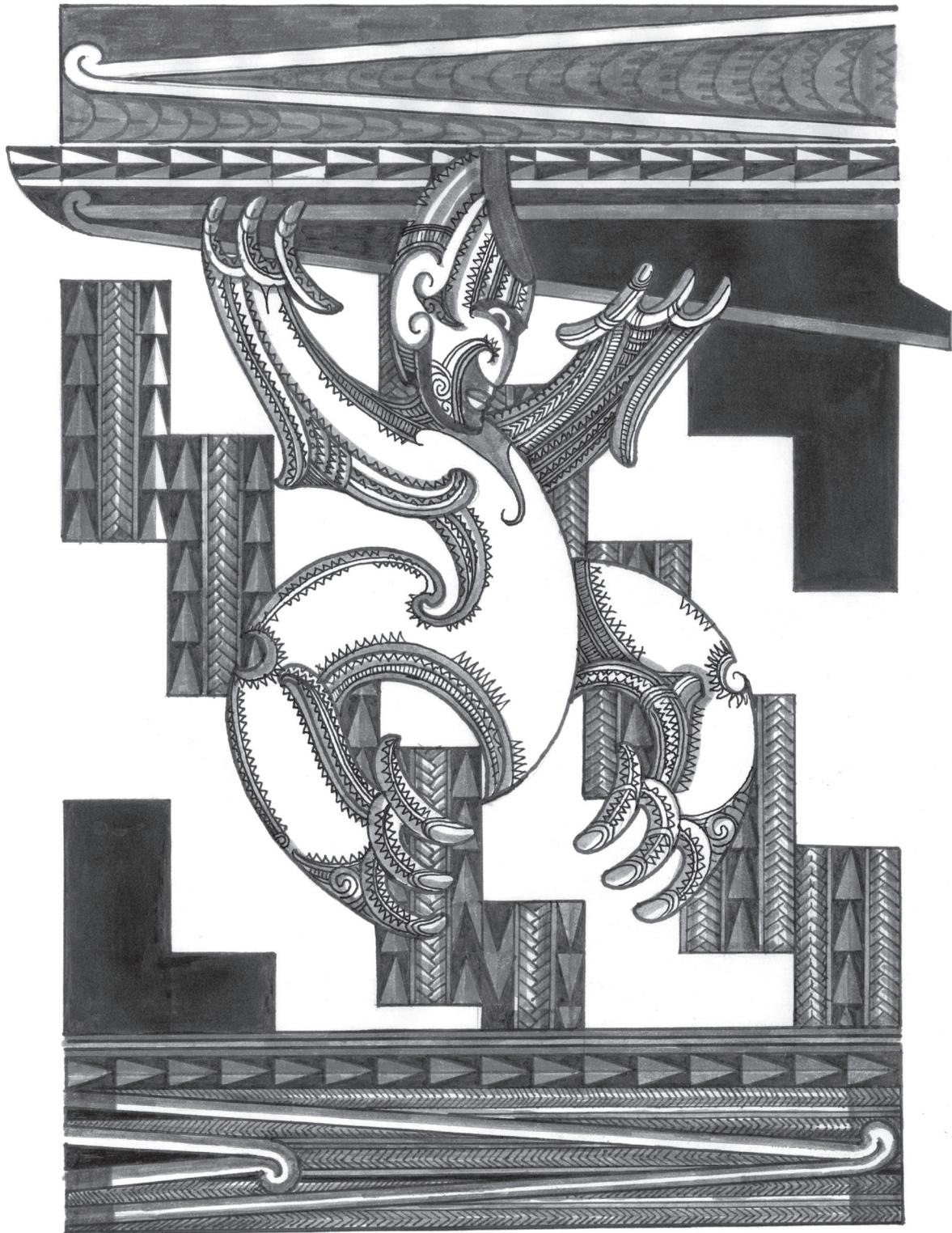


# TŪ MAI TE RANGI!

## *Report on the Crown and Disproportionate Reoffending Rates*

PRE-PUBLICATION VERSION





TŪ MAI TE RANGI!

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Embargoed till 12 noon Tuesday 11 April 2017

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# For the Crown, claimants, and media only

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*Report on the Crown and*

*Disproportionate Reoffending Rates*

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PRE-PUBLICATION VERSION

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WAI 2540

WAITANGI TRIBUNAL REPORT 2017

Cover design by Professor Derek Lardelli

*Piki ake, kake ake i te Toihuarewa*

*Te ara o Tāwhaki i piki ai ki runga*

*Climb here, ascend by the suspended way,  
The pathway of Tāwhaki when he climbed on high.*

The advice given to Tāwhaki was that he ascend by the akamatua (main vine). The poutama stairway was an ara tiatia, a pegged ascent on the winds similar to the poutama tukutuku pattern.

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## Waitangi Tribunal

Te Rōpū Whakamana i te Tiriti o Waitangi  
Kia puta ki te whai ao, ki te mārāma

The Honourable Te Ururoa Flavell  
Minister for Māori Development  
The Honourable Christopher Finlayson QC  
Attorney-General  
The Honourable Louise Upston  
Minister of Corrections  
The Honourable Amy Adams  
Minister of Justice  
Parliament Buildings  
WELLINGTON

7 April 2017

E ngā Minita, tēnā koutou

We enclose for service our report: *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates*. It is the outcome of our urgent inquiry into a claim concerning the Crown's actions and policies in reducing the disproportionate rate of Māori reoffending. The report follows the hearing of the claim at the Waitangi Tribunal's offices in Wellington from 25 to 29 July 2016.

The claimant, Tom Hemopo, a retired senior probation officer, alleged the Crown had failed to make a long-term commitment to reducing the high rate of Māori reoffending relative to non-Māori.

The claim must be seen against the backdrop of statistics relating to imprisonment in New Zealand. Māori constitute about 15 per cent of the national population but are more than 50 per cent of the prison muster. The overall national prison muster is now approximately 10,000. It was generally accepted before us that this meant at any one time there may be 20,000 children in New Zealand with a parent in prison. Based on

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current figures, this suggests at least 10,000 Māori children are likely to have a parent in prison.

Focusing in on the issue before us, the difference between Māori and non-Māori reoffending rates is substantial, undisputed and contributes to the disproportionate number of Māori in prison.

In addressing the claim, we have focused on how the Crown has gone about meeting its Treaty responsibilities in respect of Māori reoffending, in particular the actions the Department of Corrections is taking to meet these responsibilities. We have looked at why the Department does not have a specific strategy or target to reduce Māori reoffending, and why it has instead adopted a plan and target to reduce the overall reoffending rate by 25 per cent by 2017. Initial assessments of progress appeared promising. However, the Department's measurement of progress towards the goal showed that, as at June 2016, the Māori reoffending rate had reduced by 0.5 per cent, and the non-Māori reoffending rate by 6.4 per cent. This suggests a widening of the disparity between Māori and non-Māori reoffending rates. We have also looked at the mechanisms the Department has in place to work with Māori communities, particularly the role of the recently established Māori Advisory Board.

We found the Crown has a Treaty responsibility to reduce inequities between Māori and non-Māori reoffending rates in order to protect Māori interests. We do not suggest that the Department of Corrections is not making sincere efforts. It clearly is. Disproportionate Māori reoffending rates present a serious and long-standing problem. We have concluded that the situation is urgent and, for the Crown to be acting consistently with its obligation actively to protect Māori interests and to be acting equitably, it must be giving urgent priority to this issue in clear and convincing ways.

As we describe in the report, we have concluded that the Crown, through the Department of Corrections, is not prioritising the reduction of Māori reoffending. This conclusion is supported by the fact that the Department has no specific plan or strategy to reduce Māori reoffending, no specific target to reduce Māori reoffending, and no specific budget to meet this end. We saw no persuasive justification for these omissions in a situation where the gap between Māori and non-Māori reoffending rates is widening with regard to progress made toward the overall reoffending reduction target.

We have therefore found that the Crown has breached the principle of active protection by not sufficiently prioritising the protection of Māori interests in the context of persistently disproportionate Māori reoffending

rates. That is, the Crown, through the Department of Corrections, has not made an appropriately resourced, long-term strategic and targeted commitment to reducing the rate of Māori reoffending. We have also found that the Crown has breached the principle of equity by not sufficiently prioritising the reduction of Māori reoffending rates.

We have found that the Crown has not, at this point, breached the principle of partnership. We say this because we are confident that the Crown, through the Department of Corrections, is currently making good faith attempts to engage with iwi and hapū. We have found, however, that if the Crown does not live up to its stated commitment to develop these partnerships, it risks breaching its partnership obligations.

We have identified prejudice arising from the Crown's omission to prioritise the reduction of Māori reoffending rates. We are sympathetic to the claimant's wish for a Royal Commission or similarly high level inquiry into the issues he raised. However, we consider that the circumstances require the Crown to take practical action now rather than await the outcome of a Royal Commission process. Our recommendations are directed to this end.

We have recommended that the Crown:

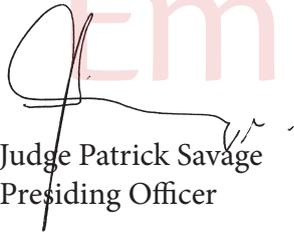
- ▶ Revise the Māori Advisory Board's terms of reference to enhance the influence of the board in high level discussions with the Department of Corrections relating to the protection of Māori interests. The increased influence of the Māori Advisory Board should extend to the co-design of the Department's rehabilitative and reintegrative programmes operating within a Māori-focused strategic framework.
- ▶ Design and implement a revised strategy with the Māori Advisory Board. We see the need for a renewed strategic focus that gives appropriate priority to reducing the disproportionate rate of Māori reoffending. The form this strategy takes will be a matter for the Crown and Māori to decide together, in partnership.
- ▶ Set and commit to a measureable, data-driven, Māori-specific target in order to hold itself accountable for reducing Māori reoffending rates within reasonable timeframes. The Department of Corrections should regularly and publically report on the progress made towards meeting this target. We also recommend that more concrete mechanisms, targets, and resourcing be set for the iwi and hapū relationship agreements currently in place.
- ▶ Include a dedicated budget to ensure that a renewed Māori-specific strategic focus, and the target and programmes that fall under this, are adequately resourced. This budget should reflect the priority

given to reducing Māori reoffending rates. The allocation of the budget should be a matter for discussion between the Department of Corrections and the enhanced Māori Advisory Board.

- ▶ Provide appropriate resourcing for senior level Department of Corrections staff to receive advice and training in incorporating mātauranga Māori and the Crown's Treaty obligations into the Department's high level practice and operations.
- ▶ Amend the Corrections Act 2004 to state the Crown's relevant Treaty obligations to Māori as addressed in this report.

We note that, just as we were preparing to release our report, the Crown sought to submit new evidence relating to a new Justice Sector target to reduce Māori reoffending and a proposed Justice Sector strategy to meet this target. We allowed the new evidence and a submission from the claimant in response. We report on this evidence in an addendum to our report. For reasons we discuss there, our consideration of this evidence does not alter our findings and conclusions to this report.

Tēnā koutou, tēnā tātau katoa.



Judge Patrick Savage  
Presiding Officer

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## PREFACE

This is a pre-publication version of the Waitangi Tribunal's *Tū Mai te Rangi!* As such, all parties should expect that in the published version headings and formatting may be adjusted, typographical errors rectified, and footnotes checked and corrected where necessary. Photographs and additional illustrative material may be inserted. However, the Tribunal's findings and recommendations will not change.

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## ABBREVIATIONS

app	appendix
CA	Court of Appeal
CEO	chief executive officer
CERD	United Nations Committee on the Elimination of Racial Discrimination
ch	chapter
comp	compiler
doc	document
ed	edition, editor
ELT	Executive Leadership Team
fol	folio
ltd	limited
MAB	Māori Advisory Board
n	note
no	number
NZLR	<i>New Zealand Law Reports</i>
p, pp	page, pages
para	paragraph
pt	part
QC	Queen's Counsel
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
sec	section (of this report, a book, etc)
RI	Recidivism Index
RNR	risk, need, responsivity
ROC/ROI	risk of reconviction / risk of reimprisonment
RQ	rehabilitation quotient
RR25%	reducing reoffending by 25 per cent by 2017
vol	volume
Wai	Waitangi Tribunal claim

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MAU HIKAIA

*Mau hikaia! Mau hikaia!  
Te ahi e ko Rangimatua  
Te ahi e ko Papamatua  
Te ahi e Rangi, te ahi e Papa  
Tēnei te kaunoti tapu  
Hei hika atu mō te tipua  
Hei hika atu mō te tawhito  
Ka whakamaranga! Ko ātea te hōmai e  
Hei tinei e, hei tinei mōwai tū mai te rangi!*

*Rub and kindle the fire with friction!  
The flames of Rangimatua the sky father  
The flames of Papamatua the earth mother  
The inferno of Rangi and Papa  
This is the sacred fire stick  
That ignites the fire gods  
That ignites the ancients  
That awakens! That clears the way  
That obliterates, eliminates until it extinguishes and a calm new day arises!*

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## CHAPTER 1

# MAU HIKAIA: INTRODUCTION

Our report follows the hearing under urgency of a claim concerning Crown actions and policies in reducing the disproportionate rate of Māori reoffending, and whether the Crown is acting consistently with its Treaty obligations in this regard. The claim sits within the broader issue of the undisputed and long-standing overrepresentation of Māori in the criminal justice system generally. However, our report is the result of an urgent inquiry into the current reoffending aspect of this issue only.

We begin with a brief outline of how this claim was brought to us and why it was granted urgency. We also introduce the main parties to our inquiry. In the second chapter we consider the wider picture of Māori overrepresentation in the corrections system, and previous reports and inquiries into this issue. In the third chapter, we set out the parties' positions on the inquiry's central issues. In the fourth chapter we present our discussion of the evidence as it relates to the central issues we have identified, and we apply the relevant Treaty principles to this evidence. In the fifth and final chapter we present our findings.

### 1.1 THE CLAIM PROCESS

On 31 August 2015, Tom Hemopo filed a statement of claim on behalf of himself and his iwi, Ngāti Maniapoto, Rongomaiwahine, and Ngāti Kahungunu. Mr Hemopo alleged the Crown had failed to make a long-term commitment to bring the number of Māori serving sentences in line with the Māori population generally. More specifically to the Department of Corrections, Mr Hemopo also alleged the Crown had failed to reduce the high rate of Māori reoffending proportionate with non-Māori.<sup>1</sup> Further, Mr Hemopo claimed the Department of Corrections allowed its *Māori Strategic Plan 2008–2013* to lapse without replacement, and had not consulted Māori in making this decision. The Department also, Mr Hemopo said, failed to provide measurement of its performance in reducing Māori reoffending.<sup>2</sup> Counsel for Mr Hemopo asked for an urgent hearing of his claim because of the 'alarmingly high rates of reoffending by Māori prisoners' and on the grounds that many Māori,

---

1. Claim 1.1.1, p3  
2. Ibid, pp5–6

and their families and communities, were suffering significant prejudice as a result of overrepresentation of Māori in reoffending statistics.<sup>3</sup>

In response, the Crown acknowledged the disproportionate rates of Māori reoffending as a serious issue causing significant prejudice to Māori. It submitted, however, that the actions of the Department of Corrections could not be inquired into in isolation from the wider Justice Sector. It said an urgent inquiry was therefore not the appropriate forum to address the issues raised by the claimant.<sup>4</sup> Further, the Crown submitted that current initiatives, and initiatives being developed, would address the issues raised by the claimant and there was no imminent event that would irrevocably affect the Crown's ability to continue to address these issues.<sup>5</sup>

Judge Patrick Savage, Deputy Chairperson of the Waitangi Tribunal, granted an application for urgency after hearing submissions on the matter in August to October 2015. Judge Savage noted that if the prejudice stated by the claimant existed, many Māori men and women in the corrections system now or in the future would face potentially irreversible prejudice. The potential social consequences of this meant that this issue could not be further delayed.<sup>6</sup> The urgent inquiry was not to consider the causes of crime in general or the Crown's response to crime in general but was to focus narrowly on the Crown's current commitment, through the Department of Corrections, to reducing Māori reoffending rates, and making them more equivalent with those of non-Māori.<sup>7</sup>

## **1.2 THE URGENT INQUIRY INTO THE CROWN'S RESPONSE TO MĀORI REOFFENDING RATES**

On 22 December 2015 Judge Savage was appointed Presiding Officer of the Tribunal panel to inquire into the urgency claim into the Crown's response to disproportionate Māori reoffending rates, Wai 2540. The appointed panel members were Bill Wilson QC, Professor Derek Lardelli, and Tania Simpson.<sup>8</sup> Counsel filed joint statements of agreed facts and up-to-date statistics for Māori and non-Māori reoffending rates in preparation for the hearing.<sup>9</sup> We received a joint statement of issues from counsel on 15 April 2016.<sup>10</sup>

Broadly, these issues were:

- ▶ What is the nature of the Crown's obligations under the principles of the Treaty to reduce Māori reoffending?
- ▶ To what extent is the Department of Corrections responsible in respect of any such obligations?

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3. Submission 3.1.1, pp 1, 7

4. Submission 3.1.5, p 2

5. Ibid, p 17

6. Memorandum 2.5.4, p 6

7. Ibid, p 6

8. Memorandum 2.5.5, p 1

9. Document A17; submission 3.1.31(a)

10. Claim 1.4.1

- ▶ How do any such obligations of the Department interface with the role of other Crown agencies?
- ▶ What obligations does the Department have to provide culturally responsive programmes to all Māori serving sentences, and to ensure its rehabilitative programmes contribute to an overall reduction in reoffending by Māori?
- ▶ What steps is the Department taking to meet its obligations, and are these sufficient?
- ▶ How is the Department accountable to Māori for the steps it is taking?
- ▶ Why did the Department allow the *Māori Strategic Plan 2008–2013* to lapse? Why did the Department not undertake, or not retain, any measurement of its performance against the *Māori Strategic Plan 2008–2013*?
- ▶ If the Crown's target of a 25 per cent reduction in the overall reoffending rate by 2017 is achieved, in what ways could this impact on the Māori reoffending rate?
- ▶ What reduction in both the overall and Māori reoffending rates has there been, if any, since the 25 per cent target was set?
- ▶ To what extent, if any, is the Department responsible for the prejudice identified in the Statement of Agreed Facts?
- ▶ Is the Department creating or perpetuating a stereotype that Māori are inherently criminal? If so, what steps should the Department take to address this?
- ▶ To remedy any Treaty breaches that may be found should the Department set a specific target, implement a specific strategy, or dedicate a specific budget to reduce reoffending by Māori offenders?

Our evidential hearing was held at the Waitangi Tribunal's offices in Wellington from 25 to 29 July 2016. On 22 August, counsel filed an agreed addendum to the agreed statistics, in time for the hearing of closing submissions. The addendum included the Department's most up-to-date statistics from June 2016 on its progress towards its set target of reducing the overall reoffending rate by 25 per cent by 2017.<sup>11</sup> We heard closing submissions on Tuesday 23 August 2016.

### 1.3 THE PARTIES IN THIS INQUIRY

#### 1.3.1 The claimant and witnesses

Before Mr Hemopo's retirement in June 2011, he was a Senior Probation Officer Practice Leader for the Department. Mr Hemopo worked for the Department for nearly three decades, from 1985 until his retirement.<sup>12</sup> During his time working for the Department, Mr Hemopo held a number of roles including as a Home Detention Officer, Community Work Officer, Community Liaison Officer, Intensive Supervision Officer, Māori Kaiwhakahaere, Senior Probation Officer Practice

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11. Submission 3.1.47(a), p 2

12. Document A1, p 2

Leader, Kaumātua for the Tairāwhiti Māori network, and Central Region Māori representative for the Tairāwhiti network.<sup>13</sup>

We also note that Mr Hemopo filed a previous claim with the Waitangi Tribunal in 2002 on behalf of Ngāti Kahungunu relating to two offender assessment tools used by the Department of Corrections to determine offenders' risk of reoffending and their treatment needs. Mr Hemopo was concerned then that the tools resulted in Māori being perceived as at greater risk of reoffending, which then resulted in longer and more punitive sentences.<sup>14</sup> The Tribunal inquired into that claim and reported in October 2005 with *The Offender Assessment Policies Report*. The Tribunal said the Crown had acted inconsistently in applying Treaty principles in this matter but was unable to conclude that those inconsistencies resulted in prejudice to Ngāti Kahungunu.<sup>15</sup> It nonetheless said action was necessary to prevent prejudice from occurring.

