

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.¹

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.²

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.³

The ROC*ROI tool is based on over 30,000 criminal histories from 1988 data in the LES,⁴ which was subsequently validated on data from four other years within a 15-year range.⁵

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.⁶ 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.⁷ 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,⁸ the enormous amount of resourcing required, and the desire to have a prediction tool available in the shorter term.⁹

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 responsibility principles;¹⁰
- ▶ those results provide a very strong basis for assuming the principles' relevance in New Zealand;¹¹
- ▶ ROC*ROI is an actuarial tool that measures rather than explains offending, which makes it as relevant for Māori as for other ethnic groups;¹² 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.¹³

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.¹⁴ Mr Riley acknowledged that consultation could have occurred during the development

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.¹⁵ 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'.¹⁶ 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.¹⁷ 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,

15. Ibid

16. Document A8, para 8, Coebergh, oral evidence, 15 December 2004

17. Document A46, paras 91, 93

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however, the research found that the LES is sufficiently accurate to indicate trends in prosecutions, convictions, and sentencing.¹⁸

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.¹⁹ 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.²⁰

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.²¹ 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.²² 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

18. P Spier and B 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.²³

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.²⁴ 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 not do that. In that event, ROC*ROI's risk scores for particular Māori offenders known to Mr

23. Document A46, paras 19, 86

24. Document A5, para 8; doc A46, para 86

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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.²⁵

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 Corrections employees and stakeholders.²⁶ 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.²⁷ 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.²⁸

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. 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 responsibil-

25. Document A5, para 72

26. Paper 2.36, para 134.2

27. Ibid, para 134.1

28. Bakker, oral evidence, 15 December 2004

ity 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'.²⁹

29. Paper 2.37, para 76.2

6.2.8

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.³⁰

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.³¹ 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.

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

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

31. Document A13, para 7

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 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, 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.³² 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.³³

Corrections 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.³⁴ 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 someone's problem of offending.³⁵

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:

- ▶ 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

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 document was co-authored by Ms Maynard, who left the department in May 2000.

6.3.1

- ▶ 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 Corrections 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/macRNs tool, has challenged a fundamental premise upon which Corrections 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'.³⁶ 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.³⁷ 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 Corrections 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.³⁸ However, the Te Piriti evaluation was published in 2003,³⁹ which means that its value as supporting evidence for the rationale behind the development of MACRNS and tikanga Māori-based interventions is purely retrospective.

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.⁴⁰ Consultation with people with relevant knowledge thus provided

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: Howells et al argue the gap requires 'urgent attention' (K Howells, A Day, S Byrne, and M Byrne, 'Risk, Needs and Responsivity in Violence Rehabilitation: Implications for Programs with Indigenous Offenders', Best Practice Interventions in Correction for Indigenous People Conference, Adelaide, October 1999, p 2). Moore's appraisal (and extensive bibliography) of the Canadian literature records the lack of quantitative (as opposed to qualitative or sociohistorical) research (John-Patrick Moore, *First Nations, Metis, Inuit and Non-Aboriginal Federal Offenders: A Comparative Profile* (Ottawa: Correctional Service of Canada, Research Branch, 2003), pp 11, 37–41).

37. Document A26, para 31; Cram, oral evidence, 14 December 2004. Hannah-Moffat and Shaw discuss the need for a more tailored assessment process in Canada than the existing LSI-R tool.

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)

40. Document A15(j), para 24

6.3.2

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,⁴¹ although it is not clear whether ‘iwi tohunga’ were involved and, if they were, how they were involved.⁴² 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.⁴³ 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’.⁴⁴ Dr Kingi also noted that the macRNS development process utilised a number of accepted mechanisms to minimise threats to validity.⁴⁵ 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’.⁴⁶

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 and presentations to Corrections 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.

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. Ibid, paras 20–26

46. Paper 2.36, para 56

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.⁴⁷ 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.⁴⁸

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.⁴⁹ 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.⁵⁰ 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.⁵¹ 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'.⁵² 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 in the CNI, the Crown argued that separating them out from the CNI for independent administration would create practical difficulties involving extra interview time and, therefore, extra remand time.⁵³ 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 valid-

47. Paper 2.36, para 48

48. Dr Kingi, 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; Ms Maynard, 16 December, 2004

51. Document A10, paras 50–68

52. Workman, p 8; see also doc A38, pp 46–47

53. Paper 2.36, para 44

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ity had not been tested but also that validation would be needed before the department could be confident of macRNS' appropriateness and utility.⁵⁴

When explaining why no pilot study of macRNS had occurred, Corrections 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.⁵⁵

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 over-representation in the Corrections system while also allowing offenders to benefit immediately from macRNS. Those immediate benefits included the routine consideration of cultural factors by Corrections staff and the provision of better quality information about cultural factors to judges and those who work with offenders.⁵⁶ 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.⁵⁷ 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 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 timeframe⁵⁸ 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.

