; doc A8, para 36; Coebergh, oral evidence, 16 December 2004

67. Document A4, app B, pp 7–8

to Maori offending' (emphasis in original).<sup>68</sup> In particular, it identified as problematic the fact that the department was using 'selective aspects of Māori culture to explain Māori offending in concert with general offender population criminogenic needs'.<sup>69</sup> The review team's conclusion was that 'the macRNs constructs are not easily understood because their identity as criminogenic versus cultural needs is unclear'.<sup>70</sup>

The Crown has acknowledged that the issue of macRNs' essential nature is one on which the department's communication could have been improved.<sup>71</sup> In late 2003, it was agreed that a macRNs communication strategy would be developed by the end of 2004, in order, among other things, to 'increase staff buy in (particularly Māori staff)'.<sup>72</sup> Also by that time, a package of updated written communications for managers would be developed and the training component of CNI would be reviewed and updated, with the cultural trainers being newly trained.<sup>73</sup> The department's policy paper about this matter notes: 'It is possible that the CNI training is too dense and that the inclusion of what was very significant cultural learning for some staff in that mix possibly created a situation of overload for some learners'.<sup>74</sup>

We consider that more than poor communication is responsible for the confusion about macRNs' nature. As we explain shortly, the evidence persuades us that the department's original position was articulated in a confusing manner, which inevitably gave rise to questions about it. In the course of dealing with those questions the department's position began to be refined, but it was not until the Tribunal's hearing that the refined position came to be articulated in a consistent manner. In the meantime, there has been considerable scope for differences in probation officers' understandings of what exactly macRNs are and, therefore, scope for misunderstandings that could cause offence and foster discontent.

Ms Maynard stated that it was as a result of her discomfort with macRNs being described as 'potentially criminogenic needs' – even though she fully understood the qualifications inherent in that description – that the early information about macRNs' nature was unclear.<sup>75</sup> Thus, while it appears that macRNs were originally conceptualised as criminogenic needs,<sup>76</sup> Ms Maynard won support for referring to them as 'culture-related needs'. It seems that, at quite an early stage, macRNs' came to be understood, at least by their designers, as culture-related dimensions of criminogenic needs (see sec 5.3.7). However, we are not convinced that the meaning of this was both articulated and communicated sufficiently clearly to all who needed

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68. Document A4, app B, p 7

69. Ibid, app B, p 8

70. Ibid, app B, p 23

71. Paper 2.36, paras 27–28; transcript 4.1, p 3

72. Document A15(o), para 23

73. Ibid, paras 24–25

74. Ibid, para 25

75. Maynard, oral evidence, 15 December 2004

76. Document A15(f). In September 2002, Dr Coebergh told CNI trainers that macRNs were conceived as being 'criminogenic in nature', although 'research and evaluation will eventually confirm or reject' this (doc A43; Coebergh, oral evidence, 15 December 2004). Compare with documents A7 and A8, which suggest that macRNs were not originally conceptualised as criminogenic needs.

to understand it. Indeed, we consider that the production of evidence for the hearing of the present claim has assisted the department to articulate its conceptualisation of MACRNS as the cultural dimensions of generic criminogenic needs. This is particularly so with regard to the precise relationship between each of the MACRNS and the criminogenic needs, which relationship has been explained with new clarity in one of the last documents submitted as evidence by the Crown.<sup>77</sup> Finally on this point, we observe that prior confusion as to whether or not MACRNS are criminogenic needs will not necessarily be allayed by their description as cultural dimensions of generic criminogenic needs, because, arguably, that description does not clarify the point.

The matters discussed above provide important context for our assessment of the quality of the training and supervision provided to MACRNS trainers and assessors. It is plain, first, that substantial financial and human resources were devoted to that training. Against that, Dr Coebergh and Mr Robson acknowledged that the communication of MACRNS' purpose and use could have been improved, that more support could have been provided to trainers, and that there was insufficient cultural supervision available for assessors after their training.<sup>78</sup> Mr Robson also considered that the department had underestimated the extent of opposition from operational staff to the CNI and MACRNS, which contributed to and reinforced their misunderstandings about the latter. Nevertheless, and relying on staff evaluations of the assessors' training, he said that most staff willingly and actively participated in it and only a very small percentage of course participants were unhappy about the wider changes occurring in the department and the new assessment tools.<sup>79</sup>

We consider that at least some of the negative matters just referred to, combined with the lack of clarity about MACRNS' essential nature, contributed to the unsatisfactory training experience of the complainant and another witness. In addition, we believe it likely that their training was affected deleteriously by the claimant's pre-existing opposition to MACRNS, as well as by the lingering effects upon some staff of an earlier training programme about the Canadian LSI-R model, which Mr Robson described as 'abusive'.<sup>80</sup> Overall, while we cannot second-guess exactly what happened at the claimant's training or why, we believe the evidence reveals that the department must accept responsibility for the lion's share of the problems that underlay any unsatisfactory training experiences.

There were other criticisms made by the claimant that arose from alleged inadequacies in the department's conceptualisation of MACRNS or in the training and follow-up supervision provided. One was that the MACRNS' screening questions ruled out offenders who the claimant would describe both as 'Māori' and as being the most disconnected from Māori culture. Another criticism was that it was inappropriate for cultural deficits to be relied on to assess

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77. Paper 2.36, app 1

78. Document A11, para 6.3; doc A8, app 2, para 35

79. Robson, oral evidence, 16 December 2004

80. Ibid

Māori offenders' motivation to change their behaviour. The reasons for the department's rejection of these points were not elaborated before us. We consider it fundamental, however, that the boundaries of 'being Māori' for the purposes of the department's assessment of MACRNS must be well reasoned, well sourced, and clearly explained to the staff responsible for assessing MACRNS. The same applies with regard to the department's position on the relevance of cultural deficits to Māori offenders' motivation to change their offending behaviour. The fact that these important questions were raised at the hearing would appear to indicate, at the least, further shortcomings in the department's communications about MACRNS.

Another criticism was that the department required probation officers to mislead offenders when explaining why the screening questions were being asked. The departmental witnesses insisted that this criticism stemmed from a misunderstanding of the department's requirements. However, having been advised in December 2004 that Tribunal members obtained the same misunderstanding from watching the department's training video, Crown counsel noted in January 2005 that fresh information about the screening questions had been issued to probation officers to correct any remaining misapprehensions. The very fact that there was room for misunderstanding about such an important matter as how probation officers should commence the MACRNS' assessment process does not, in our view, commend the effectiveness of the department's communications about that process. That point was confirmed by the varying messages from different department witnesses and documents on what can be said to offenders, and when, about the reasons for the screening questions and the MACRNS assessment itself.<sup>81</sup> Notwithstanding these difficulties, we note that the department's processes are intended to protect two cardinal rights: the right of offenders to give informed consent to the CNI assessment process, including the MACRNS, and the right of probation officers to maintain their professional integrity and relationship with offenders when undertaking the CNI and MACRNS assessment.