In our inquiry, Mr Hemopo was supported in his current claim by a number of witnesses. We also heard evidence from a number of interested parties, all of whom broadly supported the claimant. We heard from the following witnesses:

- ▶ *Dr Fiona Cram*: The Director and Research Manager of Katoa Ltd, a research and evaluation company. Dr Cram has undertaken a variety of kaupapa Māori social science research and evaluation projects.<sup>16</sup> Dr Cram also submitted evidence in support of Mr Hemopo's claim in the inquiry into the Department's offender assessment policies.<sup>17</sup>
- ▶ *Dr Tracey McIntosh*: The Co-Director of Ngā Pae o te Māramatanga, New Zealand's Māori Centre of Research Excellence hosted by the University of Auckland. Dr McIntosh is also an Associate Professor in the Department of Sociology at the University of Auckland. Dr McIntosh affiliates to Ngāi Tūhoe.<sup>18</sup>
- ▶ *Dr Margaret Anne Opie*: An independent qualitative researcher with work centred on New Zealand's corrections system. Dr Opie provided evidence on the wider context which has contributed to the current statistics regarding Māori reoffending rates.<sup>19</sup>
- ▶ *Demsa Kemp Ratima*: The Chairman of the Ahuriri District Health Board post-Treaty settlement entity in the Hawkes Bay. Mr Ratima is also the Coordinator of Ngā Marae ō Heretaunga, and the Chair of the Takitimu District Māori Council. Mr Ratima submitted evidence on behalf of the Takitimu District Māori Council.<sup>20</sup>
- ▶ *Ngāhiwi Tomoana*: The Chairperson of Ngāti Kahungunu Iwi Incorporated, the Mandated Iwi Authority for Ngāti Kahungunu under the Māori Fisheries

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13. Document A1, p 2

14. Ibid, p 5

15. Waitangi Tribunal, *The Offender Assessment Policies Report* (Wellington: Legislation Direct, 2005), pp 150, 152

16. Document A18, p 2

17. Ibid, p 3

18. Document A24, p 1

19. Document A2, p 1

20. Document A6, p 1

Act 2004. Mr Tomoana also provided written evidence supporting Mr Hemopo's claim in the previous inquiry into the Department's offender assessment policies.<sup>21</sup>

- ▶ *Toro Waaka*: The Trustee and Chairperson of the Ngāti Pāhauwera Development and Tiaki Trusts representing the confederation of hapū known as Ngāti Pāhauwera.<sup>22</sup>
- ▶ *Matthew (Shayne) Walker*: The Ngāti Kahungunu Iwi Incorporated representative on the Māori Advisory Board to the Department of Corrections. Mr Walker also worked as a Probation Officer Service Manager in the Community Probation Service, and is the General Manager of Maungaharuru-Tangitū Trust, a post-settlement governance entity in Ahuriri. Mr Walker gave evidence in his capacity as a representative on the Māori Advisory Board.<sup>23</sup>
- ▶ *Dr Rawiri (David) Waretini Junior-Karena*: An academic and lecturer at the Waikato Institute of Technology in Hamilton, and an Adjunct Faculty Professor at Te Whare Wānanga o Awanuiārangi in Auckland and Whakatāne.<sup>24</sup> Dr Waretini-Karena also had personal experience of the New Zealand corrections system and of successful rehabilitation, as he served a prison sentence and was released early with a 0 per cent likelihood of reoffending.<sup>25</sup>
- ▶ *Dr Adele Whyte*: The Chief Executive Officer of Ngāti Kahungunu Iwi Incorporated. Dr Whyte also holds a Masters degree and a PhD in science. Dr Whyte presented evidence on behalf of Ngāti Kahungunu Iwi Incorporated.<sup>26</sup>
- ▶ *Dr Kim Workman*: An Adjunct Research Associate in the Institute of Criminology at Victoria University in Wellington. Dr Workman is of Ngāti Kahungunu ki Wairarapa and Rangitāne o Wairarapa descent. Throughout his career in the public sector, Dr Workman had roles in the Police, the Office of the Ombudsman, the State Services Commission, the former Department of Māori Affairs, the Department of Corrections, and the Ministry of Health. He was the National Director of Prison Fellowship, and founded the prison reform organisations Rethinking Crime and Punishment and JustSpeak.<sup>27</sup>

### 1.3.2 Interested parties and witnesses

Interested parties and witnesses included:

- ▶ *Donna Awatere-Huata*: Ngāti Whakaue and Ngāti Porou, and an independent consultant with a Masters in Psychology and a Diploma in Educational Psychology. Ms Awatere-Huata worked as a registered psychologist for the Department of Education for South Auckland.<sup>28</sup> Ms Awatere-Huata also had

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21. Document A19, p 1

22. Document A4, p 1

23. Document A26, p 1

24. Document A23, p 1

25. Ibid, p 11

26. Document A20, p 1

27. Document A32, p 1

28. Document A16, pp 3–4

personal experience of the New Zealand corrections system: she served a prison sentence, as did her father.<sup>29</sup>

- ▶ *Te Aroha Henare*: An independent researcher with a Bachelor of Iwi Environmental Trusteeship, and postgraduate studies in Natural Resource Management and Environmental Studies. Ms Henare is of Ngāti Hine, Te Tarawa, Ngāti Tautahi and Ngāti Whakaeke descent.<sup>30</sup>
- ▶ *Julia Whaipooti*: Ngāti Porou. Ms Whaipooti holds a current practicing certificate as a barrister and solicitor and gave evidence in her capacity as Chair and spokesperson for JustSpeak, a criminal justice system reform advocacy network.<sup>31</sup>
- ▶ *Vincent Copeland*: The Executive Manager of Mahi Tahī Akoranga Trust, a registered charitable trust based in Rotorua.<sup>32</sup> The Trust was established to break the cycle of reoffending through tikanga programmes, and over the past 20 years has delivered tikanga Māori programmes for the Department.<sup>33</sup> Mr Copeland gave his evidence in written form for and on behalf of Mahi Tahī Akoranga Trust.
- ▶ *Moana Jackson*: Ngāti Kahungunu and Ngāti Porou. In 1985 Mr Jackson was commissioned by the then Justice Department to undertake research on the relationship between Māori and the criminal justice system. The research was commissioned partly as a response by the Department to widespread concern about the high rate of incarceration, and of young Māori men in particular. In 1988 Mr Jackson published his research in a report titled *The Māori and the Criminal Justice System – He Whaipāanga Hou*.<sup>34</sup> Mr Jackson appeared as a witness on behalf of the interested parties.

### 1.3.3 The Crown

The Department of Corrections (referred to here as the Department) is the main Crown agency responsible for administering the New Zealand corrections system and the Corrections Act 2004. The Act states that the purpose of the Department is ‘to improve public safety and contribute to the maintenance of a just society’.<sup>35</sup> As part of this, and pursuant to section 5(1)(c) of the Act, the Department is responsible for assisting in the rehabilitation of offenders. The Department is one part of the Crown’s Justice Sector, which also includes the Ministry of Justice, the New Zealand Police, Crown Law, the Serious Fraud Office and Child, Youth and Family (as part of the Ministry of Social Development). We received evidence from Department staff and staff from other Justice Sector agencies. They were:

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29. Document A30, pp 10–11

30. Document A31, p 1

31. Document A29, p 1

32. Document A44, p 1

33. Ibid, p 3

34. Document A28, p 1

35. Corrections Act 2004, s 5

- ▶ *Vincent Arbuckle*: The Deputy Chief Executive (Corporate Services) at the Department. The Deputy Chief Executive (Corporate Services) reports directly to the Chief Executive of the Department, and is a member of the Department's Executive Leadership Team.<sup>36</sup>
- ▶ *John Neil Campbell*: The Director Māori of the Department. Mr Campbell has held this role since July 2012, prior to which he held a number of positions within different Māori-focused teams in the Department.<sup>37</sup> The Director Māori is the most senior Māori role within the Department, and is responsible for the Department's Māori Services Team and strategic relationships with Māori.<sup>38</sup>
- ▶ *Benjamin Clark*: The Director Programmes and Interventions at the Department when the claim was filed and when his first brief of evidence was submitted opposing the application for urgency.<sup>39</sup> In January 2016, Mr Clark took up the position of Regional Commissioner of Corrections Services for the Department's Southern Region. Corrections Services is the service delivery arm of the Department: it administers both custodial and community sentences and delivers rehabilitation and reintegration interventions to offenders. Mr Clark presented evidence at the hearing in this capacity.<sup>40</sup>
- ▶ *Jean-Pierre de Raad*: The acting Deputy Chief Executive of Sector Group at the Ministry of Justice, and the General Manager, Sector Strategy.<sup>41</sup> Mr de Raad gave his evidence in written form.
- ▶ *Darius Fagan*: The Chief Probation Officer for the Department. The Chief Probation Officer and its team are responsible for the practice direction for the probation part of the corrections system. The role is concerned with the monitoring and management of how probation officers do their jobs.<sup>42</sup>
- ▶ *Anthony Fisher*: The General Manager District Courts at the Ministry of Justice at the time the claim was filed, and when his first brief of evidence was submitted.<sup>43</sup> On 26 April 2016, Mr Fisher began in the role of Director, Māori Strategy for the Ministry of Justice. The Director, Māori Strategy is a tier 3 senior management role reporting to the Deputy Chief Executive of the Ministry of Justice, providing advice both to the Chief Executive and to the Ministry's Senior Leadership Team. It was a newly created role at the time of Mr Fisher's appointment, put in place by the Ministry's Chief Executive.<sup>44</sup> Mr Fisher presented evidence at the hearing in his capacity as Director Māori Strategy.

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36. Document A10, p 1

37. Document A34, p 1

38. Ibid, p 4

39. Document A12, p 1

40. Document A39, p 1

41. Document A 7, p 2

42. Document A35, p 1

43. Document A11, p 1

44. Document A36, p 1

- ▶ *Wallace Haumaha*: A Superintendent in the New Zealand Police, and the Police's Deputy Chief Executive: Māori.<sup>45</sup> Mr Haumaha gave his evidence in written form.
- ▶ *Dr Peter Johnston*: The Director of Research and Evaluation at the Department. Dr Johnston also holds a Master of Arts and Doctor of Philosophy in Psychology, as well as a Diploma in Clinical Psychology.<sup>46</sup>
- ▶ *Nicola Reynolds*: The Chief Psychologist for the Department. The Chief Psychologist provides professional oversight and ongoing professional development and maintenance of standards for up to 150 psychologists in the field, and broader psychological advice to the Department.<sup>47</sup>
- ▶ *Richard Schmidt*: The Acting General Manager, Criminal Justice Unit, in the Policy Group at the Ministry of Justice. Mr Schmidt's substantive role is the Chief Advisor, Criminal Justice Unit.<sup>48</sup> Mr Schmidt gave his evidence in written form.

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45. Document A8, p 1  
46. Document A9, p 1  
47. Document A38, p 1  
48. Document A13, p 1

## CHAPTER 2

# TE AHI: REOFFENDING AND THE SITUATION FOR MĀORI

### 2.1 INTRODUCTION

Before we begin our analysis of the inquiry issues in detail we set out the broad situation for Māori in the criminal justice system, and how this relates to our focus on Māori reoffending rates. We do this to help the reader understand the parties' positions on the issues that we set out in the following chapter. We first define what we mean when we talk about reoffending and reimprisonment. We then briefly present the situation for Māori in the corrections system today, and previous research and inquiries relating to this issue.

### 2.2 WHAT REOFFENDING IS

As the focus of the claim and our urgent inquiry is Māori reoffending, and much of the evidence and argument we heard was based on statistical measures, we explain here the Department of Corrections terminology as reflected in the statistics it produces. For the Department, reoffending is defined as:

when an individual receives any conviction for a new offence committed within 12 or 24 months of their release from prison, or after community sentence start date, and which results in a sentence administered by the Department – ie, imprisonment, or a community sentence such as supervision, home detention or community work. It is not the seriousness of the offence which counts, but the nature of the sentence which is imposed.<sup>1</sup>

To clarify, the Department does 'not count offences which result in fines, or other minor sentences.' This means:

a minor offence (eg, shoplifting) which results in a sentence of community work is counted in our [Recidivism Index] RI statistics; but a more serious offence (eg, burglary) which results in conviction and discharge would not be counted. However,

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1. Document A37(b), p 1

offences of moderate to high seriousness almost invariably result in Corrections-administered sentence.<sup>2</sup>

The Department notes that ‘Breaches of a sentence or release order may result in a new Corrections-administered sentence’. However, in order to maintain the integrity of reoffending measures, these are generally not counted as ‘breach prosecutions are initiated (and thus reoffending rates potentially influenced) by Corrections itself’.<sup>3</sup>

We note that the above definition of reoffending includes both imprisonment and community sentences. Our inquiry was granted urgency on the basis of the current and potential prejudice to Māori. The evidence we heard looked predominantly at the impact of disproportionate reoffending rates on prisoners, and the actions taken by Department of Corrections to reduce the rate of Māori offenders who are reimprisoned. As we see the greatest potential for prejudice to occur in the more serious end of the reoffending spectrum, we, too, focus primarily on reimprisonment in our report.

### **2.3 THE SITUATION FOR MĀORI TODAY**

Having defined our focus for this inquiry, we acknowledge that this is part of a wider picture. The broad context for our inquiry into the rates of Māori reoffending and reimprisonment is that of a particularly bleak situation for Māori in the New Zealand criminal justice system generally. We were presented throughout our inquiry with various statistics and metrics relating to reoffending, and for reimprisonment more specifically. The picture that clearly emerged from these statistics – regardless of the measures or figures presented – was that Māori men and women are disproportionately represented in the criminal justice system, and in current reoffending rates. This much was undisputed, as was the fact that this has been the situation for many years. All parties agreed that this situation presented ‘an extremely serious issue that causes prejudice to Māori’.<sup>4</sup>

The overall percentages of Māori in the criminal justice system who reoffend and are reimprisoned are small as a proportion of the overall Māori population. The Department of Corrections Director Māori, Neil Campbell, emphasised that ‘that at any given time 95 per cent of Māori aren’t being managed by Corrections’.<sup>5</sup> Yet whether we look at the numbers of Māori in the criminal justice system as a whole, or the significantly disproportionate rates of Māori reoffending or reimprisonment specifically, the rates are clear, disturbing and in need of an urgent response.

To start broadly, as at June 2016 there were some 9,500 individuals serving a sentence in New Zealand’s prisons, and 30,000 others serving a community sentence

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2. Document A37(b), p 1

3. Ibid

4. Document A17, p 5

5. Transcript 4.1.3, p 607

or order.<sup>6</sup> Current estimates put the total prison population in 2017 at 10,000. As at June 2016, Māori made up 50.8 per cent of all sentenced prisoners in New Zealand's corrections system, despite comprising just 15.4 per cent of New Zealand's population.<sup>7</sup> Of all sentenced male prisoners in New Zealand, 50.4 per cent are Māori men. Māori women make up 56.9 per cent of all sentenced female prisoners.<sup>8</sup> Young Māori figure prominently. Some 65 per cent of youth (under 20 years) in prison are Māori, up from 56 per cent a decade ago.<sup>9</sup> Recent estimates of the total prison population indicate that approximately 5,000 Māori men and women will be imprisoned in 2017.<sup>10</sup>

When we turn to the issue of reoffending itself we see that Māori are overrepresented by a substantial margin. During the hearing, we were presented with agreed statistics across a range of measures, including comparative figures of Māori and non-Māori reoffending rates. These were disaggregated to measure rates for reconviction and reimprisonment. Whatever measures were presented, the rates for Māori were invariably worse. For example, the proportion of sentenced Māori prisoners reconvicted after release from prison after two years is 63.2 per cent, while the proportion of sentenced Māori prisoners reconvicted after five years is 80.9 per cent. This contrasts with 49.5 per cent non-Māori sentenced prisoners reconvicted two years after their release, and 67.7 per cent after five years.<sup>11</sup> Reimprisonment rates are similarly skewed. After two years, 41.3 per cent of released Māori prisoners are reimprisoned, and after five years 54.7 per cent are reimprisoned. By comparison, 30.5 per cent of non-Māori released from prison are reimprisoned after two years, and after five years 43.6 per cent are reimprisoned.<sup>12</sup>

These figures, to say the least, make for sober reading. Further, as will be discussed in chapter 4, we heard evidence that following steady progress in reducing reoffending rates since 2011, this progress has slowed dramatically over the last two years. More concerning still, the same evidence showed that in the same period the gap between the reduction of Māori and non-Māori reoffending rates has widened. That is, the rates for Māori and non-Māori reoffending, in the most recent statistics the Crown presented to us, are becoming even more disproportionate.

To make matters more urgent, the current position of Māori in New Zealand's criminal justice system is far from unanticipated. For the last two decades, Māori have made up around half of New Zealand's sentenced prison population.<sup>13</sup> These and similarly alarming figures, and their potential consequences, have been a matter of concern for some time.

In the late 1980s, two high-profile reports dealt extensively with New Zealand's criminal justice system. In 1988 Moana Jackson – who appeared in our inquiry as

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6. Document A33, p 6

7. Submission 3.1.31(a), p 1

8. Ibid, p 2

9. Submission 3.1.7(a), p 3

10. Submission 3.3.4, p 1

11. Submission 3.1.31(a), p 5

12. Ibid, p 6

13. Ibid, pp 1–2

a witness – released his report *The Maori and the Criminal Justice System: A New Perspective – He Whaipaanga Hou*, commissioned by the Department of Justice. *He Whaipaanga Hou* presented an approach to research based on Māori people and within a specifically Māori research framework. The report critiqued the ways that Māori offending had been dealt with in western systems that, it said, prioritised the individual over the community. It argued that institutional racism pervaded the criminal justice system and the position of Māori in this system was inseparable from the historical, socio-economic, and cultural bases of Māori offending.<sup>14</sup>

The following year, the Ministerial Committee into the Prison System, chaired by Sir Clinton Roper, released the report on its findings. *Te Ara Hou: The New Way*, or the Roper Report, made more than 200 recommendations that proposed fundamental changes to the criminal justice sector. It stated that ‘prisons have failed both as a deterrent and [as a] rehabilitative measure’, and it followed ‘that their central role in the criminal justice system must be displaced.’<sup>15</sup> Prisons were, according to the report, ‘a blunt instrument’, and ‘a fundamental shift of emphasis as to what constitutes punishment is required.’<sup>16</sup>

The Roper report recommended a two-pronged approach to prison reform to better balance the criminal justice system’s dual roles of secure containment and reform. It first saw ‘a need for the humane containment of the hard core or recalcitrant offenders and those whose prolonged incarceration is required for the protection of society’. Secondly, ‘and of more importance’, it envisaged ‘a system of habilitation centres designed to ensure that offenders can be confronted with both the reality of their crimes and the need to alter their behaviour.’<sup>17</sup> The Committee felt that conflict for resources and priority between containment and reform resulted in ‘confused, expensive, and ineffective policies.’<sup>18</sup>

In more recent years, the Waitangi Tribunal has inquired into issues around Māori offenders. Mr Hemopo told us the current urgent inquiry followed on from an earlier Tribunal report regarding the Department.<sup>19</sup> *The Offender Assessment Policies Report* (2005) concerned Mr Hemopo’s claim relating to two tools the Department used to assess offenders’ risk of reoffending and their treatment needs. In that case, the Tribunal found that the Crown had acted inconsistently with the Treaty principles of partnership and active protection. This was due to insufficient consultation with Māori and to ‘certain shortcomings’ in the Department’s management of processes relating to the design, implementation and evaluation of the tools.<sup>20</sup> Due to a lack of available information, the Tribunal was unable to conclude that these inconsistencies caused prejudice to the claimant and those he represented, and so the Tribunal could not make recommendations to the Crown.

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14. Document A28, pp 2–3

15. Document A43, p 16

16. Ibid, p 17

17. Ibid

18. Ibid, p 44

19. Submission 3.1.1, pp 9–10

20. Waitangi Tribunal, *The Offender Assessment Policies Report* (Wellington: Legislation Direct, 2005), pp 16–17

However, the Tribunal did warn that urgent action was necessary to prevent future prejudice from occurring. It was persuaded that the parties saw the need for this action, had acted in good faith, and were committed to reducing disproportionate Māori representation in the corrections system.<sup>21</sup>

In 2013, a United Nations Committee on the Elimination of Racial Discrimination (CERD) ‘urge[d]’ New Zealand to ‘intensify its efforts to address the overrepresentation of members of the Māori and Pasifika communities at every stage of the criminal justice system.’<sup>22</sup> The following year, the Government invited the United Nations Working Group on Arbitrary Detention to visit New Zealand. A subsequent 2015 report recommended that the Government ‘intensify its efforts to tackle the root causes of discrimination against Maori and Pacific Islanders in the criminal justice system, and particularly to reduce the high rates of incarceration among Maori, especially Maori women.’ It also recommended ‘that a review be undertaken of the degree of inconsistencies and systemic bias against Maori at all the different levels of the criminal justice system’, and ‘that the search needs to continue for creative and integrated solutions to the root causes that lead to disproportionate incarceration rates of the Māori population.’<sup>23</sup>

New Zealand has been subject to United Nations Universal Periodic Reviews, in 2009 and 2014, which assessed whether United Nations member states were acting consistently with their human rights commitments.<sup>24</sup> We heard evidence that in March 2016 the United Nations Committee on Human Rights said it ‘remains concerned about the disproportionately high rates of incarceration and overrepresentation of Māori and Pasifika, and particularly women and youth, at all levels of criminal justice process.’ It recommended that the Government ‘Eliminate direct and indirect discrimination against Māori and Pasifika in the administration of justice, including through human rights training programmes for law enforcement, the judiciary and penitentiary personnel.’<sup>25</sup>

The situation regarding Māori reoffending is complex, and has a long history. It forms part of an international problem regarding the situation of indigenous peoples who have experienced colonisation. As we will see, the parties in this inquiry disputed the reasons for disproportionate rates of Māori reoffending. What could not be disputed was the gravity of the issue, and that it was causing prejudice to Māori. The concerns held by the claimant, the interested parties and the Crown over the general situation of Māori within the corrections system are longstanding. We have, as a nation, known for some 30 years or more that Māori are disproportionately represented. The Department of Corrections itself in 2007 and 2008 conducted research into the overrepresentation of Māori in the criminal justice system.