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

58. Document A7, para 34

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.⁵⁹ Corrections 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.⁶⁰ In light of the ground-breaking nature of the macRNS and the importance of examining their validity, we consider that the department 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 Corrections witnesses supplemented their written evidence with oral presentations, much more emphasis was placed on the developmental nature of macRNS and the possibility of

59. Love, oral evidence, 14 December 2004

60. Coebergh, oral evidence, 15 December 2004; Maynard, oral evidence, 16 December 2004

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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 contributes to the evaluation of their validity and will be the basis for modifications and improvements.⁶¹ 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.⁶² 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 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.⁶³

61. Paper 2.36, para 88

62. Document A14, para 96

63. DA Andrews and James Bonta, *The Psychology of Criminal Conduct*, 3rd ed (Cincinnati: Anderson Publishing, 2003), pp 437, 438.

During the hearing, the Corrections 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 are neither Māori nor trained in psychology. We consider it plain that such a disjunction between the assessment tool's foundations and the skills and experience of its primary users made it particularly important that the information provided to probation officers about the tool 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.⁶⁴ 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.⁶⁵ Further evidence is provided by the Corrections witnesses' acknowledgement of the merit of Mr Jackson's description of macRNS as 'denied Māori cultural anchors'.⁶⁶ 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.⁶⁷ 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 to Maori offending' (emphasis in original).⁶⁸ 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'.⁶⁹ The review team's conclusion was that 'the macRNS constructs are not easily understood because their identity as criminogenic versus cultural needs is unclear'.⁷⁰

The Crown has acknowledged that the issue of macRNS' essential nature is one on which the department's communication could have been improved.⁷¹ In late 2003, it was agreed that

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

68. *Ibid*, p 7

69. *Ibid*, p 8

70. *Ibid*, p 23

71. Paper 2.36, paras 27–28; transcript 4.1, p 3

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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)’.⁷² 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.⁷³ 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.’⁷⁴

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.⁷⁵ Thus, while it appears that macRNS were originally conceptualised as criminogenic needs,⁷⁶ 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 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.⁷⁷ 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.

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.

77. Paper 2.36, app 1

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.⁷⁸ 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.⁷⁹

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'.⁸⁰ 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 criticism was that the macRNS' screening questions rule 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 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

78. Document A11, para 6.3; doc A8, app 2, para 35

79. Robson, oral evidence, 16 December 2004

80. Ibid

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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 Corrections witnesses and documents on what can be said to offenders, and when, about the reasons for the screening questions and the macRNS assessment itself.⁸¹ 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.⁸² 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 the connections between individual macRNS and their corresponding criminogenic needs,⁸³ 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 assess-

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

83. Paper 2.36, app 1

ment 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.⁸⁴ 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 overestimate the level of risk.⁸⁵ 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 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

84. Document A46, para 15

85. Document A3, paras 15–17; Riley, oral evidence, 15 December 2004; doc A8, para 21; see also sec 3.2. above

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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 2003–04.⁸⁶

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 must be taken into account.⁸⁷ 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, whānau, 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.

86. Document A8, para 38; doc A14, paras 117–118

87. Sentencing Act 2002, ss 7–9; see also doc A24, paras 7–8, 13–23

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'.⁸⁸ Claimant counsel submitted that there was no evidence either way that the judge had or had not imposed 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, Corrections 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.⁸⁹

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.

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 mas-

88. Document A44

89. Maynard, oral evidence, 16 December 2004; Mackie, oral evidence, 15 December 2004; Coebergh, oral evidence, 16 December, 2004

6.4.2

sive 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.⁹⁰ 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.⁹¹ 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 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.

90. The claimant raised some concerns about the policy of targeting high-risk offenders rather than all offenders, but these were not pursued.

91. In the 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).

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.⁹² 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).⁹³ 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.⁹⁴ 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 Corrections 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 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.

92. Paper 2.36, para 56

93. Document A35

94. *Ibid*, pp 10–13

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.⁹⁵ 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.⁹⁶ 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 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

95. Coebergh and Kingi

96. Ms Maynard, 16 December 2004

6.4.3

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 Corrections 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,⁹⁷ 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,

⁹⁷ Paper 2.36, para 251

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.

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 com-

munities). 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.