The criticisms of particular MACRNS in terms of Māori tikanga are similar in an important respect to the criticisms made of the department's view of what it means to be 'Māori' for the purposes of assessing MACRNS: such criticisms can be properly tested only by a process very different from our own. We note, however, that we share the concern expressed by Mr Jackson about the assessment tool being 'individuated and Māori-focussed' rather than collectivised and focused on the non-Māori cultural forces that may predispose Māori to offend.<sup>82</sup> In addition, we are concerned with the time periods – particularly the period (of no more than 48 hours) used in the OCN assessment – within which an individual Māori offender's behaviour is explored for evidence of MACRNS (or 'denied Māori cultural anchors'). Further, and despite the recently produced document explaining the department's conceptualisation of

81. For example, Robson, oral evidence, 16 December 2004; Mackie, oral evidence, 15 December 2004; doc A16(b), p 6; doc A17(c), p 6

82. Document A15(q), p 7

the connections between individual MACRNS and their corresponding criminogenic needs,<sup>83</sup> we consider that the exact nature of some of those connections (including the relationship between the MACRNS 'cultural tension' and 'cultural identity' and the criminogenic needs of 'relationships', 'violence propensity', and 'emotions') needs further explanation.

A matter of particular significance to the claim is how the CNI and MACRNS assessments are used by probation officers in pre-sentence reports and whether there is scope for courts to be misled by that use when sentencing offenders. The Crown's production of 30 randomly selected pre-sentence reports allowed the Tribunal a valuable insight to probation officers' practice in this regard. The two matters of relevance are, first, how a probation officer's assessment of an offender's risk of reoffending utilises the CNI and MACRNS results and, secondly, how MACRNS are reported in pre-sentence reports.

As has been noted (see sec 6.2.8), an offender's ROC\*ROI score (eg, 0.65) is not included in a pre-sentence report. Often included, however, is a risk-classification description (low risk, medium risk, or high risk) that has been arrived at by the probation officer after considering all the available information about an offender – including the ROC\*ROI score and the CNI and MACRNS assessment results. We accept that the risk classification arrived at will often be at variance with the offender's ROC\*ROI score. Indeed, many of the pre-sentence reports we read indicated that the offender's risk of reoffending was mitigated by certain dynamic factors (eg, remorse, high motivation to change, desistance from alcohol and other drugs) or was worsened by other such factors (eg, lack of remorse, low motivation to change, continued offending and alcohol abuse). In this way, the risk classification arrived at by a probation officer can be seen to 'override' the ROC\*ROI score.

Mr Riley observed that the use of professional judgement to override ROC\*ROI scores recognised the significance of the dynamic factors assessed by the CNI and MACRNS.<sup>84</sup> However, he cast doubt on the reasoning process behind some of the override decisions made by probation officers, because assessors, even if well trained, cannot accurately and consistently weigh up all the information relevant to prediction and tend to select and consider only some of that information. Professional judgement may also over-estimate the level of risk (see sec 3.2).<sup>85</sup> We consider it to be particularly important that probation officers' power to override ROC\*ROI scores is utilised appropriately when offenders' dynamic factors, as assessed by the CNI, have changed. Otherwise, as suggested by Mr Riley, probation officers' assessments of offenders' risks, needs, and responsivity will surely revert to being based on subjective grounds, which is precisely what the IOM system was designed to change. The best possible instruction and guidance from the department in these matters is, therefore, of critical importance. While witnesses mentioned 'business rules' as specifying situations in which ROC\*ROI scores are

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83. Paper 2.36, app 1

84. Document A46, para 15

85. Document A3, paras 15–17; Riley, oral evidence, 15 December 2004; doc A8, para 21

automatically overridden (eg, where certain offences are involved and where the offender has had a recent CNI assessment), we were given no evidence of probation officers' instruction about the effect of changes in dynamic variables on the risk of reoffending.

Among the inconsistencies we noted in the 30 pre-sentence reports were differences in the location of, and the detail of the reasons for, offenders' risk classifications. There were also inconsistencies in the reporting of macrns. Contrary to the department's earlier evidence that the results of macrns assessments are reported in the 'social factors' section of pre-sentence reports, the 30 reports demonstrated some variation in practice. Some also illustrated that, if left unchanged by the report writer, the automatically generated pro forma statements about identified macrns can seem distinctly strange. We were advised that, as a result of the 30 reports' production, the department was making renewed efforts to improve the consistency and quality of pre-sentence reports.

These matters raise particular questions about the quality of the post-training supervision of CNI and macrns assessors and the overall level of compliance that has been attained with departmental requirements for assessment. We accept that, after a sustained period of staged training and implementation of the CNI and macrns nationwide, the department is now giving particular attention to monitoring assessors' performance and has reason to be confident that compliance with its requirements has improved. The department's integrity monitoring framework, conducted by the Psychological Service, illustrates an improved percentage compliance level on all macrns monitored between the third quarter of 2002–03 and the third quarter of 2003–04.<sup>86</sup>

The fact of inconsistencies in the location and manner of the 30 pre-sentence reports' identification of macrns strengthens the claimant's concern that macrns may be being relied on by those involved in the sentencing process in ways that prejudice Māori offenders with macrns as compared to other offenders. The particular question to be considered is whether the value of including macrns in pre-sentence reports clearly outweighs the risk that they may be misinterpreted by sentencing judges in ways that could prejudice offenders. We have not seen any evidence of such injustice. In fact, the evidence supports the view that judges are not mistaken about the meaning of macrns. Therefore, it is most unlikely that an offender with macrns recorded in a pre-sentence report would be subjected to a form of 'double jeopardy' by having those negative factors counted as reasons for the imposition of a more serious penalty.

We base that conclusion on three points. First, we are mindful that sentencing judges will invariably have more information before them than the probation officer's assessment of the offender, including the history of offending and sentencing and the defence lawyer's plea in mitigation. Also the Sentencing Act 2002 confers considerable discretion on judges, while specifying 10 principles of sentencing and numerous aggravating and mitigating factors that

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86. Document A8, para 38; doc A14, paras 117–118

must be taken into account.<sup>87</sup> The only matter specified in the Act to which macRNs could be considered relevant is that, when imposing a sentence 'with a partly or wholly rehabilitative purpose', the court must take into account the offender's 'personal, family, whanau, community, and cultural background' (s 8(i)).