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21. Ibid, p viii

22. United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to the Twentieth Periodic Reports of New Zealand*, Adopted by the Committee at its Eighty-Second Session (11 February – 1 March 2013), 17 April 2013, CERD/C/NZL/CO/18–20, pp 3–4

23. United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention, Addendum: Mission to New Zealand*, 6 July 2015, A/HRC/30/36/Add.2, pp 20–21

24. Document A32, pp 20–21

25. Ibid, p 27

That the situation for Māori in the criminal justice system is troubling is not denied. The above figures represent people that have been removed from ordinary society, and also from their whānau, their hapū and their iwi. Over the course of this inquiry we were often reminded that imprisonment has a ripple effect reaching far beyond the effects felt by those imprisoned.

An especially worrying social consequence is the effect that imprisonment has on the nation's tamariki. We heard evidence that more than half of the estimated 20,000 New Zealand children who have a parent in prison are Māori.<sup>26</sup> This is especially distressing when we consider the disproportionate numbers of Māori women in prison and removed from their whānau. This means a significant number of tamariki are living without their mothers and/or fathers. Further, we heard evidence that children of imprisoned parents are more likely to serve prison sentences later in life.<sup>27</sup>

Our focus is on the efforts of the Department to reduce the disproportionate Māori reoffending and reimprisonment rates which are one factor contributing to the disproportionate numbers of Māori men and women incarcerated in New Zealand. These rates are also a factor in the disproportionate suffering of Māori families and communities. We were reminded during our hearing that in 2009 Dame Sian Elias, the Chief Justice, described Māori imprisonment rates as 'a calamitous state of affairs for the health of our society'.<sup>28</sup> Twenty years before the Chief Justice's warning, the *Roper Report* stated that one of the most serious social consequences for many prisoners is the enforced separation from their families and their inability to contribute positively to their communities.<sup>29</sup> Disproportionate rates of Māori reoffending are exacerbating a cycle of social dysfunction that our nation can ill afford. To some extent the general acceptance of these statistics for such a long time has led to a normalising of Māori reoffending and imprisonment rates and the social consequences that arise.

It is for these reasons that our urgent inquiry was considered necessary. In the remainder of our report, we turn to examining the urgency issues before us: the Department's existing and proposed actions to address the high rates of Māori reoffending we face today.

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26. Submission 3.3.4, p 10; doc A29, p 4

27. Document A24, p 13

28. Document A43, pp 279–280

29. Ibid, p 35

## CHAPTER 3

# HIKA ATU: PARTIES' POSITIONS

We observed significant common ground between the claimant and the Crown on a number of important matters concerning Māori reoffending rates. In this report we focus on key issues arising out of the points of difference.

As noted in the first chapter, a joint statement of issues was submitted by counsel and received by the Tribunal on 15 April 2016. Having carefully considered the evidence we refined and distilled these issues into those we considered necessary to meet the requirements and limits of this urgent inquiry.

In this chapter, we first summarise the essence of the parties' positions in this inquiry. We then set out the parties' positions on the following issues:

- ▶ the obligations of the Crown in this context;
- ▶ the steps the Department is taking to meet the Crown's obligations;
- ▶ the decision to allow the *Māori Strategic Plan 2008–2013* to lapse;
- ▶ the design and results of the goal to reduce overall reoffending rates by 25 per cent by 2017;
- ▶ the prejudice, if any, suffered by Māori as a result of the Department's actions; and
- ▶ any recommendations that should result.

We have included the submissions of the interested parties with those of the claimant as they were in broad agreement on these issues.

### 3.1 THE ESSENCE OF THE SUBMISSIONS BEFORE US

#### 3.1.1 The claimant and interested parties

The essence of the claimant's submission was that the Crown is not doing enough to address the disproportionate rate of Māori reoffending and is not committed sufficiently to bringing Māori reoffending rates in line with those of non-Māori. The claimant said the Crown's efforts in this area have long been inadequate, and it is unreasonable to expect different results by continuing to take the same approach.<sup>1</sup> The claimant submitted that the Department has not engaged with Māori at a strategic level and had no overall Māori-focused strategy to guide the implementation

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1. Submission 3.3.4, p 41

of the Department's current rehabilitative programmes.<sup>2</sup> The claimant called for fundamental change to the corrections system.<sup>3</sup>

The interested parties' submitted that Māori and the Crown, as Treaty partners, must share power and governance on issues that affect them.<sup>4</sup> They said the Crown's unilateral imposition of a criminal justice system on Māori breached Article 2 of the Treaty that guarantees Māori their tino rangatiratanga.<sup>5</sup> Further, they submitted the Crown has breached the Article 3 guarantee of equality by allowing systemic discrimination relating to Māori reoffending rates.<sup>6</sup> They consider the Crown therefore has a duty to engage with Māori and actively assist them in addressing this disparity regardless of its causes.<sup>7</sup> They say the Department has not adequately informed itself of the impacts its programmes and processes have on Māori. The Department has, according to the interested parties, also failed in Treaty terms by not engaging Māori expertise in co-designing kaupapa Māori processes to address the disproportionate reoffending rates between Māori and non-Māori.<sup>8</sup>

### 3.1.2 The Crown

The Crown's responded that it, through the Department, demonstrated its commitment to do all it reasonably can to address Māori overrepresentation in the reoffending statistics.<sup>9</sup> This commitment is evident in its set goal to reduce the rate of reoffending by 25 per cent by 2017, which, it said, can only be achieved by making a considerable impact on Māori reoffending rates.<sup>10</sup> It considered the Crown's commitment is also evident in the range of the Department's current rehabilitative and reintegrative programmes that aim to achieve this goal, and the Department's increasing engagement with Māori at regional and strategic levels. The Crown submitted that it had therefore neither acted inconsistently with Treaty principles nor prejudicially affected Māori.<sup>11</sup> The Crown said it does not follow that it, through the actions of the Department, is breaching the Treaty simply because Māori reoffending rates remain disproportionate as many of the causes of reoffending are outside the Department's control, and require 'an all-of-society response'.<sup>12</sup> While the Department is expected to make every reasonable effort to try to rehabilitate offenders within its care, it cannot guarantee that offenders will not reoffend.<sup>13</sup>

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2. Submission 3.3.4, pp 11–12

3. Ibid, pp 43–45

4. Submission 3.3.5(a), p 5

5. Ibid, pp 7–8

6. Ibid, pp 8, 28

7. Ibid, p 10

8. Ibid, p 52

9. Submission, 3.3.6, p 7

10. Ibid, pp 50–51

11. Ibid, p 55

12. Ibid, pp 7–8

13. Ibid, p 37

### 3.2 WHAT ARE THE CROWN'S OBLIGATIONS TO REDUCE DISPROPORTIONATE REOFFENDING RATES?

#### 3.2.1 The claimant and interested parties

The claimant submitted that the Crown, through the Department, has a Treaty obligation to address the 'dire state of the statistics' relating to Māori reoffending and to reduce disparities between Māori and non-Māori.<sup>14</sup> This was, for the claimant, both a Treaty issue and a matter of social health requiring urgent Crown action. Specifically, the claimant said that the long-term and persistent lack of progress in addressing these statistics places a Treaty obligation on the Crown to review its systems and processes. The claimant said the Crown also had a duty, flowing from Treaty principles, to actively engage and consult with Māori in designing and applying rehabilitative and integrative programmes, and to review the Department's strategies.<sup>15</sup> The principle of equity, according to the claimant, obliged the Crown to provide services that best meet Māori needs.<sup>16</sup> The claimant said that although the Crown's Treaty obligations relating to reoffending are not the Department's alone, the Department's role is crucial and it was not a legal defence merely to say that it shared responsibilities with other Departments.<sup>17</sup> The claimant emphasised that where Māori taonga are vulnerable the Crown may be required to take strong measures to protect it. The claimant submitted that the taonga in this case was the people themselves, young people in particular, who were clearly at risk.<sup>18</sup> Further, targeted measures to reduce or eliminate social or economic disparity are called for when past Treaty breaches have left any Māori group economically or socially disadvantaged.<sup>19</sup>

The interested parties emphasised the Crown's role in actively restoring the Treaty relationship of genuine partnership.<sup>20</sup> Further, if the Crown's Article 1 right to govern includes the right to imprison Māori, then its Article 2 duties and obligations are 'extremely heightened.'<sup>21</sup> The interested parties said the Māori interests guaranteed under the Treaty included Māori people themselves.<sup>22</sup> They said the Crown was obliged to take any appropriate measures necessary to minimise the disparities felt by Māori in order to reduce their structural or historical disadvantage.<sup>23</sup> Because Māori interests have tended to be secondary to the Crown's, the duty of active protection is, they say, also partly one of restoration.<sup>24</sup>

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14. Submission 3.3.4, pp 18–21

15. Ibid, pp 20–24

16. Ibid, p 28

17. Ibid, pp 22–23

18. Ibid, p 14

19. Ibid, p 16

20. Submission 3.3.5(a), pp 24–25

21. Ibid, p 10

22. Ibid, p 9

23. Ibid, pp 10–11

24. Ibid, p 24

### 3.2.2 The Crown

The Crown accepted that the current rates of Māori reoffending meant that it had ‘a Treaty obligation to take reasonable steps’ to attempt to reduce these rates, and to bring them in line with the rates of non-Māori.<sup>25</sup> It emphasised the need to consider ‘what is reasonable in the circumstances.’<sup>26</sup> However, the Crown said that this goal was unlikely to be met in the short term, and the nature of the Crown’s obligations must be seen within the limited nature of this inquiry.<sup>27</sup> The Crown said applying the Treaty principle of equity was simple in theory but could be difficult in practice.<sup>28</sup> The Department plays a key role in meeting the Crown’s Treaty obligation, and yet the Department’s ability to meet these obligations is restricted by its statutory responsibilities to improve public safety and contribute to the maintenance of a just society.<sup>29</sup> Further, the Crown said its position at the end of the Justice Sector ‘pipeline’, and the complex factors impacting on offending, reoffending and rehabilitation all limited the Department’s influence in addressing reoffending statistics.<sup>30</sup> The Crown submitted that the role of other Crown agencies in reducing Māori reoffending is outside the scope of this inquiry, though coordination between justice sector agencies working with Māori is necessary to achieve this goal. The Department said its efforts to ensure the effectiveness and measurability of its programmes flowed from its broader obligation to reduce Māori reoffending.<sup>31</sup>

The Crown said the Department was actively fulfilling the Crown’s Treaty obligations and was ‘strongly committed’ to reducing Māori reoffending.<sup>32</sup> Though it aimed for improvement in particular areas, it said ‘Treaty principles do not demand perfection.’<sup>33</sup> It said there was no evidence to support the claim that it has breached Treaty principles.<sup>34</sup> The Crown submitted that the principle of *kāwanatanga* required the protection of *rangatiratanga* in appropriate circumstances but the Crown may also consider ‘broader obligations or goals’. It claimed the right to choose, reasonably and in good faith, from a range of possible policy options. As such, the Crown said it did not breach Treaty principles merely by choosing one option over another that the claimant preferred.<sup>35</sup> Though ‘the Treaty does not impose on the Crown an absolute duty to consult’, the Crown recognised that it is obliged to inform itself when making decisions that affect Māori interests. This duty will depend on the circumstances and ‘good faith may require consultation “on truly major issues”’.<sup>36</sup> The Crown submitted that an unqualified standard of active protection could conflict with its other responsibilities, and was dependent on what was reasonable in

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25. Submission 3.3.6, p 40

26. Ibid, p 37

27. Ibid, p 44

28. Ibid, pp 40–41

29. Ibid, pp 45, 47–48

30. Ibid, pp 36–37, 48

31. Ibid, p 49

32. Ibid, pp 42, 45

33. Ibid, p 43

34. Ibid, pp 41–44, 55

35. Ibid, p 38

36. Ibid, pp 39–40

the circumstances. It noted, however, that where a taonga is threatened, the Crown may need to take 'especially vigorous action'.<sup>37</sup>

### **3.3 WHAT STEPS IS THE DEPARTMENT TAKING TO REDUCE MĀORI REOFFENDING RATES?**

#### **3.3.1 The claimant and interested parties**

The claimant said the steps the Crown is currently taking to reduce disparities in reoffending rates are both inadequate and in breach of Treaty principles.<sup>38</sup> This is due to the Department's failure to set specific targets or resources to reduce Māori reoffending, and to review its strategy to deal with the influence of gangs.<sup>39</sup> The claimant said that despite acknowledging the disproportionate statistics, the Department does not prioritise the reduction of Māori reoffending. This, he said, is evident in the failure of the Department to reduce the number of Māori reoffenders in its care.<sup>40</sup>

In designing tikanga programmes, the claimant emphasised that it was not enough for the Department to add Māori concepts to mainstream programmes. Given that Māori are in fact the mainstream prison population, programmes should, the claimant said, be co-designed to properly account for Māori historical experience and cultural values rather than being based on individualised Western psychological modelling.<sup>41</sup> The claimant said that though the Department created tikanga programmes in good faith, they were inadequate as they were not co-designed within a genuinely kaupapa framework. Moreover, these programmes are only accessible to a small proportion of Māori inmates.<sup>42</sup> The claimant said the scale of the problem required the Crown to engage with Māori at a national level.<sup>43</sup>

The claimant said the Department lacked accountability by having no specific targets to address Māori reoffending. Further, the lack of targets meant the Department was not accountable to the recently established Māori Advisory Board set up to provide advice to the Department's Executive Leadership Team on policy and service design relating to Māori reoffending.<sup>44</sup> The claimant said that even where a target is set, such as the 30 per cent target for participants in the Te Tirohanga programme, this related only to a small number of Māori inmates.<sup>45</sup> Moreover, the Crown was also unaccountable to Māori wherever it had failed to make publicly available information on its measurement of policies and programmes.

The interested parties submitted that as Māori did not cede their sovereignty to the Crown, the Crown cannot claim to represent Māori on matters of reoffending.

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37. Ibid, p 40

38. Submission 3.3.4, p 25

39. Ibid, pp 26–28

40. Ibid, p 27

41. Ibid, pp 7–8, 29–30

42. Ibid, pp 31–32

43. Ibid, p 32

44. Ibid, p 35

45. Ibid

It follows, they said, that the terms of reference and accountabilities of the Māori Advisory Board do not meet Treaty's partnership obligations.<sup>46</sup> The Department, unlike other Crown agencies, had deliberately chosen not to develop a Māori-specific strategy or set Māori specific targets and accountabilities.<sup>47</sup> The interested parties noted that while the Department's programmes do employ some Māori ideas and principles, without a broader Māori strategy they are piecemeal and insufficient.<sup>48</sup> The interested parties expressed concern over the evident lack of staff training in tikanga and Treaty obligations, suggesting that these were undervalued by the Department, and was further evidence that a Māori strategy was necessary.<sup>49</sup>

### 3.3.2 The Crown

The Crown's closing submissions presented a lengthy compilation of the steps it, through the Department, is taking to meet its obligation to reduce Māori reoffending.<sup>50</sup> These steps included an overarching goal to reduce the overall reoffending rate by 25 per cent by 2017, ongoing research and evaluation of the Department's practice, a range of specific rehabilitative interventions and reintegration services, staff training and supervision, and the various relationships the Department has with iwi and Māori groups.<sup>51</sup> These steps were discussed at length during the substantive hearing and are the subject of chapter 4 of our report. The Crown submitted that the actions taken by the Department to reduce Māori reoffending 'clearly exceeds the threshold of reasonableness in terms of meeting its Treaty obligations'.<sup>52</sup> The Crown said the Department's performance can be monitored in annual reports, through publicly available statistical material, or Official Information Act requests. Further, the Department is also accountable to Parliament, and the Māori Advisory Board can now be used to hold the Department accountable.<sup>53</sup> The Crown also submitted that the Department cannot be seen as solely responsible for reducing reoffending and pointed to the coordinated Justice Sector-wide response to factors contributing to Māori overrepresentation at various stages of the criminal justice 'pipeline'.<sup>54</sup>

## 3.4 WHY DID THE DEPARTMENT ALLOW THE MĀORI STRATEGIC PLAN 2008–2013 TO LAPSE?

### 3.4.1 The claimant and interested parties

The claimant said the Crown never presented real evidence as to why it did not measure its performance against the *Māori Strategic Plan 2008–2013*, or why it

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46. Submission 3.3.5(a), pp 23–24

47. Ibid, pp 29–30, 38

48. Ibid, p 30

49. Ibid, pp 39–40

50. Submission 3.3.6, p 50

51. Ibid, pp 18–36

52. Ibid, p 52

53. Ibid, p 50

54. Ibid, pp 35–36

allowed the plan to lapse. However, the claimant suggested the plan was allowed to lapse as the Department had set no targets against which it could be measured, in contrast to the Department's *Creating Lasting Change* strategy that superseded it.<sup>55</sup> The claimant submitted that even if the *Māori Strategic Plan 2008–2013* was deemed ineffective, the Department still had a Treaty obligation to consult with Māori on policy changes affecting Māori.<sup>56</sup> The interested parties said that the lack of a Department Māori strategy in the context of Māori overrepresentation in the criminal justice system and disproportionate rates of Māori reoffending shows 'a dereliction of duty'.<sup>57</sup>

### 3.4.2 The Crown

The Crown submitted that the lapsing of the *Māori Strategic Plan 2008–2013* and the current absence of a Māori-specific strategy or target was not evidence of a lack of commitment to reduce Māori reoffending rates. The Crown said the *Māori Strategic Plan 2008–2013* had no targets, was not measureable, and did not itself achieve meaningful change. The plan was subsumed under the *Creating Lasting Change* strategy that, by contrast, did have measureable targets. The success of the *Creating Lasting Change* strategy, the Crown said, would necessarily mean a reduction in Māori reoffending.<sup>58</sup>

## 3.5 IS THE STRATEGY TO REDUCE OVERALL REOFFENDING RATES BY 25 PER CENT SUFFICIENT TO ADDRESS MĀORI REOFFENDING RATES?

### 3.5.1 The claimant and interested parties

The claimant said that because the Crown had conceded it will not meet its goal to reduce reoffending rates by 25 per cent by 2017, their submission on this matter was hypothetical. Had the target been met, the claimant said, four outcomes were possible:

- ▶ both Māori reoffending and the disparity between Māori and non-Māori reoffending rates would reduce;
- ▶ Māori reoffending would reduce but the disparity would remain the same;
- ▶ Māori reoffending would reduce, but the disparity would increase; or
- ▶ Māori reoffending would not alter, but the disparity would increase significantly.<sup>59</sup>

The claimant saw the first two options as improbable, and saw the third as most likely, assuming the target was met.<sup>60</sup> The claimant pointed to figures showing the gap between Māori and non-Māori reoffending rates as either static or widening and submitted that any success the Department has had in reducing Māori

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55. Submission 3.3.4, pp 36–37

56. Ibid, pp 37–38

57. Submission 3.3.5(a), p 37

58. Submission 3.3.6, pp 18–19

59. Submission 3.3.4, pp 38–39

60. Ibid, p 39

reoffending related primarily to those on community sentences.<sup>61</sup> The claimant therefore suggested reviewing whether community sentences are more conducive to community safety than imprisoning Māori with short sentences.<sup>62</sup>

### 3.5.2 The Crown

The Crown similarly submitted that if its goal was met, it could reduce Māori reoffending at a rate proportionate to non-Māori, or at a greater rate, or at a lesser rate.<sup>63</sup> In any case, it said the target could only be met with significant reductions in Māori reoffending. The Crown submitted that even if the target was met with a proportionately lesser rate of reduction for Māori reoffending the overall reduction in Māori reoffending would still be significantly reduced. Given these circumstances, and the fact that previous strategies had not significantly reduced Māori reoffending it was, the Crown said, legitimate to attempt to reach this target.<sup>64</sup> The Crown noted that the Department had made progress towards the target in its first year but that recent data has shown progress had stalled, then reversed.<sup>65</sup> The Crown said that Māori-specific targets would not be meaningful as many factors influencing disproportionate Māori offending and reoffending rates are outside the Department's control.<sup>66</sup> The Crown submitted that its efforts to reduce Māori reoffending met its Treaty obligations.