Secondly, we have seen the written information that the department has circulated to judges about CNI and macRNs and note that the information is able to be discussed and updated at regular meetings held between senior department staff and senior members of the judiciary. From that, we consider it unlikely that judges would believe that macRNs are relevant to anything other than the identification of culturally rehabilitative interventions.

Thirdly, in the sole case relied on by claimant counsel where the sentencing judge commented negatively about a pre-sentence report's 'standard-form' macRNs statement, the judge's criticisms were directed squarely at the department, not the offender, and in particular at its policy of legitimising Māori offenders' conduct on grounds that are 'offensive to any acceptable notion of culture'.<sup>88</sup> Claimant counsel submitted that there was no evidence either way that the judge had or had not passed a sentence more severe than would otherwise have been imposed. Nevertheless, it seems self evident, taking into account the judicial oath and a judge's responsibilities, that the possibility of any judicial officer penalising an offender for what was so clearly regarded as the product of a department's questionable policy is remote.

Another fundamental criticism of the macRNs tool is that, being deficit based, it does not examine offenders' cultural strengths. This, it was argued, makes it likely that probation officers' use of the tool in pre-sentence reports would lead them to paint unfairly bleak pictures of those Māori offenders who were assessed with macRNs. In response, department witnesses highlighted the opportunities that are available to probation officers to discover offenders' strengths, including in the CNI and macRNs assessment process. It was said that probation officers are encouraged to include such information in pre-sentence reports. But it was acknowledged that there is no systematic assessment of offenders' strengths. Some witnesses appeared to favour the idea of such a systematised assessment being introduced or, at least, modifying the design of the pre-sentence report to ensure more consistent reporting of offenders' strengths.<sup>89</sup>

Overall, we consider that the 30 pre-sentence reports reveal that probation officers generally do report 'generic' offender strengths relevant to their rehabilitation (including, for example, a positive family environment, employment prospects, courses completed, goals set). We cannot gauge from the reports whether the reporting of cultural strengths is as pervasive as the reporting of generic strengths, but we note that probation officers may well be more familiar with generic strengths than with Māori offenders' cultural strengths.

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87. Sentencing Act 2002, ss 7–9; see also doc A24, paras 7–8, 13–23

88. Document A44

89. Maynard, oral evidence, 16 December 2004; Mackie, oral evidence, 15 December 2004; Coebergh, oral evidence, 16 December 2004

**6.4 TREATY BREACH AND PREJUDICIAL EFFECT ?****6.4.1 Introduction**

Our examination of the Department of Corrections' development, implementation, use, and evaluation of macRNS has revealed a number of areas in which its performance can be improved. The question remains whether any of the shortcomings are due to policies or conduct inconsistent with the Crown's Treaty responsibilities. As we have mentioned, in considering this question we have borne in mind the fact that macRNS are a product of massive change introduced quite recently to the operations of a very large department with staff spread throughout the country. A change of that nature is bound to cause upheaval to previous practices and place substantial pressure on a department's resources. It is also bound to arouse discontent among staff who do not agree with the underlying reasons for the change or with particular elements of it.

Our focus is on macRNS' development, implementation, use, and evaluation, because we have found no sound basis for the claimant's opposition to their underlying rationale. On the evidence, we consider that there are strong grounds for the department's conclusion that the risk, need, and responsivity principles apply in New Zealand, including to Māori offenders. It was that conclusion, coupled with State-sector imperatives for effectiveness and efficiency in Government activities, that led to the department's policy decision to focus its efforts to reduce reoffending on high-risk offenders who are motivated to change their offending behaviour.<sup>90</sup> It was a vital part of this strategy to introduce empirically based assessments of offenders' risks, needs, and responsiveness to treatment, to assist in identifying the offenders to whom rehabilitative resources should be targeted and in measuring the effects of the department's policy. Inevitably, this meant that probation officers' assessments of offenders changed dramatically, in both nature and purpose. The claimant did not directly oppose the fact that the department's previous social work model, with its almost total dependence on probation officers' judgements about offenders, had been supplanted. Certainly, we saw no evidence that challenges the department's view that more consistent decision-making results from the use of empirically based assessment tools.

Crown counsel urged the Tribunal to do as another Tribunal did recently and focus not on the process by which the policy was devised but on the content and effect of the policy itself.<sup>91</sup> That submission derives from the view that any shortcomings in the design process will be negated by a Treaty-consistent design. If that were very clearly the nature of the design, that reasoning could well hold true. However, the present circumstances are not so clear. Therefore, we consider that we would not be performing our statutory task if we did not examine the entire course of conduct involved in macRNS' development and use, as has been challenged

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90. The claimant raised some concerns about the policy of targeting high-risk offenders rather than all offenders, but these were not pursued.

91. This was a reference to the Tribunal's inquiry into the Crown's foreshore and seabed policy: see Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004).

by the claimant. The present situation is unlike that in which the inquiry into the foreshore and seabed policy was conducted. There, the Crown was about to finalise its policy and the Tribunal decided in advance of the hearing to limit its focus to the policy's content not only because of its importance but also because of the very limited hearing time available for the numerous claimants.

#### **6.4.2 Consultation: principle of partnership**

On the matter of the sufficiency of the consultation that was conducted by the department about MACRNS, we note first that the MACRNS development period, which occupied most of 1999, overlapped with the development of FREMO. It also overlapped with the earlier part of the department's consultation process, conducted between 1999 and 2001, for the purpose of developing its *Treaty of Waitangi Strategic Plan*, which is now further refined as the department's *Māori Strategic Plan*. The focus of that consultation process, it seems, was kept at the inevitably general level of principle expressed in those documents and did not explore particular policies or practices then in existence or in the process of development.

The department's view is that its consultation with Māori about MACRNS was Treaty compliant because it was reasonable in all the circumstances. In particular, it was said that MACRNS were 'relatively detailed matters of administration' and so did not warrant a consultation process involving input from Māori communities.<sup>92</sup> The kinds of matters that the department regards as warranting consultation with Māori communities can be gleaned from its *Māori Strategic Plan, 1 July 2003–30 June 2008* (see sec 2.4.3).<sup>93</sup> That plan reveals that the design and delivery of culturally responsive services and programmes for Māori offenders are regarded as matters requiring Māori community input.<sup>94</sup> Not mentioned at all are the design and delivery of the assessment processes used to guide decisions about which Māori offenders will receive those (or other) services and programmes. Those tools are relevant, for example, in answering such questions as 'Which Māori offenders should be prioritised for available services and programmes?' and 'Are the services and programmes available targeted at the assessed needs of Māori offenders?'