## 3.6 PREJUDICE

### 3.6.1 The claimant and interested parties

The claimant said the normalisation of the disproportionate number of Māori offenders causes social harm by reproducing inter-generational inequalities. The prejudice to Māori caused by the high rate of Māori reoffending extends to the offenders' whānau, hapū, iwi and, particularly, to their children. The claimant submitted that the high rate of Māori imprisonment also leads to the normalisation of this situation and the perpetuation of the stereotype that Māori are inherently criminal.<sup>67</sup> The claimant acknowledged the causes of prejudice as 'multiple and complex'. Yet the Department had contributed to this prejudice by failing to take steps towards a wide-ranging review of the prison system in order to effect real change.<sup>68</sup> The interested parties said that the Department had a responsibility to provide the necessary resources to meet its reoffending reduction targets and alleviate the 'social harm caused by imprisonment and reoffending'.<sup>69</sup>

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61. Submission 3.3.4, p 40

62. Ibid, pp 40–41

63. Submission 3.3.6, p 50

64. Ibid, p 51

65. Ibid, pp 51–52; submission 3.1.47(a), pp 1–2

66. Submission 3.3.6, p 51

67. Submission 3.3.4, pp 42–43

68. Ibid, p 42

69. Submission 3.3.5(a), p 38

### 3.6.2 The Crown

The Crown said the evidence showed the Department was not responsible for prejudice caused by the overrepresentation of Māori in the criminal justice system and reoffending statistics. Further, the Crown submitted that there was insufficient evidence to determine whether the stereotype of inherent Māori criminality was a widely shared assumption. It said that, on the contrary, a statistical assessment would suggest it was not widely held. Most New Zealanders, the Crown said, understood that socio-economic disadvantage rather than ethnicity 'lies at the heart of the problem'.<sup>70</sup>

## 3.7 RECOMMENDATIONS

### 3.7.1 The claimant and interested parties

The claimant sought a far-reaching and fundamental review of the corrections system, in the form of a Royal Commission of Inquiry. The claimant suggested that the terms of reference for such an inquiry might draw variously from the *Te Ara Hou/Roper Report*, Moana Jackson's *He Whaipanga Hou*, international research on equality in the criminal justice system, and the experience of other jurisdictions such as Finland and Norway. The claimant sought a review of individualised psycho-therapeutic programmes.<sup>71</sup> The claimant also sought Crown engagement with Māori at a high strategic level on the terms of reference for this review.<sup>72</sup> The claimant further sought that the Department create specific targets for reducing Māori reoffending and make a strategic commitment to reduce Māori reoffending in line with that of non-Māori. The claimant sought a recommendation that the Crown to engage with Māori at a strategic level to co-design rehabilitative programmes that best address Māori reoffending.<sup>73</sup>

The interested parties agreed with the claimant on the need for consultation and partnership with Māori and the need for a Māori-specific strategy and targets.<sup>74</sup> The interested parties welcomed the Justice Sector Māori Strategy and said that this should include specific Māori targets.<sup>75</sup> They said that Māori reoffending rates can be better addressed by an independent body that ensured the appropriate use of transparent and accessible data to address Māori reoffending rates.<sup>76</sup> The interested parties also recommended that an independent body, appointed by the Māori Advisory Board in conjunction with the Justice Sector Governance Group, be established to provide kaupapa Māori research expertise on the Department's Māori strategies, targets and accountabilities. This body would be resourced to commission independent research, and also review research, data and assessment tools.<sup>77</sup>

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70. Submission 3.3.6, pp 52–53

71. Submission 3.3.4, p 43–44

72. Ibid, p 45

73. Ibid, p 46–47

74. Submission 3.3.5(a), pp 38

75. Ibid, p 41

76. Ibid, p 43

77. Ibid, pp 44–45

The interested parties also sought a review of the Department's use of psychological testing, tools and risk modelling, which they say reinforces a neo-liberal view of offenders as abnormal, avoids consideration the drivers of crime, and prioritises an efficient penal system over offender rehabilitation.<sup>78</sup> The interested parties recommended raising the age of youth justice. Raising the youth justice age to include 17-year-olds would, they said, immediately benefit young Māori offenders, while reducing both reoffending rates and the disparity between Māori and non-Māori.<sup>79</sup> The interested parties also said that recidivism rates could be further addressed if more people were managed within the community, and if the Bail Amendment Act 2012 be evaluated and reviewed.<sup>80</sup>

### 3.7.2 The Crown

The Crown responded that a Royal Commission of Inquiry and a proposal for 'transformative change' would require an examination of factors outside the narrow scope of this inquiry. The Crown said it was unfair and not meaningful to criticise the Department on points that were not, and could not be, fully explored during this inquiry.<sup>81</sup> Further, the Crown said that setting a specific target to address proportionality across ethnicity would not be realistic or meaningful at the time, because many variables causing Māori overrepresentation are outside the Department's control.<sup>82</sup> However, the Crown said that its general strategy and reoffending reduction target essentially doubled as a strategy to reduce Māori reoffending. The Crown said that a Māori-specific budget was unrealistic given the extent to which Māori participate in mainstream programmes and access infrastructure and other general Department resources. The Department was, the Crown said, not required to provide culturally responsive programmes to all Māori serving sentences as these were dependent on each individual's circumstances.<sup>83</sup>

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78. Submission 3.3.5(a), p 48

79. Ibid, p 50

80. Ibid, pp 51–52

81. Submission 3.3.6, pp 5–6

82. Ibid, p 51

83. Ibid, p 54

## CHAPTER 4

# TE KAUNOTI TAPU: TREATY PRINCIPLES AND DISCUSSION OF EVIDENCE

Having considered the parties' submissions, the first part of this chapter sets out the Treaty principles that relate to the claim before us. In the remainder of the chapter we set out and discuss the relevant evidence the parties presented to us. We then assess the consistency of the Crown's actions with its Treaty obligations in this case.

### 4.1 TREATY PRINCIPLES RELEVANT TO THIS INQUIRY

Under the Treaty of Waitangi Act 1975, our task is 'to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty'.<sup>1</sup> Any claim before us must relate to acts or omissions by or on behalf of the Crown. To be well-founded a claim must be substantiated by the available evidence, show that Crown acts or omissions breached Treaty principles, and that this breach has caused or will likely cause prejudice to Māori.

We now set out what we consider the principles and related duties that apply to the issues before us. In doing so, we have been guided by previous Tribunal reports and their interpretation and application of Treaty principles.

#### 4.1.1 Kāwanatanga and rangatiratanga

The Treaty of Waitangi was based on a fundamental exchange of kāwanatanga, or the right of the Crown to govern and make laws for the country, in exchange for the right of Māori to exercise tino rangatiratanga over their land, resources and people.<sup>2</sup> Finding the appropriate balance between governance for all New Zealanders and protection of the Treaty rights of Māori is complex and cannot be applied generally

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1. Treaty of Waitangi Act 1975

2. Waitangi Tribunal, *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wellington: Legislation Direct, 2015), pp 25–26; Waitangi Tribunal, *Tauranga Moana 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, p 20

to any given situation.<sup>3</sup> We must consider the circumstances of each case, what is at stake, and the options available for resolution. In any case, the Crown's right of kāwanatanga is not an unfettered authority. The guarantee of rangatiratanga requires the Crown to acknowledge Māori control over their tikanga, and to manage their own affairs in a way that aligns with their customs and values.<sup>4</sup>

#### 4.1.2 Active protection

The principle of active protection flows from the exchange of kāwanatanga and rangatiratanga. The Tribunal has in the past interpreted active protection broadly, based on the Treaty's preamble. In the English text, the preamble states 'Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand [is] anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order.' This 'protection' is not only a passive obligation. Rather, the failure actively to protect Māori Treaty rights when necessary is as much a breach of the Treaty as the active removal of those rights.<sup>5</sup> As suggested by the reciprocal nature of this partnership, the obligation of active protection has limits. The Crown is required to protect Māori interests as far as is reasonable in the circumstances.<sup>6</sup> The obligation is, however, the Crown's alone and it cannot avoid it by delegating its responsibilities to others.<sup>7</sup> We agree with the views set down by the Tribunal in the past that as the power imbalance between the Treaty partners lies in the Crown's favour, the Crown, through its protection of rangatiratanga, is to maintain equilibrium in the Treaty partnership.<sup>8</sup>

Active protection extends beyond Crown protection of specific Māori resources, to the protection of Māori interests generally.<sup>9</sup> We agree with the Tribunal in the *Napier Hospital Report* in saying the Treaty promise of royal protection meant that 'Where adverse disparities in health status between Maori and non-Maori are persistent and marked, the Crown is obliged to take appropriate measures on the basis of need so as to minimise them over the long run.'<sup>10</sup> This meant the duty of active protection included the promotion of Māori wellbeing.<sup>11</sup> We also accept the view of the Tauranga Moana Tribunal when it said the Crown had failed actively to protect Māori health outcomes in situations where the disparity between Māori and Pākehā had long been known. In such cases the Crown is obliged to do what it can

3. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 57

4. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p 15

5. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 70

6. Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wellington: GP Publications, 1998), p 134

7. Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p 265; Waitangi Tribunal, *Ngawha Geothermal Resource Report* (Wellington: Brooker and Friend Ltd, 1993), pp 100–101

8. Waitangi Tribunal, *Te Whanau o Waipareira Report*, p 16

9. Ibid, pp xxiv, 16; Waitangi Tribunal, *Tauranga Moana*, vol 1, p 21

10. Waitangi Tribunal, *Napier Hospital Report*, p 54

11. Ibid

to align Māori and Pākehā health standards.<sup>12</sup> We consider the obligation actively to protect Māori interests to be heightened in the knowledge of past historical wrongs done by the Crown and any prejudice that has affected subsequent generations.<sup>13</sup>

Taonga to be protected under article 2 of the Treaty are things possessed by or related to Māori that are valued or treasured, including that which give sustenance to taonga.<sup>14</sup> Their value extends to current and potential uses.<sup>15</sup> There is a need for a spiritual connection between a taonga, the people and the people's obligation to protect it for future benefit.<sup>16</sup> We agree that defining a resource as a taonga to be protected by the Treaty depends on the evidence of the case, and that 'evidence is sourced to and depends on Maori law and tenure, cultural values, and customary use'.<sup>17</sup>

#### 4.1.3 Equity

The principle of equity, or the obligation of the Crown to act fairly between Māori and non-Māori, derives from the British citizenship rights granted to Māori by article 3 of the Treaty.<sup>18</sup> Like the duty of active protection, it can require positive intervention by the Crown to address disparities.<sup>19</sup> The Tribunal in the *Napier Hospital Report* found that the difficulties of applying the principle of equity in practice increases when what is sought is equity of outcomes, rather than equity of access to services, treatment or care.<sup>20</sup> However, we accept as a general point that there is

a wide range of potential access barriers – physical, socio-economic, cultural – that might be found to tell against Māori. A systemic or prolonged failure on the part of the Crown to reduce such barriers would, in the absence of countervailing factors, commonly be inconsistent with the principle of equity.<sup>21</sup>

#### 4.1.4 Partnership and reciprocity

The principle of partnership, arising out of the exchange of kāwanatanga and rangatiratanga, describes how the Crown and Māori were to relate to each other under the Treaty as two peoples living in one country. This relationship is founded on good faith and respect.<sup>22</sup> It requires both parties to act reasonably towards one

12. Waitangi Tribunal, *Tauranga Moana*, vol 2, p 811

13. Waitangi Tribunal, *Taranaki Māori, Dairy Industry Changes, and the Crown* (Wellington: Legislation Direct, 2001), p 34

14. Waitangi Tribunal, *The Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wellington: Brooker and Friend Ltd, 1990), p 40

15. Waitangi Tribunal, *The Wananga Capital Establishment Report* (Wellington: GP Publications, 1999), p 49

16. Waitangi Tribunal, *Te Raupatu o Tauranga Moana: Report on the Tauranga Confiscation Claims* (Wellington: Legislation Direct, 2004), p 19

17. Waitangi Tribunal, *He Maunga Ronga: Report on Central North Island Claims: Stage One*, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1251

18. Waitangi Tribunal, *Napier Hospital Report*, p 62

19. Waitangi Tribunal, *Whaia te Mana Motuhake*, p 31

20. Waitangi Tribunal, *Napier Hospital Report*, p 62

21. Ibid

22. Waitangi Tribunal, *Te Whanau o Waipareira Report*, p 27

another, with each party acknowledging the needs and interests of the other. This requires co-operation, compromise and the will to achieve mutual benefit. It also means respect for each partner's spheres of authority.<sup>23</sup>

The Crown's duty to consult with Māori is central to this partnership and there is a need for both parties to treat the other in good faith for robust and sincere consultation to occur. Similarly, for the Crown to protect actively the interests of Māori, it must adequately inform itself of the nature and extent of Māori rights and interests at issue. It must do this through meaningful consultation with Māori.<sup>24</sup>

We accept the guarantee of rangatiratanga means 'it is for Māori to say what their interests are, and to articulate how they might best be protected.'<sup>25</sup> In its previous report relating to the Department, however, the Tribunal said the Crown's duty to consult with Māori is not absolute. As a requirement of good governance there is an onus on the Crown 'to assess whether its policy processes are sufficiently informed by Maori knowledge and opinions to render further consultation unnecessary.'<sup>26</sup> It said the Crown 'must also be mindful that some subjects are of such importance to Maori that consultation will be required by the good faith element of the Crown-Maori Treaty partnership.'<sup>27</sup> We accept this view and understand the duty to consult as a way of holding one Treaty partner accountable to the other.

Having set out the relevant Treaty principles in a general sense, in the remainder of this chapter we discuss the evidence presented to us and assess the consistency of the Crown's actions with its Treaty obligations in the circumstances of our inquiry.

#### **4.2 THE BALANCE OF INTERESTS IN THE CONTEXT OF THIS CLAIM: KĀWANATANGA AND RANGATIRATANGA**

In considering whether the Crown, through the Department, is meeting its Treaty obligations to Māori, we must define the balance between Crown kāwanatanga and Māori rangatiratanga as they relate to reducing Māori reoffending rates. Here, we first set out the interests of the Crown and the claimant and their respective responsibilities and rights in the circumstances of this urgent inquiry.

##### **4.2.1 The Crown's interests**

As we stated in chapter 1, the Crown established the Department of Corrections to administer corrections services, and the Department is bound by its statutory responsibilities. The Department, as the agency responsible for offenders under its supervision, exercises the Crown's kāwanatanga rights through the Corrections Act

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23. Waitangi Tribunal, *Tauranga Moana*, vol 1, p 20

24. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 27

25. Waitangi Tribunal, *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, p 681

26. Waitangi Tribunal, *The Offender Assessment Policies Report* (Wellington: Legislation Direct, 2005), p 11

27. *Ibid*

2004. To better assess the Department's statutory obligations, we set out here the relevant sections of the Act.

Section 5(1) of the Corrections Act 2004 states:

- (1) The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by—
  - (a) ensuring that the community-based sentences, sentences of home detention, and custodial sentences and related orders that are imposed by the courts and the New Zealand Parole Board are administered in a safe, secure, humane, and effective manner; and
  - (b) providing for corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act that are based, amongst other matters, on the United Nations Minimum Rule for the Treatment of Prisoners; and
  - (c) assisting in the rehabilitation of offenders and their reintegration into the community, where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available, through the provision of programmes and other interventions; and
  - (d) providing information to the courts and the New Zealand Parole Board to assist them in decision-making.

Section 6(1) of the Act states:

- (1) The principles that guide the operation of the corrections system are that—
  - (a) the maintenance of public safety is the paramount consideration in decisions about the management of persons under control or supervision;
  - (b) victims' interests must be considered in decisions related to the management of persons under control or supervision;
  - (c) in order to reduce the risk of reoffending, the cultural background, ethnic identity, and language of offenders must, where appropriate and to the extent practicable within the resources available, be taken into account—
    - (i) in developing and providing rehabilitative programmes and other interventions intended to effectively assist the rehabilitation and reintegration of offenders into the community; and
    - (ii) in sentence planning and management of offenders;
  - (d) offenders must, where appropriate and so far as is reasonable and practicable in the circumstances, be provided with access to any process designed to promote restorative justice between offenders and victims;
  - (e) an offender's family must, so far as is reasonable and practicable in the circumstances and within the resources available, be recognised and involved in—
    - (i) decisions related to sentence planning and management, and the rehabilitation and reintegration of the offender into the community; and

- (ii) planning for participation by the offender in programmes, services, and activities in the course of his or her sentence;
- (f) the corrections system must ensure the fair treatment of persons under control or supervision by—
  - (i) providing those persons with information about the rules, obligations, and entitlements that affect them; and
  - (ii) ensuring that decisions about those persons are taken in a fair and reasonable way and that those persons have access to an effective complaints procedure;
- (g) sentences and orders must not be administered more restrictively than is reasonable necessary to ensure the maintenance of the law and the safety of the public, corrections staff, and persons under control or supervision;
- (h) offenders must, so far as is reasonable and practicable in the circumstances within the resources available, be given access to activities that may contribute to their rehabilitation and reintegration into the community;
- (i) contact between prisoners and their families must be encouraged and supported, so far as is reasonable and practicable within the resources available, and to the extent that this contact is consistent with the maintenance of safety and security requirements.

Both sections make it clear that the Department's primary statutory concern is the improvement and maintenance of public safety. Yet it is also clear that this entails assisting in the successful rehabilitation and reintegration of offenders. The Crown said during the hearing that 'The Department must regard public safety as the paramount consideration' and while it 'has an important part to play in rehabilitation and reintegration, this cannot be its only focus and it must balance multiple considerations with finite resources'.<sup>28</sup>

The Crown also said that 'Given the current level of Māori reoffending, the Crown accepts that it has a Treaty obligation to take reasonable steps to try to reduce that level'. Further, it said that in view of the current disparity between Māori and non-Māori reoffending rates 'the Crown has a Treaty obligation to take reasonable steps to try to reduce Māori reoffending' to a rate in proportion to the non-Māori reoffending rate.<sup>29</sup>

Crown witnesses for the Department rejected the view raised in claimant evidence that it placed public safety over and above reducing reoffending by rehabilitating and reintegrating offenders.<sup>30</sup> In the Department's view, there was a tension, not an inherent conflict between the two.<sup>31</sup> Working to ensure offenders go on to live free from further criminal offending clearly contributes to public safety. Vincent Arbuckle, the Department's Deputy Chief Executive (Corporate Services),

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28. Submission 3.3.6, p 15

29. Ibid, p 44

30. Transcript 4.1.3, p 377; document A33, p 3

31. Transcript 4.1.3, p 436

for example, said the Department must think about delivering rehabilitation and reintegration in a manner consistent with public safety.<sup>32</sup>

The Department, according to Crown witnesses, represented just ‘one link in the chain’ in reducing reoffending, and it must work in partnership with other Crown agencies and organisations, including Māori and iwi service providers.<sup>33</sup> The Department has said there are opportunities for partnership in the Department’s Māori Advisory Board, which we discuss later in this chapter. However, in the Department’s view, the role of the Māori Advisory Board is determined by those who are statutorily responsible and legally accountable for the Department’s performance.<sup>34</sup>

Crown witnesses pointed to institutional limits the Department faces in reducing reoffending rates. In response to the question on the historical impacts of colonisation on Māori, for example, the Department’s Director of Research and Evaluation, Dr Peter Johnston, said the Department was a

reasonably practically orientated organisation that wants to do what it can do. It has a mandate, it has a scope of activity, it is not an organisation that is in a position to venture out into wider social policy, political change, redress for historic wrongs and so on and so forth. That is not a Department of Corrections function, we are not in a position to do those things.<sup>35</sup>

Nevertheless, Crown counsel submitted that ‘No one more than the Department wants the problem to be solved’, as Department staff see and deal with the situation each day.<sup>36</sup>

#### 4.2.2 Māori interests

The claimant’s assertions regarding Māori interests in reducing Māori reoffending rates centred on concern for Māori men and women serving prison sentences, and for the whānau, hapū, iwi, and communities to which those men and women belong, and to whom they will return when they leave prison. Essentially, the claimant submitted that alongside the Crown’s Treaty responsibilities, Māori also have an interest in reducing reoffending and a rangatiratanga right to be involved in the rehabilitation and reintegration of Māori offenders.