We do not accept the contention that MACRNS are detailed matters of administration. That view conflicts with department witnesses' own emphasis on the importance of MACRNS to staff understandings of Māori culture and their acceptance of its relevance to the department's work. If, as seems to be the case, the department's 'threshold' for community consultation effectively reserves it for the department's highest-level policies and for the design of services and programmes that utilise Māori cultural knowledge, then it is our view that the threshold is misconceived. The first reason is that an organisation's understanding of and

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92. Paper 2.36, para 56

93. Document A35

94. Ibid, pp10–13

commitment to its high-level policies is best tested by examining the policies' implementation in a range of areas of operation, including areas that the organisation may not volunteer to have examined. Without such 'reality checks', high-level expressions of intent, including such intentions as are expressed in the Department of Corrections' *Māori Strategic Plan*, can become platitudes. Consultation with Māori communities on any important operational matters that affect them should not be ruled out on the ground that such matters are 'beneath' the range of legitimate topics for such consultation.

The second reason for contesting the department's 'threshold' for Māori consultation derives from our understanding of the interests that a Māori group such as Ngāti Kahungunu has in the department's operations. In chapter 1, we identified two such interests: the interest in having reoffending by its own people reduced and the interest in seeing Māori culture used appropriately in the treatment of Māori, and particularly Ngāti Kahungunu, offenders. We believe there is no need to elaborate on the second of those interests, which is the inevitable product of the central place of the group (whānau, hapū, and iwi) in Māori culture. As for the nature of Māori groups' interests in reduced rates of reoffending among their own members, we provided some relevant information in chapter 2. Of particular note is the research of Dame Joan Metge, which indicates that, in addition to the well-recognised social and economic costs suffered by victims, offenders, and their respective families and communities, the sheer size of the problem of Māori offending has a cultural cost to Māori groups that is manifested in the concept of whakamā. That said, it should also be recognised that whakamā does not necessarily assist in preventing offending but it does place an obligation on the offender, and often on his or her whānau, to gain an immediate awareness of those affected. The consequences of offending are sometimes brought home to a perpetrator when the effects of such behaviour on the victim and his or her whānau are understood, especially when articulated by whānau members at face-to-face hui. Then, the full effects of the concept of whakamā can act as a strong deterrent to future serious offending.

The critical point is that the threat posed to Māori communities and Māori culture by the high rate of Māori offending and imprisonment is unique. It differs in important respects to the threats posed by such other social indicators as, for example, Māori health and income levels that are lower than those of the general population. The scale of Māori offending and imprisonment not only distorts the very nature of New Zealand communities, particularly Māori communities, but also has the effect of undermining the integrity of Māori culture. This is because, compared with other social indicators, high rates of Māori offending are more likely to attract non-Māori condemnation and blame, which, in turn, erodes Māori (and non-Māori) respect for and pride in Māori culture and values. While there are without doubt serious negative consequences for society as a whole, it is also evident that Māori communities themselves bear a particular burden in this context. The sheer scale of Māori offending can be seen as eroding Māori potential and capacity and impeding iwi development. The rebuilding of Māori communities, both urban and rural, particularly those affected by

economic restructuring, educational underachievement, and low socio-economic status, is inevitably compromised by the high rate of Māori offending. Not only is an essential part of the Māori male population unable to contribute to hapū and iwi rebuilding - let alone New Zealand society in general - but limited tribal resources are diverted into support and rehabilitation efforts for the offender, his or her whānau, and those affected by the offender's actions. The inevitable outcome is often the erosion of the basic structures of hapū and iwi, the decline in drawing on the values and strengths of Māori culture, and a rejection of any pride in Māori identity. Yet, despite the obvious difficulties mentioned, there is still considerable scope for iwi and hapū involvement in the identifying and intervention processes in terms of Māori offending and the desire to participate in the rehabilitation of those affected.

For these and related reasons, it is therefore essential that Māori communities retain a pivotal involvement in the intervention and rehabilitation of Māori offenders. That involvement must begin with the need to be consulted. If the department is serious about its aim of developing relationships with Māori, and with iwi in particular, then it must formalise those relationships in constructive and meaningful ways. We were not told of any such formal relationships. The department needs to show initiative in this context.

With regard to consultation in this instance, we are of the firm view that the department's definition and use of macrns are matters of fundamental importance to Māori groups, including Ngāti Kahungunu. Therefore, in terms of the Treaty principle of partnership, those matters required consultation with groups such as Ngāti Kahungunu, unless the department was already informed of their views or special factors rendered that kind of consultation unreasonable. The department sought to rely on both of those exceptions.

The department believed that, in light of the other consultation it had conducted, it was unlikely that consultation with Māori communities would provide any new insights that would make a difference to the macrns policy and practice that came to be adopted.<sup>95</sup> We observe that such a stance is entirely self-serving and also risks being construed as patronising. Further, it is contradicted by Ms Maynard's acknowledgement at the hearing that, if more consultation had been undertaken when developing macrns, especially when naming them, it would have removed many of the problems surrounding perceptions of whether macrns were criminogenic needs or not.<sup>96</sup> We are confident that consultation with Māori at a community level would have been more likely than any other kind of information-gathering process to highlight such problems of perception and to offer insights into their resolution. Had such problems been identified and dealt with before macrns were implemented, the present claim, or at least a significant part of it, might have been averted.

The department also pointed to the urgency of implementing macrns as part of the CNI, the implementation deadline for which had been set before macrns were even mooted. We are by no means certain, however, that in the circumstances – where the CNI's design had

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95. Document A10, para 27

96. Maynard, oral evidence, 16 December 2004

**6.4.3**

been longer in development and was more readily informed by overseas experience – the advantages of implementing the macRNs at the same time as the CNI outweighed the possible disadvantages. We are left asking why, for example, the CNI's implementation could not have been delayed by, say, three months while a process of consultation with Māori communities about macRNs was undertaken and the lessons learned incorporated in the tool and the training to be given about it. Alternatively, and with the decided benefit of hindsight, we are not convinced that staff training about and implementation of the CNI and macRNs were best managed as one 'package'. It may have been more comprehensible for all concerned if that task had been approached in two stages, with the generic CNI tool being dealt with first and the macRNs tool being dealt with later, once it was clear that staff, and the tool, were ready.

The conclusion we have reached, therefore, about the Treaty consistency of the department's consultation with Māori is that it did not meet the standard of the Treaty principle of partnership. We conclude this part of our analysis by noting our view, also expressed in connection with the ROC×ROI assessment tool, that a significant reason why the department went unchallenged in its decision not to undertake consultation with Māori communities about macRNs was because their development occurred 'in-house' and did not receive scrutiny from other Government departments, including Te Puni Kōkiri, or the approval of Cabinet. We add, however, with particular regard to the CNI and macRNs assessments, that we are concerned that a policy with such operational significance was able to be implemented without the need for such input or approval.

**6.4.3 Other elements of development and use – principle of active protection**

Aside from the matter of consultation with Māori, we have identified a number of other areas in which valid criticisms can be made of the department's handling of the process of developing, implementing, and monitoring macRNs. One problem is the unclear communication that has occurred within the department about macRNs' essential nature. We consider the communication problems indicate a more fundamental problem, that of a lack of clarity in macRNs' conceptualisation, due, at least in part, to what has been described as the semantic difficulties inherent in integrating the concept of Māori cultural deficits within a psychological criminogenic needs based model. As well, there have been shortcomings identified in the availability of cultural supervision for probation officers following macRNs training, in the consistent reporting of macRNs in pre-sentence reports, and in the ongoing absence of scientific evaluations of macRNs' predictive and construct validity.

The continuing absence of proof of macRNs' predictive and construct validity is of particular concern, because, without it, macRNs' rationale and fitness for purpose remain unproven. We recall our impression that, although department witnesses and Crown counsel stated that macRNs would be confirmed or modified over time as further evidence of their utility and effectiveness was gathered and that the department considered that the tool was in its

infancy,<sup>97</sup> this perspective seemed to gather strength during the Tribunal hearing. Up until that point, the written evidence had suggested that, in both theory and practice, macRNs tended to be used as if they were fully and finally developed. As for the difficulties in testing macRNs' validity, we acknowledge that their construct validity testing poses unique challenges, that the department's commissioned review was considered too flawed to merit completion, and that there have been unforeseen technical problems with the department's planned predictive validity test. As for the most tangible expected benefits of macRNs for offenders, we acknowledge, as Mr Tawhiao explained, that elements of the department's holistic vision of culturally responsive services and programmes for Māori offenders have been more difficult to implement than to imagine. Those factors explain the present situation, although they may not justify it, which is that macRNs have now been assessed since 2001 yet the department can neither verify their soundness nor point to any quantifiable benefits that flow to Māori offenders who are assessed with macRNs.

In those circumstances, the department's continuing claim that macRNs are vital to the goal of reducing reoffending by Māori becomes less and less credible. Indeed, we consider that, rightly or wrongly, the circumstances leave the department open to the criticism that the status quo appears to suit its purposes but that those purposes are no longer the stated purposes for which macRNs were devised and implemented. That situation will endure for so long as the disjunction remains between, on the one hand, the supposed experimental nature of macRNs and, on the other, a lack of proof of their validity, despite the huge changes associated with their introduction.

The question we have had to consider is whether the shortcomings we have described reveal breaches by the department in achieving the standard of behaviour required by the Treaty principle of active protection of Māori interests. Again, the relevant Māori interests are those of Ngāti Kahungunu in the goal of reducing reoffending by its own members and in having Māori culture used appropriately in the treatment of offenders. Undoubtedly, the combination of shortcomings we have discussed reveals that those fundamental Māori interests have not been actively protected by the department. Indeed, the department's failure to consult groups such as Ngāti Kahungunu in the development of macRNs suggests that, from the outset, it may not have recognised those interests as being relevant to any part of its work in connection with macRNs. Since then, the department's work with macRNs has continued – through various delays and difficulties – as if the only relevant Māori interests are individual Māori offenders' interests in not being treated disadvantageously compared with non-Māori offenders. Our conclusion that Māori group interests are also inevitably involved in the department's work to reduce reoffending by Māori means that, in terms of Treaty principle, the department is liable to be assessed at each key stage in the evolution of macRNs, including their evaluation, for the ability of its policies and conduct to protect those interests.

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97. Paper 2.36, para 251

**6.4.4**

At the hearing, it was suggested by claimant counsel and, we believe, well received by the departmental representatives, that the increasingly overdue evaluation of macRNs' validity and effects be conducted as a joint enterprise between the department and relevant Māori interests. Such a partnership approach would, we consider, go a long way towards restoring the imbalance in the control of macRNs' evolution and use to date. In the next section, we provide further comment on this notion.

**6.4.4 Prejudice?**

It is ironic that the absence of evaluative information about macRNs provides part of the reason why we cannot conclude whether macRNs are or are not prejudicing relevant Māori interests. Our analysis, however, reveals that the risk that macRNs may be prejudicing Māori interests is not merely a risk that they might be being used in ways that disadvantage individual Māori offenders. In addition, there is the risk that macRNs' use and effects may be prejudicing the interests of Māori groups, including Ngāti Kahungunu, in reducing reoffending by their own members and in having Māori cultural concepts used appropriately in the treatment of Māori offenders. Prejudice to the first of those interests would occur, for example, if it were the case that, despite the effort and expense that has been invested in macRNs, they are not in fact effective in assisting to reduce reoffending by Māori. Prejudice to the second of the interests would occur if it were the case that macRNs distort Māori cultural concepts. The risk of prejudice to those Māori group interests must be factored into the department's strategies for evaluating macRNs' use and effects.