We heard evidence of the extent to which prison is a ‘Māori experience’. Dr Tracey McIntosh stated that prisons ‘are holders of flesh and blood. They are holders of whakapapa . . . In this country they are largely holders of Māori flesh and blood, and going even deeper than that, they are holders of particular veins of Māori society.’<sup>37</sup>

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32. Document A33, p 3

33. Ibid, p 7

34. Ibid, p 10

35. Transcript 4.1.3, p 518

36. Transcript 4.1.4, p 55

37. Document A24, p 8

Claimant witnesses also emphasised the longstanding nature of the ‘churn’ of young Māori through the prison system as recidivist offenders, and Māori overrepresentation in general was highlighted as a significant concern for Māori.<sup>38</sup>

Claimant witnesses argued that all Māori are affected by Māori overrepresentation in the criminal justice system, and there are social costs to high reoffending rates. Dr McIntosh said:

The collateral effects of imprisonment spread from the individual outwards, reverberating along the radiating threads of social relationships and connections. There is evidence to suggest that once set in motion, these reverberations can persist through time, increasing in resonance, generating long lasting and potentially intergenerational effects.<sup>39</sup>

That is, whānau, hapū, and iwi of Māori serving sentences may be affected as victims of crime by losing financial and familial support from the person serving a sentence, and by the break-up of their whānau.<sup>40</sup> Furthermore, disproportionate reoffending rates, and in particular disproportionate reimprisonment rates, ensure that social inequality continues for generation after generation of Māori.<sup>41</sup> Counsel for the interested parties submitted that in this case, the Crown’s kāwanatanga is restricted by Māori rangatiratanga and its obligation to Māori is heightened as ‘the most precious taonga is the taonga of the people that are imprisoned and their children and their families.’<sup>42</sup>

The claimant and claimant witnesses supported tikanga Māori programmes and initiatives being used to rehabilitate and reintegrate offenders, but were concerned that this be done in accordance with the principle of rangatiratanga. Te Aroha Henare said that Māori are the authors, owners, and originators of all tikanga Māori, and that this ownership ought to be recognised.<sup>43</sup> Tikanga, according to Donna Awatere-Huata, cannot operate in a prison divorced from whānau, hapū, and marae.<sup>44</sup>

Dr McIntosh stated that ‘as Māori, we have a cultural duty, we have a moral duty to intervene with our whānau.’<sup>45</sup> Similarly, Desma Ratima expressed a desire to be a part of the reintegration of Māori in prison, because upon release, they will return to their families and communities who want to ensure they do not return to prison.<sup>46</sup> Ultimately, for the claimant, it was not good enough for Māori to sit watching what was continuing to happen without participating with real power and influence.<sup>47</sup>

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38. Document A24, p 7

39. Transcript 4.1.3, p 88

40. Claim 1.1.1, pp 8–9

41. Submission 3.3.1, pp, 5

42. Transcript 4.1.4, p 23

43. Transcript 4.1.3, pp 285, 289–290

44. Ibid, p 302

45. Ibid, p 118

46. Ibid, p 194

47. Transcript 4.1.4, p 28

### 4.2.3 Our view

The Crown, through the Department, has a clearly defined role in maintaining and ensuring public safety through the appropriate management and care of offenders under its supervision, and legal responsibility for their fair treatment. We understand the Crown's kāwanatanga responsibility is to commit to reducing reoffending by Māori in order to maintain public safety. This extends to the safety and wellbeing of Māori communities affected by Māori offending and reoffending.

We acknowledge that the Crown has a kāwanatanga right to decide on policy and strategies in fulfilling its responsibilities, but this right must be considered alongside the guarantee to Māori of the exercise of their rangatiratanga. We also consider that a Crown–Māori partnership approach will be more effective in reducing reoffending.

Māori have a clear interest in the safety and wellbeing of their own communities through the successful rehabilitation and reintegration of offenders. For whānau and hapū, Māori offenders are husbands, wives, parents, tamariki, and mokopuna, removed from their communities. As we see it, rangatiratanga demands that Māori be substantially involved in matters affecting them. This includes Māori being involved in maintaining the safety of their families and communities. Māori have a clear interest in the process by which Māori reoffending is reduced, particularly the use of Māori to support a culturally relevant approach. This is consistent with the rangatiratanga right of Māori to ensure that tikanga is followed appropriately and under the correct authority in the rehabilitation and reintegration of Māori offenders.

Crown and claimant witnesses professed a sincere desire to see Māori reoffending reduced: both the Crown and Māori have public safety and wellbeing as a central concern. In this sense, the respective spheres of kāwanatanga and rangatiratanga are aligned. Insofar as Māori offenders are in the corrections system, the Department is responsible for their care. The Department and Māori have a shared interest in the rehabilitation of offenders and their reintegration into communities. When released, it is to their whānau, hapū, and iwi that offenders will return, and it is they who have an interest in the ability of those who have returned to live crime-free. This is not diminished by the fact that some offenders are dislocated from their whānau, hapū, and iwi.

In this situation of strong and urgent interest to Māori, we say the Crown must involve Māori in designing, developing and implementing strategies that affect Māori. It is our view that the alignment of kāwanatanga and rangatiratanga in this case requires the Department, in exercising its statutory functions, to have particular regard to the Crown's Treaty obligations actively to protect Māori interests, treat Māori fairly, and work in partnership with Māori to rehabilitate and reintegrate offenders.

In the remainder of this chapter, we consider whether the Crown, through the actions or omissions of the Department, has acted consistently with these Treaty obligations in the circumstances of this urgent inquiry.

### 4.3 THE CROWN'S OBLIGATIONS OF ACTIVE PROTECTION AND EQUITY

We have noted that the Crown has a duty actively to protect Māori interests, and to act fairly to reduce inequities between Māori and non-Māori. In this section, we first set out what actively protecting Māori interests and acting consistently with the Treaty principle of equity means in this context. We then look at the strategic approaches of the Department and the range of programmes it has in place to address Māori reoffending and at the design and projected outcomes of the Department's current strategic target. In light of this assessment we give our view of the evidence relating to these matters.

#### 4.3.1 How can the Crown protect Māori interests and act equitably?

In its 2005 *Offender Assessment Policies Report*, the Tribunal said the high and disproportionate rate of, in that case, Māori offending and imprisonment poses a unique threat to Māori communities by being likely to diminish respect for Māori culture. It said, and we agree, that this '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'. The Tribunal, in the context of that inquiry, said 'Māori communities themselves bear a particular burden in this context'.<sup>48</sup> It was concerned that the scale of Māori offending had the potential to compromise the capacity for Māori to develop their iwi and their communities. This was so because a significant proportion of men and women were being disconnected from their communities, hindering their ability to contribute to them, and diverting resources that could be used in Māori communities. The outcome was the potential 'erosion of the basic structures of hapū and iwi . . . and a rejection of any pride in Māori identity'.<sup>49</sup> We recall this passage as, despite its different context, we understand this crisis as continuing to threaten Māori communities today. Māori reoffending, particularly the disproportionate rates of Māori imprisonment, contributes to this. We consider the wellbeing of Māori communities is undermined by persistent disparities between Māori and non-Māori reoffending rates, and this has been the case for far too long.

It is our view that the principle of active protection is heightened in circumstances of inequity between Māori and non-Māori. Article 3 of the Treaty gave rise to this obligation, ensuring that Māori enjoyed the same benefits, rights, and privileges that the Crown bestowed on its British subjects. The essential point of the principle of equity is that, at the time of the signing of the Treaty, none of the basic rights and privileges of British subjects were limited by race.<sup>50</sup> Where the interests of settlers were prioritised to the disadvantage of Māori, the principle of equity required active measures to restore the balance.<sup>51</sup> In the context of this inquiry, we

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48. Waitangi Tribunal, *Offender Assessment Policies Report*, p 148

49. *Ibid*, pp 148–149

50. *Ibid*, p 13

51. Waitangi Tribunal, *Te Tau Ihu o te Waka a Māui: Preliminary Report on Customary Rights in the Northern South Island* (Wellington: Legislation Direct, 2008), p 5

see the principles of active protection and equity as complementary and we look at the two together when applying them to the evidence.

We have been guided by other Tribunal reports assessing the Crown's duty of active protection in social policy. As a general point, we accept the 2001 *Napier Hospital and Health Services Report's* statement in relation to Māori health. That is, the Crown was obliged to give 'protection against *the adverse effects of settlement*' (emphasis in original), which 'arises over and above considerations of equity' and 'calls for additional resources and effort to be deployed in favour of Maori whenever general programmes afford them insufficient protection.'<sup>52</sup> We agree that this scope of active protection can include remedial action against indirect causes such as environmental, social, economic, cultural, and institutional factors. We see that where there are persistent disparities between Māori and non-Māori social outcomes, the active protection of Māori interests might require what the *Napier Hospital Report* called 'affirmative action' for Māori 'in order to reduce structural or historical disadvantage.'<sup>53</sup> This point applies in the circumstances of our inquiry.

The *Napier Hospital Report* also articulated a tension when applying the principle of equity. Equity applies to equal standards of healthcare, where a pattern of inferior treatment of Māori compared to non-Māori would be inconsistent with the principle. Equity would also apply to equal access to services, as equal standards of care could still leave Māori disadvantaged if they were unable to access the services offered. Complexity arose when considering equity with respect to equal outcomes. The *Napier Hospital Report* stated, in the circumstances of that inquiry, that equal health outcomes were only likely to be assured when Māori disadvantage was also reduced in other essential dimensions of wellbeing, including addressing socio-economic and environmental factors.<sup>54</sup>

Essentially, beneficial health outcomes could not be guaranteed for individual Māori, just as it could not be guaranteed for any individual citizen.<sup>55</sup> Nor could focusing on health care services be the sole means to achieving equal health outcomes.<sup>56</sup> Nonetheless, the *Napier Hospital Report* stated that a general equity of health outcomes for Māori as a whole was one of the expected benefits of the citizenship granted by the Treaty. It said the achievement of equitable outcomes was a long-term goal dependent on a range of state policies and services, as there were factors contributing to disparities beyond the control of any one service provider. However, the key point for us is that the Tribunal said that until equal outcomes are realised, the failure to set Māori gains in outcomes as a priority would be inconsistent with the principle of equity.<sup>57</sup>

Our report looks at Māori reoffending in the corrections system, not the health system. The wellbeing of Māori communities more broadly is, however, the context

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52. Waitangi Tribunal, *Napier Hospital Report*, p 53

53. *Ibid*, p 54

54. *Ibid*, pp 62–63

55. *Ibid*, p 64

56. *Ibid*, p 63

57. *Ibid*, p 64

for our concern. Crown witnesses acknowledged that reoffending is a factor in the high rates of Māori incarceration, and one for which the Department has a central role.<sup>58</sup> We agree with Crown counsel that achieving equitable outcomes is a complex issue. Historical and contextual issues are among many significant factors related to reoffending. We accept that the Department does not seek to ‘hide behind complexity as an answer to criticism.’<sup>59</sup> The Crown acknowledged that ‘a particular state of affairs, such as where a taonga is in a vulnerable state, may require “especially vigorous action” on the part of the Crown.’<sup>60</sup>

We are faced with an urgent situation of grossly unequal reoffending rates, including reimprisonment rates, which have serious impacts on thousands of Māori men, women, and children and their communities. Te ira tangata, the essence of life is the ultimate taonga. We consider these circumstances to meet Crown counsel’s criteria for requiring especially vigorous action. The gravity and enduring nature of this situation – which we say the Crown has a Treaty obligation to resolve – raises the threshold for Crown action. In our view, for the Crown to act consistently with the Treaty principles of active protection and equity in these circumstances it must urgently prioritise and commit, and be seen to be prioritising and committing, to the reduction in the rate of Māori reoffending.

In what follows we look at what the Crown is doing to address Māori reoffending rates and whether these efforts amount to urgent prioritisation. We first look at the strategic priorities of the Department, that is, the lapsing of the *Māori Strategic Plan 2008–2013*, its replacement with *Creating Lasting Change*, and the Department’s target of reducing the reoffending rate by 25 per cent by 2017. We then look at the design and most recent outcomes of attempts to meet this target. Following this we turn to the various rehabilitative and reintegrative programmes offered by the Department.

#### **4.3.2 The Department’s strategies to reduce reoffending rates**

##### **(1) Early strategies**

From its beginnings in 1995, the Department has recognised that reducing the rate of Māori reoffending needed to be a major strategy goal.<sup>61</sup> It has implemented a range of Māori-focused programmes and initiatives to achieve this.<sup>62</sup> The Department also developed a series of Māori strategies to address rates of Māori offending and reoffending. These strategies outline the Department’s vision and goals in improving outcomes for Māori, and guide the use of rehabilitative interventions and partnerships with Māori groups.

A key issue for this inquiry is the Department’s decision to allow its most recent Māori-specific strategy, the *Māori Strategic Plan 2008–2013*, to lapse without measurement or replacement. In order to consider this more fully, we outline the history

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58. Transcript 4.1.3, p 493

59. Submission 3.3.6, p 17

60. Ibid, p 40

61. Waitangi Tribunal, *Offender Assessment Policies Report*, p 24

62. Document A10(a), pp 8–13

of the plan's development as set out in *The Offender Assessment Policies Report 2005*. This development began in 1999 when the Department produced a draft Treaty of Waitangi policy statement entitled *He Whaakinga*, setting out the general objectives required of the Department to meet its Treaty responsibilities to Māori.<sup>63</sup> After consulting with Māori communities, prisoners, its employees, and other Government agencies, the Department in 2001 released a report summarising the hui feedback titled *Let Māori Take the Journey: Nā Tāu Rourou, Na Taku Rourou, Ka Ora ai te Iwi*, which looked into how the Department involved Māori stakeholders when it worked with Māori offenders. It also examined how partnerships between the Department and Māori worked, how the Department used tikanga Māori, and the role of the Department's Māori employees. *Let Māori Take the Journey* helped to shape the later *Treaty of Waitangi Strategic Plan, 2001–2003: Kotahi Ano te Kaupapa – Ko te Oranga o te Iwi*. The kaupapa of this strategic plan aimed to align Māori expectations heard during consultation with the Department's aim of reducing reoffending and maintaining community safety.<sup>64</sup>

After further consultation and feedback, the Department produced an updated *Māori Strategic Plan, 1 July 2003 – June 2008: Kotahi Ano te Kaupapa; Ko te Oranga o te Iwi*. This strategic plan retained the kaupapa statement of the *Treaty of Waitangi Strategic Plan* and most of the policy statement, with added emphasis on partnering with Māori and other Government agencies to provide services to best meet the objective of community safety and reducing reoffending.<sup>65</sup> This was followed by the *Māori Strategic Plan 2008–2013* in question, itself a companion document to a broader *Departmental Strategic Business Plan 2008–2013*.

## **(2) The Māori Strategic Plan 2008–2013**

As noted in chapter 2, a key claim in this inquiry was that the Department has no Māori-specific strategic direction to address the high and disproportionate rate of Māori reoffending. In 2011 the Department's *Strategic Business Plan 2008–2013* and the documents within it, including its *Māori Strategic Plan 2008–2013*, were replaced by a new strategy, *Creating Lasting Change 2011–2015*. One consequence of this was that the *Māori Strategic Plan 2008–2013* was allowed to lapse in 2013 and was not replaced.

Vincent Arbuckle, Deputy Chief Executive (Corporate Services) and member of the Department's Executive Leadership Team, acknowledged the way the Department approached Māori reoffending was guided by a series of Māori strategies beginning in 2001. Mr Arbuckle said that the *Māori Strategic Plan 2008–2013* was one of several documents included in the Department's *Strategic Business Plan 2008–2013*, which also included a *Pacific Strategy 2008–2013*, the *Community Probation Services Business Plan*, and *Prison Services Business Plan*.<sup>66</sup> The stated vision of the *Māori Strategic Plan 2008–2013* was to improve public safety by ensuring

63. Waitangi Tribunal, *Offender Assessment Policies Report*, pp 26–27

64. *Ibid*, p 27

65. *Ibid*, pp 27–29

66. Document A33, pp 16–17

sentence compliance and reducing reoffending, and to achieve this by enhancing capabilities and strengthening partnerships. Its position within the Department's *Strategic Business Plan* was to highlight areas of focus that would 'contribute to the same outcomes and strategic priorities to positively impact on Māori offending'.<sup>67</sup>

The *Māori Strategic Plan 2008–2013* focused the Department's efforts for Māori into two key areas where it saw evident 'levers of change'. These were: positive participation of Māori offenders in Te Ao Māori, the Māori world; and positive participation of Māori offenders in Te Ao Hurihuri, the global world. Participation in Te Ao Māori meant reconnecting 'the worldview of willing offenders, to the pro-social and traditional Māori cultural worldview', and developing a secure and positive cultural identity. Participation in Te Ao Hurihuri meant helping 'Māori offenders learn skills and gain knowledge to contribute to their success in wider society', and developing the knowledge that they can participate as Māori in wider society.<sup>68</sup>

With regards to reoffending in particular, the *Māori Strategic Plan 2008–2013* stated:

Reoffending rates of Māori offenders remain a critical target that we are determined to reduce . . . The positive purpose of our work is to motivate Māori offenders to turn their lives around in order to contribute successfully to the Māori world . . . and the global world.<sup>69</sup>

While the *Māori Strategic Plan 2008–2013* set no specific targets for reducing reoffending, it stated that the Department would know it was succeeding when it saw:

- ▶ 'more Māori offenders participating in assessments, programmes, and services incorporating a Māori worldview;
- ▶ [the] health needs of Māori offenders [being] addressed;
- ▶ Māori offender participation in rehabilitation programmes;
- ▶ improvements in literacy and numeracy skills;
- ▶ more Māori offenders participating in employment and training opportunities;
- ▶ rates and seriousness of Māori recidivism and reconvictions reducing.<sup>70</sup>

### **(3) The lapse of the Māori Strategic Plan 2008–2013**

In his discussion of the lapse of the *Māori Strategic Plan 2008–2013* the claimant, Mr Hemopo, expressed concern that the broad *Creating Lasting Change* strategy 'does not refer to the *Māori Strategic Plan* and it is extremely generic, with just a few references to Māori scattered throughout'.<sup>71</sup> Further, Mr Hemopo stated that the Department could not provide him with evidence that the *Māori Strategic Plan 2008–2013* had ever been implemented while it did exist, that there was consultation

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67. Document A1(b), p 504

68. Ibid, p 508

69. Ibid, p 512

70. Ibid, p 514

71. Transcript 4.1.3, p 22

with Māori when the plan lapsed, or that there was Māori involvement in the development of *Creating Lasting Change* as a replacement.<sup>72</sup>

For Crown witnesses, the claimant's concerns that the lapsing of the *Māori Strategic Plan 2008–2013* signalled a lapse in commitment to Māori offenders were unfounded. Vincent Arbuckle's evidence was that, 'While the document that was the *Strategic Plan* ceased to apply, the initiatives, commitment and philosophy continued unabated and, now are getting even stronger. The underpinning idea is that if we are to succeed overall we must succeed with Māori.'<sup>73</sup>

The stated explanation of why the Department could not supply any information on the measurement of the *Māori Strategic Plan 2008–2013* was given in a reply to an Official Information Act request on 11 June 2013. It stated: 'in mid 2012 the Department undertook a major organisational restructure. One result of this restructure is that . . . reports measuring the Department's performance against the *Māori Strategic Plan 2008–2013* are no longer accessible.'<sup>74</sup>

In August 2013, responding to a second request for information on the plan's performance, the Department's response was that 'the documents sought are no longer accessible because they do not exist or cannot be found.'<sup>75</sup>

However, in Mr Arbuckle's evidence, he stated: 'Although the *Māori Strategic Plan 2008–2013* provided evidence of a commitment to reducing re-offending amongst Māori, of itself it did not achieve meaningful change, nor did its expiry signal any relaxing of the Department's commitment.'<sup>76</sup>

Neil Campbell similarly affirmed that 'since 2012 . . . the Department has invested far more in the area of rehabilitation and reintegration than it has previously and Māori can only benefit from that.'<sup>77</sup>

While the Department offered little evidence on the decision-making process or any consultation that occurred around the decision to let the plan lapse, more explanation was offered of the rationale behind the *Creating Lasting Change* strategy which followed it.