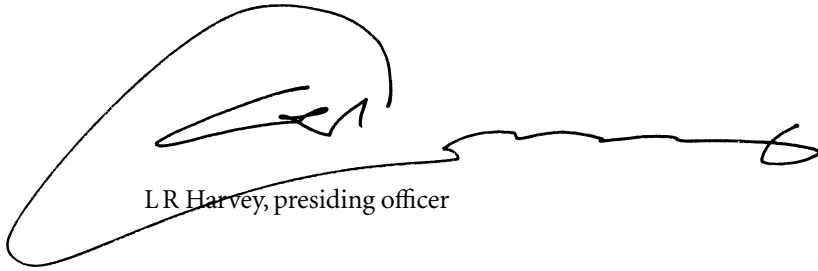
In the absence of comprehensive evaluative information about macRNs, our own impressions of whether their effects might or might not be prejudicing relevant Māori interests are only that. However, some of the concerns we have expressed earlier are plainly relevant to the question of macRNs' possible prejudice to the interests of Māori groups. We recall, for example, our concern that the very short period (of no more than 48 hours) that provides the context for the OCN macRN assessment may not be well suited to the identification of needs with a systemic character. Since it is OCN assessments that provide the basis for pre-sentence reports' information about macRNs, any valid concerns about those assessments must undermine the rationale for including macRNs information in the pre-sentence reports. On the matter of the risk of prejudice to individual Māori offenders from macRNs' use, we have found it unlikely that the reporting of macRNs in pre-sentence reports could lead to their being misinterpreted by sentencing judges. That said, there remain issues about macRNs' use in pre-sentence reports that need to be pursued. Whether cultural strengths should be included in those reports along with macRNs is a matter for further discussion. We observe, however, that the assessment of cultural strengths may be a task best suited to an in-depth examination (such as the SMCA) rather than a less rigorous pre-sentence assessment process.

If that proves so, further questions arise as to the uses made of such information by sentencing judges and the department's own probation officers and sentence planners.

Since we have been unable to determine whether or not prejudice is being caused by the conduct of the department inconsistent with Treaty principles, there is no jurisdiction to recommend to the Crown that any particular remedial action be taken. Yet, the uncertain state in which matters remain must serve as an incentive for the department to provide answers to the outstanding questions about MACRNS' conceptualisation, articulation, and use by staff and sentencing judges (and, of course, the effects of all of those on offenders and Māori communities). At the hearing, there seemed to be a level of agreement between the parties that a joint review is now needed to examine the remaining questions about MACRNS' use and effects. The purpose of such a process would be to advise the department about any changes that should be made to its policy and operations. The Tribunal encourages the department to establish, as a matter of urgency, a team possessed of the full range of skills to manage a comprehensive review of the MACRNS assessment tool. The results of such an assessment will provide a secure basis for determining the future shape and place of MACRNS in the department's strategic responses to the needs of Māori offenders, of Māori communities, and of New Zealand society as a whole.

In conclusion, from this discussion two self-evident points emerge. First, Māori offending rates are unacceptably high. The erosion of latent Māori potential and capacity and the deleterious effects on the wider community remain a cause for deep concern. No society concerned with the future well being of all its citizens can be content with the status quo. There can be no doubt that serious measures must be taken to arrest this mounting crisis. Secondly, the causes of this situation are complex. In short, there are no simple answers, and potential remedies must continually be explored. But the essential point is that, where there are genuine, sincere, and legitimate attempts to find solutions to this seemingly insoluble dilemma, caution is necessary to avoid dispensing with potentially sound approaches that have suffered from poor presentation and consultation. We do not say that the department's efforts are without criticism – that is clearly not so – but we do think that many of the ideas deriving from the general IOM framework and MACRNS and their application may yet assist the common goal of reducing offending by all sections of New Zealand society.

Dated at *Wellington* this *7<sup>th</sup>* day of *October* 20 *05*

A large, stylized handwritten signature in black ink, consisting of a large loop at the start followed by a series of connected strokes.

L R Harvey, presiding officer

A handwritten signature in black ink that reads "H. M. Mead" in a cursive style.

H M Mead, member

A handwritten signature in black ink that reads "J R Morris" in a cursive style.

J R Morris, member



## APPENDIX

### RECORD OF INQUIRY

#### RECORD OF HEARINGS

##### THE TRIBUNAL

The Tribunal constituted to hear the Wai 1024 claim originally comprised Judge Layne Harvey (presiding), John Baird, Professor Hirini Moko Mead, and Joanne Morris. However, owing to work commitments, Mr Baird withdrew before the hearing.

##### COUNSEL

Grant Powell and Sarah Eyre appeared for the claimant, Craig Linkhorn and Veronica Chalmers for the Crown.

##### HEARINGS

The claim was heard from 14 to 16 December 2004 at the Tribunal's offices in Wellington, and closing submissions were heard at the same venue on 14 January 2005.

#### RECORD OF PROCEEDINGS

\* Document confidential and unavailable to the public without a Tribunal order

##### 1. CLAIMS

###### 1.1 Wai 1024

A claim by Pirika Tame (Tom) Hemopo on behalf of Ngāti Kahungunu concerning assessment tools devised and used by the Department of Corrections to calculate offenders' risks of reoffending and treatment needs, 18 December 2002

**2. PAPERS IN PROCEEDINGS**

- 2.1 Claimant counsel, memorandum seeking urgency, 11 November 2002
  
- 2.2 Acting chairperson, memorandum directing registrar to register claim 1.1 as Wai 1024, 18 December 2002
  
- 2.3 Acting chairperson, memorandum authorising Joanne Morris to determine application for urgency, 18 December 2002
  
- 2.4 Joanne Morris, memorandum directing filing of claimant and Crown counsel submissions on application for urgency, adequate remedy, and appropriate body to hear claim, 18 December 2002
  
- 2.5 Claimant and Crown counsel, joint memorandum seeking extension for filing of submissions, 20 December 2002
  
- 2.6 Crown counsel, memorandum in response to paper 2.4, 13 February 2003
  
- 2.7 Claimant counsel, memorandum in response to paper 2.4, 21 February 2003
  
- 2.8 Joanne Morris, memorandum declining application for urgency, 20 March 2003
  
- 2.9 Claimant counsel, memorandum in support of further application for urgency, 14 June 2004
  
- 2.10 Chairperson, memorandum authorising Joanne Morris to determine further application for urgency, 18 June 2004
  
- 2.11 Crown counsel, memorandum concerning further application for urgency, 5 July 2004
  - (a) Joanne Morris, memorandum granting application for urgency, 29 July 2004
  
- 2.12 Deputy chairperson, memorandum appointing Judge Layne Harvey presiding officer of Wai 1024 Tribunal, 19 August 2004
  
- 2.13 Claimant and Crown counsel, joint memorandum concerning hearing procedure, 27 August 2004
  - (a) Claimant counsel, memorandum concerning hearing date, 1 September 2004
  
- 2.14 Chairperson, memorandum appointing Professor Hirini Mead, Joanne Morris, and John Baird members of Wai 1024 Tribunal, 8 September 2004

- 2.15** Crown counsel, memorandum introducing Crown evidence, 24 September 2004
  
- 2.16** Claimant counsel, memorandum concerning hearing date and procedure, 8 October 2004
  
- 2.17** Presiding officer, memorandum concerning hearing, evidence, and cross-examination and asking questions of Crown counsel, 5 November 2004
  
- 2.18** Crown counsel, memorandum concerning documents A12 and A12(a), 29 October 2004
  
- 2.19** Chairperson, memorandum advising of withdrawal of John Baird from Tribunal, 17 November 2004
  
- 2.20** Presiding officer, memorandum concerning potential conflicts of interest, 22 November 2004
  
- 2.21** Crown counsel, memorandum concerning Crown evidence and responding to Tribunal questions (paper 2.17), 16 November 2004
  
- 2.22** Crown counsel, memorandum responding to Tribunal questions (paper 2.17), 24 November 2004
  
- 2.23** Claimant counsel, memorandum concerning potential conflicts of interest and credibility of Crown witnesses, 26 November 2004
  
- 2.24** Crown counsel, memorandum concerning credibility of Crown witnesses, 29 November 2004
- (a)** Claimant counsel, memorandum concerning claimant evidence, 6 December 2004
  
- 2.25** Crown counsel, opening submissions, 7 December 2004
  
- 2.26** Crown counsel, memorandum concerning presentations by Crown witnesses, 7 December 2004
  
- 2.27** Claimant counsel, opening submissions, 7 December 2004
- (a)** Claimant and Crown counsel, joint memorandum concerning allocation of hearing time, 8 December 2004
  
- 2.28** Presiding officer, memorandum concerning hearing timetable and evidence and requesting documentation from Crown counsel, 9 December 2004

- 2.29 Claimant and Crown counsel, joint memorandum concerning hearing timetable, 10 December 2004
  
- 2.30 Crown counsel, memorandum concerning Tribunal requests for documentation (paper 2.28), 13 December 2004
  
- 2.31 Crown counsel, memorandum concerning pre-sentence reports, 14 December 2004
  
- 2.32 Presiding officer, memorandum concerning filing and hearing of closing submissions and requesting documentation from Crown counsel, 17 December 2004
  
- 2.33 Presiding officer, memorandum concerning filing of pre-sentence reports, 23 December 2004
  
- 2.34\* Crown counsel, memorandum concerning pre-sentence reports, 23 December 2004
  
- 2.35 Crown counsel, memorandum concerning Tribunal request for documentation (paper 2.35), 7 January 2005
  
- 2.36 Crown counsel, closing submissions, 10 January 2005
  
- 2.37 Claimant counsel, closing submissions, 11 January 2005
  
- 2.38 Claimant counsel, oral presentation and submissions in reply, 14 January 2005
  
- 2.39 Presiding officer, memorandum requesting further information from claimant and Crown counsel, 21 January 2005
  
- 2.40 Crown counsel, memorandum concerning Tribunal request for further information (paper 2.39), 25 January 2005
  
- 2.41 Crown counsel, memorandum concerning Tribunal request for further information (paper 2.39), 11 February 2005
  
- 2.42 Presiding officer, memorandum granting Crown counsel leave for late filing, 23 February 2005
  
- 2.43 Crown counsel, memorandum filing documents A46–A48, 18 March 2005

**2.44** Presiding officer, memorandum requesting further information from Crown counsel, 17 May 2005

**2.45** Crown counsel, memorandum concerning Tribunal request for further information (paper 2.44), 21 June 2005

### **3. RESEARCH COMMISSIONS**

There were no research commissions.

### **4. TRANSCRIPTS**

**4.1** Crown Law Office, transcript of Crown counsel's closing submissions, 14 January 2005

## **RECORD OF DOCUMENTS**

\* Document confidential and unavailable to the public without a Tribunal order

### **A. DOCUMENTS RECEIVED UP TO JUNE 2005**

**A1** Pirika Tame Hemopo, brief of evidence, 21 October 2002

**A2** David Balfour, brief of evidence, 8 November 2002

**A3** Malcolm Robson, David Riley, and Leonardus Bakker, brief of evidence, 12 February 2003

**A4** Pirika Tame Hemopo, brief of evidence, 24 May 2004

**A5** David Riley, brief of evidence, 24 September 2004

**A6** Charlie Tawhiao, brief of evidence, 24 September 2004

**(a)** Charlie Tawhiao, summary of document A6, 14 December 2004

**A7** Kristen Maynard, brief of evidence, 24 September 2004

- A8** Dr Branko Coebergh, brief of evidence, 24 September 2004
- A9** Charlie Tawhiao, Dr Branko Coebergh, Kristen Maynard, and David Riley, bibliography for evidence of authors, 1 October 2004
- A10** Te Kani Kingi, brief of evidence, 8 October 2004  
**(a)** Te Kani Kingi, summary of document A10, 15 December 2004
- A11** Malcolm Robson, brief of evidence, 18 October 2004
- A12** David Riley, appendix to document A5, 29 October 2004  
**(a)\*** Appendix to document A5, 14 December 2004
- A13** Heather Mackie, brief of evidence, 16 November 2004  
**(a)** Heather Mackie, record of statistics as at 5 November 2004, 24 December 2004
- A14** Dr Branko Coebergh, brief of evidence, 16 November 2004
- A15** Crown documents  
**(a)** Ann Clark, Community Corrections Service memorandum concerning IOM proposal to develop New Zealand specific assessment tool (IOM/MS), 26 March 1998  
 ‘Integrated Offender Management Development and Implementation Project: Proposal to Develop a New Zealand Specific Assessment Tool’, paper to senior management team, 9 March 1998  
**(b)** Kristen Maynard, Policy and Service Development memorandum concerning evaluation of ethnic and gender bias in risk and needs assessment tool being used by Community Corrections Service (CP2040), 19 June 1998  
**(c)** Mike Curran, paper to senior management team concerning draft discussion document on cultural and gender appropriateness of risk and needs assessment tool being used by Community Corrections Service, 17 September 1998  
**(d)** Kristen Maynard, ‘Maori Culture-related Needs – Literature Review’, February 1999  
**(e)** Dr Branko Coebergh, Leonardus Bakker, Brendan Anstiss, Kristen Maynard, and Scott Percy, ‘A Seein “I” to the Future: The Criminogenic Needs Inventory (CNI)’, 17 November 2004  
**(f)** Kristen Maynard, ‘Kimihia: Māori Culture-Related Needs – Seeking More Effective Ways to Assess and Address Māori Offending’, *He Pukenga Kōrero*, vol 5, no 1 (Spring, 1999), pp 25–33  
**(g)** Leon Bakker, James O’Malley, and David Riley, *ROC – Risk of Reconviction: Statistical Models which Predict Four Types of Reoffending* (Wellington: Department of Corrections, 1999)