#### **(4) *Creating Lasting Change***

Vincent Arbuckle explained the Department replaced the range of strategic documents, including the *Māori Strategic Plan 2008–2013*, with the single *Creating Lasting Change* strategy to provide a stronger collective focus on achieving specific priority areas.<sup>78</sup> Mr Arbuckle explained that previously the Department had 'a very complex arrangement of strategies and documents that . . . no one ever read.'<sup>79</sup> He argued that they made little practical impact on the Department as few understood or were even aware of the range of documents and sub-documents. *Creating*

72. Ibid, pp 21–22

73. Ibid, p 431

74. Document A1(b), p 521

75. Ibid, p 545

76. Document A33, p 17

77. Document A34, p 39

78. Document A33, p 17

79. Transcript 4.1.3, p 471

*Lasting Change*, by contrast, was designed to be simple and accessible to the whole organisation.<sup>80</sup>

*Creating Lasting Change 2011–2015 Year One* listed the Department's core strategic priorities as: keeping communities safe by ensuring sentences are complied with; cutting rates of reoffending; using taxpayer funding efficiently and improving service responses; and using unique insights into offending behaviour to lead a programme of change across the public service and within the community sector.<sup>81</sup> It also stated that the Department will know it is succeeding when: it is respected for its role in keeping communities safe; when it achieves a breakthrough in recidivism rates; when it has greater success with Māori offenders, particularly in reducing Māori reoffending; and when it delivers on key government expectations.<sup>82</sup> The Year Two and Three iterations of *Creating Lasting Change* added the target of reducing reoffending overall by 25 per cent by 2017, which it called RR25%.<sup>83</sup>

In Mr Arbuckle's evidence, a key difference between *Creating Lasting Change* and the *Māori Strategic Plan 2008–2013* was that the *Creating Lasting Change* had measurable outcomes and an overall target to reduce reoffending. *The Māori Strategic Plan 2008–2013*, by contrast, was 'not measured to evaluate [its] effectiveness, and lacked firm targets in respect of re-offending'.<sup>84</sup> During the hearing Crown counsel suggested that despite the lapsing of the *Māori Strategic Plan 2008–2013* more positive developments were signalled by the inclusion of a measurable, if general, target to reduce reoffending. Crown counsel said that it was more important to look at the commitment made to reduce Māori reoffending than the title of a given document.<sup>85</sup>

#### **4.3.3 Reducing the rate of reoffending by 25 per cent by 2017 (RR25%)**

The target to reduce the reoffending rate by 25 per cent by 2017 (RR25%) was a central strategic focus of the Department. It arose out of the government-wide *Better Public Services* framework announced in June 2012 by Prime Minister John Key. *Better Public Services* involved setting 'ambitious targets' across the public sector for the following five years.<sup>86</sup> Under the *Better Public Services* framework the Department was assigned a target of a 25 per cent reduction in the reoffending rate by 2017, to be measured against a June 2011 baseline. As Dr Peter Johnston, the Director of Research and Evaluation at the Department, explained, the reoffending rate in 2011 was approximately 30 per cent over a 12-month period, meaning that 30 per cent of offenders were reconvicted within 12 months of ending of their prison sentence or after their community sentence start date. The RR25% target meant a 25 per cent reduction of that 30 per cent, or a reduction of approximately 8 percentage

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80. Transcript 4.1.3, pp 471–472

81. Document A1(b), p 574

82. *Ibid*, p 583

83. *Ibid*, pp 589, 607

84. Document A33, p 17

85. Transcript 4.1.3, p 67

86. Document A33, p 17

points. This meant the Department was intending to reduce the overall reoffending rate to 22 per cent by 2017.<sup>87</sup>

**(1) Design and implementation of RR25%**

During the substantive hearing Crown witnesses were asked why, given that Māori made up over 50 per cent of the prison population, there was no Māori-specific target as part of the RR25% goal. As noted, the Department's response was that while it was valid to set a specific target to reduce Māori reoffending, it was decided that all offenders would benefit from a general reduction target.<sup>88</sup> Vincent Arbuckle said an explicit target to reduce the disparity between rates of Māori and non-Māori reoffending was challenging due to the variables outside the Department's control, including socio-economic deprivation and gang membership.<sup>89</sup>

Under Tribunal questioning, Crown witnesses were asked about the decision to implement the RR25% target. They confirmed to us that RR25% was both a Government initiative made at a high executive level and a political aspiration, rather than a Department policy driven by data.<sup>90</sup> Mr Arbuckle also said that the Government did not set or promote sub-targets by ethnicity in its *Better Public Services* framework, including the Department's reoffending target.<sup>91</sup> In 2014, the Department declined an Official Information Act request from Mr Hemopo seeking to understand how the claimed reductions in reoffending affected Māori in particular. It declined the request on the basis that as "The Department does not calculate *Better Public Services* targets reductions in re-offending results separately by ethnicity . . . the documents alleged to contain the information requested does not exist".<sup>92</sup>

Given that RR25% was a target set for all offenders, with no Māori-specific sub-target, the parties agreed a number of outcomes for the disparity between Māori and non-Māori reoffending rates were possible. The claimant identified four ways RR25%, if successful, could affect the Māori reoffending rate:

- ▶ both Māori reoffending and the disparity between Māori and non-Māori reoffending rates would reduce;
- ▶ Māori reoffending would reduce but the disparity would remain the same;
- ▶ Māori reoffending would reduce, but the disparity would increase; or
- ▶ Māori reoffending would not alter, but the disparity would increase significantly.<sup>93</sup>

The claimant submitted that a reduction in reoffending by Māori accompanied by a reduction in disparity was always unlikely, given that in the past the Department has not been able to shift reoffending rates by Māori to the same extent

87. Transcript 4.1.3, pp 495, 525

88. Ibid, p 447

89. Ibid, pp 464–466

90. Ibid, pp 474, 525

91. Document A33, p 18

92. Document A1(b), p 939

93. Submission 3.3.4, pp 38–39

as non-Māori. The claimant believed the most likely outcome, if RR25% was successful, was that there would be some reduction in Māori reoffending but a widening disparity. He said a consequence of a general reoffending reduction target being set was that even if no reduction in Māori reoffending was achieved but the overall reoffending rate reduced, the setting of RR25% could be counted as a success by the Department.<sup>94</sup>

The Crown similarly submitted three possible outcomes for the Māori reoffending rate if the target was met:

- ▶ it might reduce at a proportionate rate to other ethnicities;
- ▶ it might reduce at a greater rate to other ethnicities; or
- ▶ it might reduce at a lesser rate to other ethnicities.<sup>95</sup>

However, Crown witnesses said that, with Māori making up such a high proportion of the offender population, the target could only realistically be met if there was also a substantial reduction in the Māori reoffending rate. The Crown submitted that it was not ‘a case of there being no [Māori] strategy’. Rather, ‘Although *Creating Lasting Change* and RR25% do not set sub-targets by ethnicity, it is inherent in the specific and ambitious target of RR25% that every attempt would need to be made to reduce the rate of Māori re-offending significantly.’<sup>96</sup> Despite a range of potential outcomes, Vincent Arbuckle said the Department has always understood that the key to achieving its RR25% target was to make significant in-roads into reducing reoffending by Māori.<sup>97</sup>

### **(2) Projected outcomes of RR25%**

Having noted the potential implications of the design of RR25%, and what the theoretical success of this target would mean, we turn to its projected outcomes. Despite initially good results, the most recent evidence we received was that the Department would not meet its target. Mr Arbuckle’s evidence was that after achieving solid progress against the target from 2012 to 2014, most recently the trend turned back to an increasing rate of reoffending. He conceded that there appeared to be little likelihood of the RR25% target being achieved in 2017.<sup>98</sup> In fact, it was likely that the Department would fall significantly short of the target.

An internal Department Memorandum from Dr Peter Johnston stated that at February 2014, the Department was just over halfway towards its 25 per cent reduction target.<sup>99</sup> However, since 2014, the overall progress towards this target has slowed significantly.

An addendum to the agreed list of statistics showed that, measured from the baseline of the June 2011 reoffending statistics, by June 2014 the Department had made 12.1 per cent progress towards RR25% for all offenders, and 13.1 per cent progress

94. Submission 3.3.4, pp 38–39

95. Submission 3.3.6, p 50

96. Transcript 4.1.3, p 411

97. *Ibid*, p 431

98. *Ibid*, p 432

99. Document A27(a), p 1

for Māori offenders. The figures for 2015 indicated a reversal in progress towards the 25 per cent reduction goal, dropping to 8.3 per cent overall progress in 2015. The figures as at June 2016 showed a further drop in the overall progress towards the goal of 5.6 per cent, while Māori progress slumped to 0.5 per cent.<sup>100</sup> This trend continued in July 2016 with overall progress slowing to 5.5 per cent, while Māori progress was 0.4 per cent.<sup>101</sup> Further, the reimprisonment rate for Māori had risen from 29.7 per cent in June 2011 to 33 per cent in June 2016.<sup>102</sup>

Put plainly, the most recent Department statistics show that initial progress in reducing the Māori reoffending rate has come to a virtual standstill, while reimprisonment rates have increased. More disconcerting still, when the figures are disaggregated to compare progress towards the reoffending reduction goal for Māori and non-Māori, the gap between them appears to be widening. In June 2012, progress towards the goal was 6.6 per cent for Māori and 7.1 per cent for non-Māori. By June 2016 the figures were 0.5 per cent progress for Māori against 6.4 per cent for non-Māori.<sup>103</sup> That is, the Department's recent efforts appear to have coincided with increasingly disproportionate Māori and non-Māori reoffending rates.

Department witnesses were unclear on the reasons for the Department's likely failure to meet its RR25% target, especially given the encouraging results of individual rehabilitation programmes. Mr Arbuckle's evidence was:

The abating progress towards the target was perplexing given that, since 2012, the Department has recorded excellent results in offender rehabilitation programme outcomes. These results had been improving every year, with significant reductions in reconvictions and re-imprisonments now being consistently recorded for most key rehabilitation programmes.<sup>104</sup>

During the hearing, Mr Arbuckle told us that although 'interventions can be effective', people return to environments where these effects are reversed. In this context, Mr Arbuckle reiterated that 'the two things that most drive re-offending are [their] economic situation and involvement in gangs'. He noted in this context that these offenders 'can get a short term benefit from a programme but long term they get undone by the context in which someone goes back into'.<sup>105</sup>

He said the reasons the results of these programmes were not reflected in overall reoffending figures illustrated the factors influencing reoffending outside of the Department's control.<sup>106</sup> These included police prosecution policies, more court cases resulting in conviction, an increase in the use of community sentencing, and faster court processing. He also referred to a 'shrinking, but more recidivistic,

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100. Document A37(d)

101. Submission 3.1.47(a), p 1

102. Document A37(d)

103. Ibid

104. Document A33, p 21

105. Transcript 4.1.3, p 439

106. Ibid, p 433

population' managed by the Department, that is, a greater proportion of offenders with multiple prior convictions or sentences and a larger proportion of offenders affiliated with gangs.<sup>107</sup>

Mr Arbuckle said that while the reoffending rate itself has not significantly reduced, the absolute number of Māori and non-Māori reoffenders has reduced by 25 per cent since 2011.<sup>108</sup> To Mr Arbuckle, this suggested a cohort of persistent reoffenders who are serving shorter sentences and reoffending at a more rapid rate. That is, there are now fewer reoffenders, but they are reoffending faster.

When questioned by the Tribunal Mr Arbuckle said the reasons for the turnaround in progress towards the reoffending reduction target since 2014 were a combination of the effects of having already collected, in the Tribunal's phrasing, 'the low-hanging fruit', together with the consequences of dealing with offenders whose behaviours are more difficult to change.<sup>109</sup> Again, Mr Arbuckle attributed the failure to reach the RR25% target to the 'hardcore offenders' who are 'rotating through the system much more regularly'.<sup>110</sup>

Dr Peter Johnston made a similar point about a cohort of persistent recidivists in a December 2015 internal memorandum updating progress towards RR25%. Dr Johnston said:

the [reoffending] rate increase appears at least in part to be driven by a change in the offender population under management. Relative to June 2011, Corrections is now managing a smaller population of offenders, but this reduced population comprises a greater *proportion* of recidivists. [emphasis in original.]<sup>111</sup>

The memorandum said that research showed higher reoffending rates in subgroups with characteristics such as: being male, being young, being Māori, having committed burglary or other 'dishonesty-type' offences, and having gang-affiliation.<sup>112</sup> Dr Johnston was at that time also unsure of the reasons why Māori reoffending rates should be so disproportionate. The same 2015 memorandum earlier noted:

the recent increase [in reoffending rates] is slightly more evident amongst Maori offenders than non-Maori. Given that Maori participate in rehabilitation programmes at rates similar to non-Maori, and appear to gain as much benefit as do others, there is no clear explanation for why rates of reoffending among Maori should diverge in this manner.<sup>113</sup>

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107. Document A33, pp 21–22

108. Transcript, 4.1.3, p 445

109. Ibid, p 476

110. Ibid, p 477

111. Document A27(a), p 4

112. Ibid, p 4

113. Ibid, p 2

During the hearing, Dr Johnston reiterated Vincent Arbuckle's view that the Department was 'thwarted by external factors' in the pursuit of RR25%.<sup>114</sup>

It is clear that since 2014 the disparity between Māori and non-Māori reoffending rates is growing despite the Department's commitments to address it. Despite this, the Department said the absence of a Māori specific strategy or target does not signal a lack of effort to achieve positive results for Māori offenders. Counsel for the Crown submitted that 'The Department's overall strategy should not be looked at in a vacuum. It must ultimately be considered in relation to the approach the Department takes to individual offenders. Success in reducing reoffending will depend upon making a difference with each individual.'<sup>115</sup> We now turn to consider the more specific programmes and initiatives the Department offers to reduce reoffending, to consider their design, scope, and success in reducing reoffending by Māori.

#### **4.3.4 The Department's programmes and interventions to reduce reoffending**

##### **(1) Māori Services Team and the Reducing Reoffending by Māori Work Plan**

###### **2015–2016**

The Crown said the Department's commitment to reducing Māori reoffending is evident in its wide range of long-running programmes and initiatives.<sup>116</sup> This includes the work of the Department's Director Māori, Neil Campbell. The Director Māori is a tier-three position in the Department and is not part of the Department's Executive Leadership Team, though Mr Arbuckle told us that the Director Māori has 'daily and unlimited access to the chief executive and the executive team.'<sup>117</sup> Mr Campbell said he is responsible for leading the development and implementation of a rehabilitation and reintegration strategy for Māori offenders. In addition he gives advice on strategic matters to the Department's Executive Leadership Team, managers and staff.<sup>118</sup> The Director Māori also leads the Māori Services Team, which has eight direct reports: four Manager Māori Services positions, and four Senior Advisers Cultural Supervision. The stated purpose of the Manager Māori Services role is to provide leadership and support at a regional level for the rehabilitation and reintegration of Māori offenders. According to Mr Campbell, this includes 'effective linking to hapū, kaitiaki and, as appropriate, iwi support, with a particular emphasis on Māori prisoner reintegration.'<sup>119</sup>

Mr Campbell explained that the Department had developed a *Reducing Reoffending by Māori Work Plan 2015–2016* that was endorsed by the Department's recently established Māori Advisory Board in February 2016.<sup>120</sup> More will be said

114. Transcript 4.1.3, p 514

115. Ibid, p 414

116. Submission 3.3.6, p 22

117. Transcript 4.1.3, p 454

118. Document A34, p 4

119. Ibid, p 4

120. Document A34, p 7

of the Māori Advisory Board's role and its engagement with the Department later in this chapter. Here we note the evidence relating to the *Reducing Reoffending by Māori Work Plan 2015–2016* that the Department said demonstrated its commitment to reducing reoffending by Māori.

The *Reducing Reoffending by Māori Work Plan 2015–2016* set out the Department's current programmes and initiatives in place or being developed to reduce Māori reoffending. Mr Campbell said the *Reducing Reoffending by Māori Work Plan 2015–2016* provided 'a way to combine our efforts into one single, planned approach'.<sup>121</sup> The work plan's 26 initiatives are divided into three work streams: strategic and tactical, practice, and operations. The strategic and tactical work stream listed, among others things, the RR25% target and the development of a Justice Sector Māori Strategy.<sup>122</sup> Crown witness Anthony Fisher, Director, Māori Strategy for the Ministry of Justice, said the Justice Sector Māori Strategy was an ongoing Justice Sector-wide project that aimed to reduce harm and volumes in relation to Māori offending and victimisation, by focusing on policy and operational changes at critical points in the criminal justice system where Māori are overrepresented. It was directed by the Justice Sector Leadership Board, and was being developed by the acting General Manager, Sector Strategy of the Ministry of Justice, the Deputy Chief Executive Māori for the New Zealand Police, the Director Māori of the Department of Corrections, and the Director, Māori Strategy for the Ministry of Justice.<sup>123</sup>

The practice work stream for the *Reducing Reoffending by Māori Work Plan 2015–2016* included the implementation of the Te Ihu Waka Framework, and the reviews of Mauri Tu Pae and the Specialist Māori Cultural Assessment programmes, all of which will be discussed below. The operations work stream noted several relationships with Māori groups and organisations, as well as the expansion of several existing initiatives into new regions.<sup>124</sup>

For each of the initiatives listed, the *Reducing Reoffending by Māori Work Plan 2015–2016* showed their status as being in progress, underway, or not yet started. However, the *Reducing Reoffending by Māori Work Plan 2015–2016* did not give specific timeframes for completing the intended pieces of work, or lines of accountability.<sup>125</sup> Nonetheless, Mr Campbell gave evidence that the initiatives were on track 'to be completed by December 2016, and Māori Services Team is playing a vital role in achieving that'.<sup>126</sup> The minutes from the February 2016 Māori Advisory Board meeting noted that the board discussed the work plan and 'agreed that timeframes and progress on initiatives would be included as a standard reporting item for future board meetings'.<sup>127</sup> A Highlight Report for the work plan was sent to the

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121. Document A34, p 7

122. Ibid; document A34(a), p 1

123. Document A36, pp 4–5

124. Document A34(a), p 1

125. Ibid, p 1

126. Document A34, p 7

127. Document A43, p 318

Māori Advisory Board and the Executive Leadership Team on 3 May 2016, ahead of the Māori Advisory Board meeting planned for 10 May. This report listed more specific timeframes for most initiatives.<sup>128</sup>

The claimant disputed that the *Reducing Reoffending by Māori Work Plan 2015–2016* demonstrated the Department's commitment to reducing disparate reoffending rates. Mr Hemopo said it appeared to simply be a compilation of what the Department was already doing in relation to Māori reoffending, and that there was no accountability in achieving outcomes.<sup>129</sup> Shayne Walker, Ngāti Kahungunu's representative on the Department's Māori Advisory Board, shared Mr Hemopo's concern that the *Reducing Reoffending by Māori Work Plan 2015–2016* did little to hold the Department accountable to any progress in reducing Māori reoffending, as it did not include any timeframes or specific targets.<sup>130</sup>

## **(2) Programmes and services**

Crown witnesses said the Department's programmes and services, properly designed and appropriately delivered, could achieve significant reductions in reconviction and reimprisonment.<sup>131</sup> The range of the Department's services to support the needs of Māori can be classed as designed for rehabilitation and reintegration, or for training and supervision. We set these out below, drawing from Crown evidence, to set out the basis for the Crown's key claim that they are committed to reducing Māori reoffending.

### **(a) Rehabilitative programmes and services**

The Department's initial briefing to the Māori Advisory Board in November 2015 said that the suite of culturally-specific programmes, based on Te Ao Māori, aims 'to strengthen the cultural identity of Māori offenders to enhance attitudinal and behavioural change and therefore reduce re-offending'. This approach, according to the same document, was supported by recent research on the links between Māori cultural identity and wellbeing.<sup>132</sup>

One of the more prominent of the Department's rehabilitation and reintegration measures discussed in our inquiry was Te Tirohanga. Te Tirohanga is the new name given to what were previously called Māori Focus Units, the five 60-bed units at Waikeria, Tongariro-Rangipo, Hawke's Bay, Whanganui, and Rimutaka Prisons designed to run as tikanga-based, whānau-centric communities. In addition to naming the units themselves, Te Tirohanga is also the name of the recently implemented national programme operating in those units. The Te Tirohanga programme involves an 18-month programme of six three-month phases, and is 'underpinned by a pro-social behavioural framework based on kaupapa Māori

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128. Ibid, pp 323–325

129. Transcript 4.1.3, p 24

130. Ibid, p 165

131. Document A37, p 13

132. Document A26(a), p 24; doc A34, p 6

values provided by iwi representatives of the Maori Governance Board. The kaupapa values include: wairua, whānau, manāki, kaitiaki and rangatira.<sup>133</sup>

Operating within Te Tirohanga, Mauri Tu Pae is a three-month, ‘medium intensity’ core therapeutic programme designed by contracted Māori service providers for Māori prisoners. It is designed to assist changes in attitudes and behaviours of offenders and to develop ways of continuing positive changes.<sup>134</sup> The Te Tirohanga programme also includes a whānau assessment; attaining a Level 2 National Certificate in Māori delivered by Te Wānanga o Aotearoa; an intensive alcohol and drug programme for those needing it; and training and employment programmes.<sup>135</sup> In October 2012, the Department’s Executive Leadership Team decided that ‘a specific goal for the Te Tirohanga programme would be to reduce reoffending by 30 per cent for those tāne participating in it’.<sup>136</sup>

Other measures offered by the Department include the Specialist Māori Cultural Assessment that is designed to motivate Māori offenders to consider a culturally-enhanced pathway out of offending. A report on the findings of the assessment is then produced for the use of the offenders and the Department, and contains recommendations for self-directed and Department-directed activities and programmes.<sup>137</sup>

Tikanga Māori programmes are delivered through the Te Ihu Waka Framework, designed to incorporate the kaupapa of manākitanga, whanaungatanga, rangatiratanga and wairuatanga. The Te Ihu Waka Framework was designed in 2014, and underpins the content of all tikanga Māori programmes. It was designed with the aim of ensuring all tikanga programmes are delivered consistently across the Department so that offender outcomes can be effectively measured. To develop the framework, an iwi-recognised service provider from Ngāti Kahungunu was contracted to provide expert advice from a Māori cultural perspective, and an advisory committee of Department staff and provider representatives was established to provide advice on the Te Ihu Waka framework and the material.<sup>138</sup>

Other rehabilitative interventions the Department offers include Mauri Toa Rangatahi, a nine-week medium-intensity rehabilitative intervention in prisons and the community that ‘was developed and is implemented with a bicultural lens’ to make it relevant to Māori youth.<sup>139</sup> A recently established Te Ara Māori unit in Manawatu aims to give a ‘tikanga-based environment to support male offenders to strengthen positively their cultural identity’.<sup>140</sup> Te Kupenga is the name given to ‘a highly-tailored, whānau-centric approach aimed at reducing intergenerational whānau offending’.<sup>141</sup> The Department also established the Gang Whānau

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133. Submission A34, p 15

134. Document A34, p 17

135. Ibid, pp 15–17

136. Ibid, p 14

137. Ibid, pp 7–8

138. Ibid, p 10

139. Submission 3.3.6, p 26

140. Document A34, p 22

141. Ibid, p 23

Engagement Framework as a cross-agency approach to promote engagement of ‘pro-social gang whānau’, and ‘inform practitioners about the unique differences in the impact of gang influence on men, women, youth and children who want to change to a pro-social lifestyle.’<sup>142</sup>

#### **(b) Reintegration programmes and services**

Benjamin Clark, the Regional Commissioner of Corrections Services for the Department’s Southern Region, said that the Department currently has 25 contracts to provide over 3,900 places every year to help transition prisoners into the community.<sup>143</sup> The Department’s reintegration services include Out of Gate, an initiative to help short-serving and remanded prisoners reconnect with their whānau and community. It also includes Tiaki Tangata, a Māori-focused, whānau-centric integration programme supporting long-serving Māori offenders to transition into their local community. Neil Campbell said the recent establishment of Tiaki Tangata meant it was too early to evaluate its effectiveness.<sup>144</sup> The Department has a Rotorua, Tokoroa and Taupo programme to provide mentor support, accommodation and employment to offenders with enduring connections to those areas.<sup>145</sup> The Department also established Whare Oranga Ake, the name given to two units located immediately outside the prison’s perimeter fence, which are designed to prepare minimum security male Māori prisoners to return to the community prior to their release, in a kaupapa Māori environment.<sup>146</sup>

#### **(c) Training and supervision**

The Department has some 8,000 staff working in a range of capacities, based in 18 prisons and over 150 community corrections sites nation-wide.<sup>147</sup> As at November 2015 Māori made up 21 per cent of the Department’s staff. This made the Department the largest employer of Māori staff, excluding the armed services, across the public service.<sup>148</sup> When frontline and office-based roles were broken down, the proportion of Māori staff in 2015 ranged from 35 per cent in the Principal Case Manager role, to seven per cent of the Department’s psychologists.<sup>149</sup>

In her evidence, Nicola Reynolds, the Department’s Chief Psychologist, said that as at June 2016 only eight of the Department’s 139 psychologists (5.8 per cent) identified as Māori.<sup>150</sup> However, she also noted that a recent workplace survey of registered psychologists in New Zealand overall indicated that, among the 43 per cent of those who responded, just three per cent identified as Māori.<sup>151</sup> Ms

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142. Ibid, p 38

143. Document A39, p 21

144. Document A34, pp 21–22

145. Submission 3.3.6, p 29

146. Document A34, pp 11–13

147. Document A26(a), p 43

148. Ibid, p 42

149. Ibid

150. Document A38, p 3

151. Ibid, p 3

Reynolds' evidence was that the Department has experienced consistent difficulties in recruiting and retaining Māori psychologists. This was, in Ms Reynolds' view, partly because they are highly sought by other organisations.<sup>152</sup> She stated that the Department at one time had a Māori bursarship scheme, whereby the Department would partially fund the living costs of students undertaking their clinical training at university, provide them with employment during university holidays, and provide them with guaranteed employment following their training. She said it had been decided at some point that the programme was no longer appropriate, partly because staff hired through the programme tended only to stay at the Department a short time.<sup>153</sup> However, according to Ms Reynolds, the Department has recently been looking to reinstitute 'mentorship role[s] with the universities', although any mentorship scheme was only a proposal at the time of her evidence, and no specific dates or timeframes were given.<sup>154</sup> She acknowledged it was 'absolutely obvious' that the Department needs Māori psychologists, and that the Department would ideally have many more Māori psychologists in their employment.<sup>155</sup>

The Crown emphasised the Department's staff training, acknowledging that for both claimant and Crown witnesses having skilled and compassionate people delivering the Department's rehabilitation and reintegration services was centrally important.<sup>156</sup> Crown witnesses pointed to Frontline Start, a three-week training course for all new corrections officers, probation officers, offender employment instructors, and programme facilitators. Frontline Start, according to Mr Campbell, shows 'the Department's commitment to work effectively with Māori'.<sup>157</sup> He also noted that further 'continuity' training is offered, including, among other things, 'Treaty of Waitangi training'.<sup>158</sup> Mr Campbell said that cultural supervision is fundamental to the effective delivery of programmes and interventions to Māori.<sup>159</sup> A Senior Advisor Cultural Supervision operates in each region, providing supervision to programme facilitators, who are then assessed in their Māori-specific competency.<sup>160</sup> There is also a framework whereby external providers give the Department's psychologists ongoing cultural supervision. This operates as a parallel framework to the psychologists' professional knowledge competency framework.<sup>161</sup>

We also heard evidence on the role and training of the Department's probation officers. Of the Department's 1,051 probation officers at the time of this inquiry, 22 per cent identified as Māori.<sup>162</sup> According to Darius Fagan, the Department's Chief Probation Officer, the RR25% target galvanised the Department's view that

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152. Transcript 4.1.3, pp 585–587

153. Ibid, pp 586–587

154. Ibid, pp 585–586

155. Ibid, pp 585, 588

156. Submission 3.3.6, p 30

157. Document A34, p 32

158. Ibid, p 33

159. Ibid

160. Submission 3.3.6, p 30

161. Document A38, pp 4–5; submission 3.3.6, p 31

162. Document A35, p 2

probation officers are an intervention in and of themselves, and ‘there is an opportunity in every interaction to influence change.’<sup>163</sup>

In the view of Mr Hemopo – himself formally a senior probation officer – it was important that probation officers be trained in tikanga in order to properly connect with Māori offenders.<sup>164</sup> Mr Fagan said all new probation officers complete the Probation Officer Curriculum, which has Māori practice concepts and models integrated throughout. There are also modules focused on Māori-specific aspects of the practice framework, which look at the relevance of Treaty principles to the role. Probation officers are assessed in the application of Māori practice concepts according to a Māori-specific staff competency framework.<sup>165</sup> Mr Fagan said probation officers participate in reflective practice sessions. These include fortnightly group case presentations, and six weekly private sessions with a practice leader.<sup>166</sup> He also pointed to evidence that Māori practice concepts have been integrated into the Probation Service’s practice framework. This framework includes the Standards of Practice, the Supported Decision Framework, and He Kete Mātauranga, a knowledge bank of supporting tools, modules and information to assist staff understanding and training.<sup>167</sup>

We heard concerns from Mr Hemopo about the incorporation of Māori cultural concepts in probation practice. Claimant counsel suggested there were significant differences between the descriptions of the hongī in the Department’s *Working Effectively with Māori Guide* and the understanding of the hongī given by Mr Hemopo in his evidence. The Department’s guide states that ‘A hongī is a formal traditional greeting where two people come together, press noses, and share breath through the nose.’<sup>168</sup> It suggests that ‘when meeting an offender or whānau you may wish to hongī as a demonstration of whanaungatanga and your willingness to engage.’<sup>169</sup> Mr Hemopo said that ‘The hongī is a physical expression of our meeting on a spiritual level. My wairua, spiritual self, greets yours. The hongī is a key to a free flow of emotions based on mutual trust and goodwill.’<sup>170</sup> He stated: ‘The hongī is the highest act of respect for another person . . . The Māori way is to hongī when you meet someone new. This applies to every person, including someone who is reporting to you as a probation officer because they have broken the law.’<sup>171</sup>

During cross-examination of Mr Fagan, claimant counsel suggested that a probation officer without Mr Hemopo’s knowledge of tikanga would not be able to grasp the deeper understanding of the hongī or its importance from reading the *Working Effectively with Māori Guide*. Mr Fagan responded that this would be true if the guide stood alone as the source of training. However, he said Department

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163. Transcript 4.1.3, p 655

164. Document A27, pp 17, 20

165. Document A35, pp 18–19

166. Submission 3.3.6, p 31

167. Document A35, pp 11–15

168. Transcript 4.1.3, p 666

169. Ibid

170. Document A27, 12

171. Ibid

staff would also be taught the meanings of such practices through the Practice Leadership model and from information delivered in their training.<sup>172</sup> Regarding staff in general, the Crown submitted that the evidence before the Tribunal identified that, among other things, there is a need for the Department to build up a pool of Māori staff with relevant skill sets, which would in turn increase the number of Māori with the necessary skills and experience to move into leadership positions in the Department. It also noted the need to address the low proportion of Māori psychologists within the Department, including working on strategies to attract and retain Māori psychologists.<sup>173</sup>

#### 4.3.5 Mainstream programmes

Besides culturally-based programmes, Department witnesses emphasised that Māori also participate in mainstream programmes. Mainstream programmes were defined by the Department's then Director Programmes and Interventions Benjamin Clark as 'programmes that are not specifically Māori focused or tikanga-based'. It was Mr Clark's evidence, that these programmes are as effective or more effective for Māori than culturally-based programmes.<sup>174</sup> In its initial briefing to the Māori Advisory Board in November 2015, the Department said that mainstream programmes aim to give more offenders, including Māori offenders, access to 'programmes and interventions that we know work'. It said that given the 'large number' of Māori offenders eligible to use the Department's programmes and interventions, 'All mainstream programmes are designed to be responsive to Māori offenders.'<sup>175</sup>

Both claimant and Crown witnesses suggested that the term mainstream could be misinterpreted. During the hearing, Dr Fiona Cram said in response to a question on Māori participation in mainstream programmes that 'A mainstream programme within the Corrections Facility should be a Māori programme because Māori within Corrections are the mainstream.'<sup>176</sup> On the other hand, Vincent Arbuckle said that 'mainstream programmes are already infused with significant Māori cultural dimensions' as is sensible given that half of those participating in these programmes would be Māori. Mr Arbuckle cautioned against thinking of 'mainstream' programmes as Pākehā programmes. Rather, they are mainstream insofar as 'they are open to all', and can still include Māori cultural elements.<sup>177</sup>

The Department offers, for example, Special Treatment Units for prisoners with a high risk of violent or sexual offending, which incorporate tikanga Māori cultural components into cognitive behavioural therapy. These, the Crown said, work for Māori and non-Māori.<sup>178</sup> The Department has Drug Treatment Units to target prisoners' alcohol and drug dependencies, a family violence programme incorporating

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172. Transcript 4.1.3, p 667

173. Submission 3.3.6, p 56

174. Document A12, p 1

175. Document A26(a), p 24

176. Transcript 4.1.3, p 324

177. Ibid, p 470

178. Submission 3.3.6, p 26

tikanga elements, programmes to reduce minor driving offences, and parenting support programmes designed to reduce intergenerational reoffending by supporting positive family ties.<sup>179</sup>

#### 4.3.6 Measuring programmes and participation

The evidence relating to the measurement of performance in rehabilitative and reintegrative programmes was unclear. In August 2015, the Department declined a request from claimant counsel for information on the effectiveness of any of its rehabilitative programmes for Māori as it ‘does not calculate these results separately by ethnicity’.<sup>180</sup>

However, Dr Peter Johnston detailed how the Department measured its rehabilitation and re-integration programmes through a ‘Rehabilitation Quotient’ (RQ) comparing reconviction and reimprisonment rates of offenders exposed to a rehabilitative programme to those with no such exposure.<sup>181</sup> Dr Johnston explained:

Disaggregation of RQ results by ethnicity (eg Māori/non-Māori) is completed when required, but is not undertaken routinely because in many cases . . . the number of participants is insufficient for this form of analysis, as disaggregation reduces sample sizes below the level necessary for statistical ‘power’. . . RQ analysis is a complex and resource-intensive procedure, therefore it is not considered prudent to routinely conduct such analyses given their limited statistical value.<sup>182</sup>

Crown witnesses gave evidence of the Department’s more recent Māori-specific research, and the evaluation techniques used to measure the impacts of culturally-based programmes on reoffending.<sup>183</sup> Mr Arbuckle said the Department was uniquely positioned to measure the effectiveness of particular initiatives and to undertake different approaches over time, and report on progress. For Mr Arbuckle, ‘The importance of this is that the Department can manage its services on the basis of facts rather than feel-good, and can adopt, develop or discontinue programmes and interventions based on evidence of what works to reduce re-offending’.<sup>184</sup>

Dr Johnston said the Department has limited evidence demonstrating that ‘culturally-based interventions’ result in significant reductions in Māori reoffending, and that Rehabilitation Quotient results for tikanga-based interventions have been ‘disappointing’. On this basis, Dr Johnston said, they should not ‘stand-alone’ but should be used in conjunction with mainstream programmes. For Dr Johnston, by contrast to the results of tikanga programmes, ‘RQ results repeatedly confirm that, relative to non-Māori participants, Māori perform as well, and sometimes better,

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179. Ibid, pp 26–27

180. Document A1(b), pp 937–938

181. Document A37, p 14

182. Ibid, pp 16–17

183. Ibid, pp 10–13

184. Document A33, p 4

as a result of completing “mainstream” programmes.<sup>185</sup> He did note, however, that exceptions to the ‘disappointing’ results were evident in good results for Māori participants in the Te Tirohanga programme and also in Mauri Tu Pae.<sup>186</sup>

Referring specifically to the Department’s psychological programmes, Ms Reynolds said the Department’s research has shown that when cultural concepts are introduced into offence-focused programmes, Māori respond well to cognitive-behavioural interventions. One study she cited evaluated the use of cultural principles in a Special Treatment Unit for sexual offenders with child victims. According to Ms Reynolds, the research found that reoffending outcomes were significantly better for Māori completing the treatment within the culturally-informed environment in comparison with those in similar programmes without the Māori cultural practices. Furthermore, non-Māori were found to experience ‘benefits from engaging in the programme with Māori cultural principles, with no negative impact on reoffending.’<sup>187</sup> However, Ms Reynolds stated that ‘offenders who responded well to the cultural concepts but who did not evidence as much change in the [cognitive behavioural therapy] component of the programme did not have as positive outcomes in terms of re-offending.’<sup>188</sup> According to Ms Reynolds, this research emphasised that within the treatment method Māori cultural concepts must be used together with the offence-focused cognitive behavioural therapy approach in order ‘to bring about viable change.’<sup>189</sup>

Besides the number of individual programmes offered, we also received evidence on the numbers of people able to participate in them. As at the end of December 2015 New Zealand’s male Māori prison population was approximately 4,200. We received evidence that in the year 2014–2015, 7,201 rehabilitative programme placements commenced with some 55 per cent of these by Māori. The completion rate for prison programmes was the same for Māori and non-Māori (82 per cent), and slightly lower for Māori in community programmes (61 per cent compared with 64 per cent for non-Māori).<sup>190</sup>

Numbers varied from programme to programme and according to limited available placements. During the hearing Dr Peter Johnston said placements for Te Tirohanga number 250 to 300 per year.<sup>191</sup> In June 2014 a Department response to the claimant’s Official Information Act request said that ‘approximately 250 men per year will be engaged in one of the six phases over a 12 month period.’<sup>192</sup> However, an August 2015 Department response to an Official Information Act request from the claimant said that in 2014 only 130 prisoners participated in Te Tirohanga.<sup>193</sup> In addition, Dr Johnston said about 300 people per year participate in the Special

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185. Document A37, p 15

186. Ibid

187. Document A38, p 9

188. Ibid

189. Ibid, pp 9–10

190. Document A37, p 14

191. Transcript 4.1.3, p 509

192. Document A1(b), p 724

193. Ibid, p 938

Treatment Unit rehabilitation programme, 55–60 per cent of whom are Māori. He noted, however, that this programme was ‘reserved for very high risk, serious violent offenders and serving relatively long sentences.’<sup>194</sup> We heard evidence that Mauri Tu Pae, Tiaki Tangata, Education and Skills for Young Māori and the Bicultural Therapy Model are available to those participating in Te Tirohanga, suggesting some overlap in programmes and the numbers participating.<sup>195</sup> Similarly, Ministry of Justice documentation showed that by April 2013, 90 prisoners had been placed in one of the two Whare Oranga Ake units in the country, while 49 had been released from prisons following completion of part of their sentence in a Whare Oranga Ake unit.<sup>196</sup> It was the claimant’s evidence that approximately 20 Māori prisoners can access these facilities annually.<sup>197</sup>

Benjamin Clark’s evidence was that ‘The Department has finite human and financial resources’. For this reason ‘It needs to ensure its rehabilitative interventions are targeted to those offenders who are most likely to derive the most benefit from them (and that have the greatest potential to reduce the most serious potential harms to the community upon release).’<sup>198</sup> The Department uses tools to measure offenders’ risk of conviction or imprisonment and assess the eligibility of offenders for programmes on this basis. This is in keeping with the Department’s statutory obligations. However, claimant witness, Shayne Walker said this approach excluded people in ways inconsistent with tikanga, a concern he said the Māori Governance Board had previously raised in relation to the Māori Focus Units.<sup>199</sup>

Dr Johnston explained that there is a process of matching offenders to programmes. Those with a low risk of reoffending are generally not assessed as being in need of rehabilitative programmes, while those in the middle band are able to access a range of programmes. Those at higher risk of reoffending are fewer in number, as are the programme placements to suit them.<sup>200</sup> Programmes have eligibility criteria, which will determine whether it is suitable for offenders to participate in them or not. Neil Campbell gave evidence, for example, that in selecting tāne for the Te Tirohanga programme, priority is given to those who identify as Māori, are of Māori descent, or who have Māori children, and also to men who can complete the programme before their scheduled release date. However, further eligibility criteria includes:

- ▶ ‘having no sexual offending as the primary offence;
- ▶ a low-medium to minimum security classification;
- ▶ a medium risk of reoffending;
- ▶ not having completed a Mauri Tu Pae programme already in the offender’s current sentence;

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194. Transcript 4.1.3, p 510

195. Document A1, p 31

196. Document A1(b), p 850

197. Document A1, pp 17–18

198. Document A39, pp 10–11

199. Document A26, p 7

200. Transcript 4.1.3, p 510

- not being an active identified drug user; and
- having sufficient motivation to complete the programme within a kaupapa Maori environment.<sup>201</sup>

#### 4.3.7 Our view

##### (1) *The Department's strategies and the Māori Strategic Plan 2008–2013*

A key question in applying the Treaty principles of active protection and equity in this inquiry was whether the Department was prioritising the reduction of Māori reoffending rates. We have discussed various ways the Department aims to address the issue of Māori reoffending. We are encouraged by some of these efforts. Neil Campbell gave evidence that outcomes for Māori taking part in the Māori Focus Units in 2013/2014 showed 'statistically significant reductions' in reoffending, and the 'Maori reconviction effect size for the programme was also better than that for all (Māori and non-Maori) completers'.<sup>202</sup>

Though it is too early to judge just how successful the more recent Te Tirohanga programme was by comparison with the Māori Focus Units, Mr Campbell said there 'is anecdotal support that Te Tirohanga is having the right effect on tāne and their whānau'.<sup>203</sup> He said an internal process evaluation of Te Tirohanga in April 2015 found the parts of the programme working well included 'a strong positive culture' in the units, whereas 'more clarity of staff roles was required, and the timing of the alcohol and drug treatment aspect of the programme was problematic'.<sup>204</sup> During the hearing Mr Campbell also said he 'intuitively' believes the Te Tirohanga model could in future be implemented across a whole facility rather than to a unit.<sup>205</sup> We agree that this would be a positive move.