- (h) Dr Branko Coebergh, Leonardus Bakker, Brendan Anstiss, Scott Percy, Kristen Maynard, and Terry Huriwai, 'The Criminogenic Needs Inventory (CNI): A Cognitive-Behavioural Assessment of Offender Criminogenic Needs and Responsivity Barriers', undated
- (i) Kristen Maynard, Policy Development memorandum concerning Māori culture-related need competencies (CNI/MACRN), 3 March 2000
- (j) Cultural Advisory Team, paper to senior management team concerning application of FREMO to CNI (CAT/FREMO/CNI), 5 July 2000
- (k) Christina Rush, memorandum to senior management team concerning CNI research and evaluation strategy (OD9-4), 11 October 2004
- (l) Jared Mullen, Policy Development memorandum concerning strategic framework for improving effectiveness of IOM for Māori (SAS-13), 20 February 2002
- (m) Department of Corrections, 'Request for Proposal: Review of the Māori Cultural Related Needs Component of the CNI', [2002]
- (n) Kirsten Maynard, memorandum to Maria McDonald concerning draft MACRNS evaluation report, 24 November 2003
- (o) Jared Mullen, memorandum to general management team concerning MACRNS (MACRNS), 27 November 2003
- (p) Jared Mullen, memorandum to general management team concerning SMCA (OMS4/4 5), 23 August 2004
- (q) Moana Jackson, 'An Analysis of the Maori Criminogenic Needs Process of the Department of Corrections', undated
- (r) Kristen Maynard, minutes of Community Corrections Service national Māori hui, 25–28 November 1997

**A16** Department of Corrections, *OCN Trainer Guide* (Wellington: Department of Corrections, 2003), 2003

- (a) Department of Corrections, *OCN Participants Workbook* (Wellington: Department of Corrections, 2003)
- (b) Department of Corrections, *Offending Period Criminogenic Needs (OCN) Assessment Booklet* (Wellington: Department of Corrections, 2001)
- (c) Department of Corrections, *Offending Period Criminogenic Needs (OCN) Resource Booklet* (Wellington: Department of Corrections, 2001)

**A17** Department of Corrections, *PCN Trainer Guide* (Wellington: Department of Corrections, 2003)

- (a) Department of Corrections, *PCN Participants Workbook* (Wellington: Department of Corrections, 2003)

**A17**—*continued*

(b) Department of Corrections, *PCN Flipfile* (Wellington: Department of Corrections, 2002)

(c) Department of Corrections, *Pre-disposing Period Criminogenic Needs (PCN) Assessment Booklet* (Wellington: Department of Corrections, 2002)

(d) Department of Corrections, *Pre-disposing Period Criminogenic Needs (PCN) Resource Booklet* (Wellington: Department of Corrections, 2002)

**A18** Department of Corrections, 'Māori Cultural Resource: Assessment Training', Community Probation Service resource, undated

**A19** Heather Mackie, response to Tribunal question, 24 November 2004

**A20** David Riley, responses to Tribunal questions and questions from claimaint counsel, 24 November 2004

**A21** Dr Branko Coebergh, responses to Tribunal questions, 24 November 2004

**A22** Department of Corrections, *Pre-sentence Assessment*, vhs videotape, undated

**A23** Catherine Love, brief of evidence, 1 December 2004

**A24** Geoffrey Hall, brief of evidence, 1 December 2004

**A25** Ngahiwi Tomoana, brief of evidence, 1 December 2004

**A26** Fiona Cram, brief of evidence, 1 December 2004

(a) Fiona Cram, 'Overview of Evidence', undated

**A27** Pirika Tame Hemopo, brief of evidence, 1 December 2004

**A28** David Balfour, brief of evidence, 1 December 2004

(a) Tangihaere Walker, brief of evidence, 6 December 2004

**A29** Jared Mullen, Policy Development internal memorandum concerning Māori interventions pathway (OMS 4/4-2), 4 October 2004

**A30** Crown counsel, glossary of terms, December 2004

**A31** Te Kani Kingi, bibliography for document A10, 8 December 2004

**A32** Crown counsel, Department of Corrections organisational chart, undated

**A33** Crown counsel, Wai 1024 timeline, undated

**A34** Department of Corrections, *Managing Offenders in the Department of Corrections* (Wellington: Department of Corrections, 2002)

**A35** Department of Corrections, *Māori Strategic Plan, 1 July 2003 – 30 June 2008: Kotahi Ano te Kaupapa; ko te Oranga o te Iwi* (Wellington: Department of Corrections, 2003)

**A36** Crown counsel, supporting material, undated

**A37** Crown documents

(a) Kristen Maynard, 'Potential Māori Culture-related Need Assessment Questions', working draft 3, 25 March 1999

(b) Kristen Maynard, 'Potential Māori Culture-related Need Assessment Questions', working draft 2, 23 February 1999

(c) Kristen Maynard, Policy and Service Development memorandum concerning cultural input into CNI, 24 February 1999

(d) Department of Corrections, 'Culture-related Needs Assessment Questions', undated

(e) Department of Corrections, 'MacRN – Whānau-related Need', filenote, 31 January 2000

(f) Kristen Maynard, 'Notes for Discussion of Concept of Whanau', 20 January 2000

(g) Kristen Maynard, Policy and Service Development memorandum concerning Māori panel to discuss specific needs of Māori offenders, 27 March 1998

(h) Justine Maynard, minutes of Māori panel to discuss specific needs of Māori offenders, 3 April 1998

**A38** Fiona Cram, Leonie Pihama, Matewiki Karehana, and Tim McCreanor, *Evaluation of the Framework for Measuring the Effectiveness of Corrections Programmes for Māori: A Report to the Department of Corrections* (Auckland: University of Auckland, 1999)

**A39** Department of Corrections, example of pre-sentence report, undated

(a) Department of Corrections, example of level 2 pre-sentence report, May 2003

**A40** Leonardus Bakker, summary of evidence given on 15 December 2004, undated

(a) Leonardus Bakker, summary of evidence given on 15 December 2004, 24 December 2004

**A41** James O'Malley and Leonardus Bakker, email correspondence concerning ROC\*ROI, 10, 11 December 2004

- A42** Kristen Maynard and Branko Coebergh, powerpoint presentation of evidence, undated
- A43** Branko Coebergh and Department of Corrections, email correspondence concerning MaCRNS, 2, 3 September 2002, 15 December 2004 (claimant)
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- A45** David Wales, brief of evidence, 11 February 2005
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