The Justice Sector Māori Strategy is another positive development, albeit at a sector-level. However, the Department does not support having its own Māori Strategy. The *Creating Lasting Change Strategy 2011–2015* that subsumed the *Māori Strategic Plan 2008–2013* was said to have 'four core priorities' of public safety, reducing reoffending, better public value, and leadership.<sup>206</sup> We consider that given the significantly disparate representation of Māori in the corrections system, reducing Māori reoffending must be a specific priority underpinned by a clear strategy.

The Department's *Four Year Plan 2015* 'reflects the current position for the strategic direction of the organisation', and stated the Department's responsibility in achieving Justice Sector outcomes was the delivery of two specific outcomes: that reoffending is reduced, and that public safety is improved.<sup>207</sup> Its stated vision was of 'Creating lasting change by breaking the cycle of re-offending', and its goal was 'To reduce re-offending by 25% by 2017'.<sup>208</sup> Yet this *Four Year Plan* mentions Māori

201. Document A34, p 16

202. Ibid, p 18

203. Ibid, p 19

204. Ibid; see also document A25, pp 45–47

205. Transcript 4.1.3, p 639

206. Document A(b), p 522

207. Document A27(a), pp 39, 42

208. Ibid, p 42

only three times, and two of these are in a single bullet point noting the piloting of a new outcome framework for the Tikanga Māori programmes.<sup>209</sup> In the remainder of that 93-page document it only mentions Māori one other time, when discussing a new Auckland South Corrections Facility which, it says, will have a strong focus on reducing Māori reoffending.<sup>210</sup> If Māori were not significantly over-represented in the corrections system, a generalised approach for all may be defensible.

Similarly, in our view, the *Reducing Reoffending by Māori Work Plan 2015–2016* is not a strategy in the sense that it had an overarching vision, goal or target, with each component initiative or programme clearly contributing to that common end. Rather, it is a programme that provided a single-document overview of the Department's work relating to reducing Māori reoffending through existing and planned initiatives.

In the context of this urgent inquiry, we consider the lack of a Māori-specific strategy since 2013 a serious deficit. Judged by the programmes and initiatives already discussed, it is clear that the Crown is making efforts to reduce Māori reoffending. However, our focus is on whether these efforts are sufficient to be consistent with the Crown's Treaty obligations.

We heard evidence from the Department that as the *Māori Strategic Plan 2008–2013* was not measured for effectiveness, it cannot say how useful it was. In our assessment, a lack of data is less a reason to replace the plan, than an indication that it required amendment so that it could be effectively measured. By the Crown's own submission, the existence of a Māori strategy was evidence of a commitment to reducing Māori reoffending.<sup>211</sup> However, the lack of effective performance indicators undermined this commitment. As we see it, the decision to allow a Māori-specific strategy to disappear in the context of dire Māori reoffending statistics does not indicate that the Department is doing all it can to reduce Māori reoffending. In the absence of Māori-specific targets and measures, we do not consider *Creating Lasting Change* to be a plan specifically related to reducing rates of Māori reoffending.

Crown witnesses held somewhat divergent views on the need for a Māori-specific strategy. On the one hand, Vincent Arbuckle said that the Department's commitment to reducing Māori reoffending, and the initiatives demonstrating this commitment, had only grown stronger since the plan lapsed in 2013.<sup>212</sup> Dr Peter Johnston questioned the logic of the idea that the Department would separate off its largest group of clients and create a parallel strategy unconnected to the programmes and initiatives already working well for Māori.<sup>213</sup> On the other hand, the Department's Director Māori Neil Campbell foresaw a new Māori strategy being implemented.<sup>214</sup> As he put it during the hearing, 'I can't see working with iwi Māori

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209. Ibid, p 62

210. Ibid, p 127

211. Submission 3.3.6, p 19

212. Transcript 4.1.3, p 431

213. Ibid, p 508

214. Ibid, pp 646–647

and that not occurring. I just can't see that result happening.<sup>215</sup> Mr Campbell did qualify this however, by stating that first and foremost the Justice Sector is putting their effort into the Justice Sector strategy. In Mr Campbell's view it would be better for a Department Māori strategy to be coordinated with a Justice Sector-wide approach.<sup>216</sup> In the Crown's submissions on this matter, it was the former rather than the latter position that prevailed. It appeared to us that high level Department officials themselves differed over the need for a separate Māori strategy.<sup>217</sup>

At points in our inquiry, Crown witnesses suggested that one reason they were hesitant to commit to a Māori-specific strategy was because the Department is dealing with a smaller overall number of offenders, but a greater 'churn' of reoffenders, very often gang members. As Dr Johnston made clear, however, it is Māori who are more likely to receive short sentences (imprisonment for two years or less) on average than non-Māori, and it is this cohort that has the highest rate of reimprisonment.<sup>218</sup>

Further, Dr Peter Johnston suggested that he saw ethnicity as less fundamental to disproportionate Māori reoffending rates than whether offenders, regardless of ethnicity, shared certain traits. These traits included the age at which they began offending, frequency of convictions and gang involvement.<sup>219</sup> The issue of gang involvement played an important part in the Crown's argument throughout the inquiry. Dr Johnston, for example, said research had shown that the difference in the rate of reimprisonment between non-Māori and Māori non gang members was 'almost zero'. From this he suggested that 'we don't have a problem with Māori disproportionality in re-conviction we have a problem with gangs and the high rates of their re-offending'. He clarified that people with 'very disadvantaged backgrounds' tend to be those with high rates of reoffending. Further, he said it was 'true that Māori form the largest sub-group of those groups. But those are the drivers of high rates of re-offending. Ethnicity per se, in and of itself, is not a factor in driving high rates of re-offending.'<sup>220</sup> Dr Johnston, accepted the proposition put to him that 'the ethnic Māori life experience for so many Māori is social deprivation and in many instances gang affiliation or involvement in the whānau.'<sup>221</sup> He also agreed the group of people sharing the characteristics that tend to predict offending behaviour are disproportionately Māori.<sup>222</sup>

There was, to us, some circularity in the argument of Crown witnesses in this respect. On the one hand, disproportionate reoffending rates was less a Māori issue than a gang or socio-economic issue while, on the other, there is a strong correlation between Māori, socio-economic deprivation and gang membership.

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215. Transcript 4.1.3, p 647

216. Ibid

217. Submission 3.3.6, pp 18–19

218. Transcript 4.1.3, p 494

219. Ibid, p 499

220. Ibid, p 500

221. Ibid, pp 499–500

222. Ibid, p 499

In any case, it is our task to assess whether Crown actions have been consistent with Treaty principles, and one of the principles we discussed refers to the need for restoration when inequity exists between Māori and non-Māori. Crown and claimant witnesses agreed that the legacies of colonisation have influenced the position of indigenous peoples in the corrections system in New Zealand and elsewhere. Dr Johnston said ‘there is absolutely no question in anybody’s mind that the colonisation dynamics that occurred in New Zealand, Australia and Canada in relation to the plight of the indigenous population have been of massive influence on where we are today. No one disputes that.’<sup>223</sup>

We accept that the issue of reoffenders cycling through the corrections system is a difficult one, but it is also the one on which we are focused, and for which the Department accepts responsibility for having a central role.<sup>224</sup> We do not expect the Department to try and resolve issues beyond its responsibilities. Yet, in dealing with those issues it is tasked with, we see a clear need for more focused strategic thinking around Māori reoffending, a significant part of which will require considering the issue of gang membership. Māori have a unique perspective based on their history and lived experience as tangata whenua. Given the concerning level of disproportionality experienced by Maori we consider that for the Crown to be acting consistently with its Treaty obligations it needs to commit to a focus on working with Māori at a high level to find and apply Māori-centred solutions.

Besides the absence of a Māori-specific strategy, we were concerned by the lack of a specific budget for reducing Māori reoffending. We received evidence that the Department’s funds are sourced from the total budget for Rehabilitation and Reintegration rather than allocating specific funds for Māori offending.<sup>225</sup> The claimant’s Official Information Act request for documentation on the Department’s budget set aside for Māori reoffending since May 2014 was declined as this information ‘does not exist.’<sup>226</sup> The Department did confirm that it spends about \$2 million annually on prison and community-based tikanga programmes.<sup>227</sup>

Mr Arbuckle told us the Department sets its budget for a specific function and not a particular type of offender. He said it would not make sense for budgets to be set specifically for Māori offenders as Māori participate in all the Department’s programmes. For this reason individual Māori will use parts of the budget for each programme that they participate in.<sup>228</sup> However, any targeted strategic plan to reduce Māori reoffending will require a dedicated budget to ensure sufficient resources to allow the strategy to succeed, and to encourage accountability. Crown witnesses mentioned the resources involved in setting a meaningful target to reduce Māori reoffending. Additional resources may be required in circumstances where the

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223. Transcript 4.1.3, p 518; see also doc A42, paras 4–6

224. Transcript 4.1.3, p 493

225. Document A1(b), p 723

226. *Ibid*, p 939

227. *Ibid*

228. Document A33, p 24

active protection of Māori interests is urgent. It is our view that the circumstances before us meet this standard.

Witnesses for the claimant said that the Department could better fulfil its statutory obligations to improve public safety by taking a portion of the vast sums spent on imprisoning offenders to invest in communities as a preventative measure.<sup>229</sup> As the chair of Ngāti Kahungunu Iwi Incorporated Ngāhiwi Tomoana put it during the hearing, ‘We don’t want to build prisons, we want to take down the fences.’<sup>230</sup> We do not consider it beyond the Department to focus its resources on a targeted plan aimed at reducing its majority prison population, and protecting the interests of the Crown’s Treaty partner.

During the hearing, our attention was directed to areas of social policy with comparable considerations to the Department. Peter Johnston was asked about the Māori-specific targets set for Māori education and whether this could be compared with the Department setting a Māori-specific target for reducing Māori reoffending rates.<sup>231</sup> Dr Johnston said the two were not comparable, as ‘the teaching of literacy is something where all the ingredients of change, development, improvement, largely are present in the room between the tutors and the child,’ whereas ‘when we are dealing with offenders there is a host of issues outside of our control.’<sup>232</sup>

Comparisons were also made with the health system, specifically between prisons and hospitals. Desma Ratima said that

if you are sick and go to hospital, you expect to receive all the treatment you need for your illness. When someone has done the wrong thing and broken the law, this needs to be addressed and doing so may include time in prison . . . when they leave prison, they should have received all the help they need so that they don’t break the law again.<sup>233</sup>

During Mr Ratima’s cross-examination, Crown counsel suggested that prisons are also similar to hospitals in that hospitals do not always succeed in treating illnesses in the first instance, or at all. Nor, Crown counsel said, do hospitals guarantee particular outcomes to any patients.<sup>234</sup> In his evidence Mr Ratima said that prisons harm offenders by isolating them from society and then releasing them ill-equipped to change their lives for the better.<sup>235</sup> Under Tribunal questioning, Mr Ratima accepted that the key point of the analogy was that prisons should be more like hospitals, that is, places of healing, without having the conflicting aim of containment.<sup>236</sup>

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229. Transcript 4.1.3, pp 216, 379–380

230. Ibid, p 216

231. Ibid, pp 506, 513

232. Ibid, p 513

233. Document A22, p 2

234. Transcript 4.1.3, pp 196–197

235. Document A22, p 6

236. Transcript 4.1.3, p 213

Clearly, the health and education sectors operate in different contexts to the Department, each facing distinct sets of responsibilities, challenges, and limitations, both within and outside of their control. Nonetheless, Māori-specific strategies inform the policies and practices of both these sectors, and these are measured and reported on. We are of the view that certain broad principles are relevant to a consideration of the Department's approach in developing and implementing an equitable approach to reducing reoffending.

First, in the Māori-specific strategies of the health and education sectors there is recognition that inequity existing between Māori and non-Māori requires change. In its guide to *He Korowai Oranga Māori Health Strategy 2014*, the Ministry of Health stated that 'As part of working well for everyone, the health system needs to demonstrate that it is achieving as much for its Māori population as it is for everyone else.'<sup>237</sup> In relation to District Health Boards, it stated that one of the Boards' responsibilities was 'to reduce disparities between population groups.'<sup>238</sup> The Taranaki District Health Board, in its *Te Kawau Mārō: Taranaki Māori Health Strategy 2009 to 2019* reflected the Ministry's statement. It noted that Article 3 of the Treaty of Waitangi guarantees equity between Māori and other New Zealanders, and that health inequalities 'are unnecessary, avoidable, unfair, and unjust . . . In New Zealand there is clear evidence of wide and enduring inequalities between the health status of Māori and non-Māori.'<sup>239</sup> Similarly, the Ministry of Education's *Ka Hikitia Accelerating Success 2013–2017: The Māori Education Strategy* stressed the consideration of equitable outcomes for Māori, saying 'there is much room for improvement in how well the education system is performing for particular groups of students and this needs urgent attention and focus for change.'<sup>240</sup> One of the final goals of the strategy was to have 'Māori students achieving at least on a par with the total population.'<sup>241</sup>

Secondly, Māori-strategies in the health and education sectors recognised that a long-term commitment is required to effect change, coupled with short-term, specific, and measurable sub-targets. This contrasts with the Department's view that setting a target to reduce Māori reoffending to a rate proportionate with non-Māori would simply 'lead to inevitable failure in the short to medium term and be counterproductive.'<sup>242</sup> The *He Korowai Oranga* health strategy set 'pae ora,' or healthy futures, as a long-term goal. It stated that 'over the next 10 years, the health system will work towards pae ora to support the achievement of health equity.'<sup>243</sup> The Canterbury District Health Board's *Māori Health Action Plan 2016/17*, sitting within the framework of *He Korowai Oranga*, identified 15 targeted health programmes or services where Māori were achieving worse health outcomes. These

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237. Document A48, p 7

238. Ibid, p 7

239. Document A46, pp 7, 9

240. Document A47, p 5

241. Ibid, p 8

242. Transcript 4.1.3, p 415

243. Document A48, p 9

would be focused on over a year as priorities for working towards overall equity. The rationale for this was that, while there were ‘many areas of focus,’ it was decided that, ‘in the first instance, the areas of focus would be those where there were differentials in access or outcomes for Māori, where indicators existed that were readily measurable in order to determine progress.’<sup>244</sup>

The Ministry of Education made it clear that its *Ka Hikitia* strategy was also a long-term commitment to change. Phase 1 of the strategy, ‘Managing for Success,’ operated from 2008 to 2012 and focused on direction setting and momentum building.<sup>245</sup> ‘Accelerating Success 2013–2017’ constituted Phase 2 of the strategy, and focused on action by all key stakeholders in Māori education. Phase 3 of the strategy was scheduled for 2018 to 2022, and beyond.<sup>246</sup> These three phases demonstrate that short-term commitments, such as success in individual rehabilitative programmes or the development of partnerships, can be incorporated with a long-term framework to achieve equity.

Strategies used by government agencies in other areas of social policy also stress the importance of cross-government responsibility and engagement to achieve equity between Māori and non-Māori. The *Ka Hikitia* strategy, for example, addressed the concern raised by Dr Johnston that all the tools for change are present in the classroom.<sup>247</sup> Its introduction stated that one of the critical factors underpinning the success of the strategy was ‘Strong engagement and contribution from parents, whānau, hapū, iwi, Māori organisations, communities and business.’<sup>248</sup> That is, the Ministry of Education acknowledged that the success of Māori students depends not only on classroom interaction with teachers but on supportive communities and involvement across the education sector and beyond. A coordinated approach is certainly desirable. But this should be no barrier to setting specific Māori-targets where possible. As we see it, success in the Education sector is similarly impacted on by wider social issues including family dysfunction, violence, lack of housing, transience, health issues, incarcerated parents, children in care, and lack of income.

We could say more about these strategies. When seen together, however, several relevant features emerge. First, governing bodies in these areas of social policy have identified the need to have a Māori-specific strategy. Secondly, they focus directly on the Treaty and its principles as a means to inform action and to achieve Māori-focused outcomes consistent with the Treaty. Thirdly, they are informed by Māori thinking. Fourthly, they emphasise the need to achieve equity and, in some cases, have specific, measurable targets and accountabilities. Finally, they recognise the need for change, and believe that positive change can be achieved. The Department, by contrast, seems to believe that it cannot effect positive change at a significant level.

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244. Document A45, p 8

245. Document A47, p 7

246. Ibid, p 8

247. Transcript 4.1.3, p 513

248. Document A47, p 6

**(2) Our view on RR25%**

We have noted the parties' general agreement that the design of Reducing Reoffending by 25 per cent, or RR25%, made various outcomes possible. The evidence before us was that the RR25% target was not based on Department policy or data, but was a high level politically imposed goal. During the hearing Mr Arbuckle said that the Department had to maintain a balance between realism and ambition. He said 'we honestly believed that 25% reduction was possible and we worked damn hard to achieve that'.<sup>249</sup> Yet the target of a 25 per cent reduction in the overall reoffending rate appears arbitrary as there was little or no empirical basis from which the Department could have confidently expected to succeed in achieving this target. In our view, any future Māori-specific target should be designed with Māori as part of a Māori-focused strategy, be informed by data, and have measures to hold the Department accountable to meeting it.

Regarding RR25%, we see two matters of primary concern. The first is a matter of design, the second of results. We agree with the claimant that the RR25% target was never highly likely to result in eliminating or significantly reducing disparity between Māori and non-Māori. This was, in our view, inherent in the design of the RR25% target. As we see it, an equitable approach to the RR25% target is not one that commits to simply lowering the overall rate, trusting that Māori reoffending will reduce at a rate proportional to this. Rather, an equitable approach in the circumstances before us is one that recognises the significant imbalance of the situation, and targets the primary group affected and does what is possible to reduce Māori reoffending rates. This will require disaggregating the data and focusing on reoffending by Māori with specific and measurable targets, and the appropriate resourcing and strategic vision to make this viable. We are gratified to hear evidence that the absolute numbers of reoffenders has reduced significantly. Yet this occurred alongside the widening of the gap between Māori and non-Māori progress towards reducing reoffending rates.

That the practical outcomes of the design of RR25% have increased disparity in Māori and non-Māori reoffending rates can come as no great surprise. The RR25% target set by the Department was designed in such a way that achieving equitable outcomes was unlikely. The outcomes of RR25% have, unfortunately, shown this to be accurate. We reiterate that in these circumstances the Crown has a Treaty obligation to prioritise reducing disparities between Māori and non-Māori regardless of their causes.

**(3) A Māori-specific target**

We have noted that the Department measures specific interventions. Our concern is the lack of measureable targets for Māori reoffenders more broadly. Crown witnesses commented on the current lack of Māori-specific targets for reoffending.

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249. Transcript 4.1.3, p 445

The Department, as noted, has set a goal for reducing reoffending for participants in Te Tirohanga by 30 per cent by 2017.<sup>250</sup> This is an ambitious goal but it raises questions. The Department is clearly willing to set a Māori-specific target for this particular programme, but is seemingly unwilling to set an overall Māori target.

Dr Johnston suggested that culturally-based programmes ‘are not sufficiently effective to serve as “stand-alone” rehabilitative measures.’<sup>251</sup> The exceptions, he said, were the positive results for Māori for those who completed the Te Tirohanga (formally Māori Focus Units) programme, and also in the Mauri Tu Pae (formerly Māori Therapeutic) Programme.<sup>252</sup> Though the rate of Māori completion for tikanga programmes (88 per cent) and Mauri Tu Pae (92 per cent) was heartening, we do have concerns about the availability of placements for some of these programmes.<sup>253</sup> Quite simply, as we set out above, the numbers currently participating in these programmes are a small fraction of the Māori prison population. The number of offenders incarcerated and the number of offenders enrolled in programmes need not align precisely. We understand that for reasons of safety some offenders may not be suitable or eligible for some programmes. Yet with such a small proportion of offenders able to participate in and therefore benefit from them, these programmes are unlikely to be sufficient in reducing the Māori reoffending rate in proportion with that of non-Māori. These programmes are also not supported by a single strategic vision.

Witnesses supporting the claimant doubted this evidentiary basis for claiming that mainstream programmes were significantly reducing Māori reoffending.<sup>254</sup> Dr Johnston speculated that the overall ineffectiveness of culturally-based programmes in reducing recidivism meant there was likely to be little appetite to establish a new framework to specifically target Māori reoffending.<sup>255</sup> What is clear to us is that the Department’s current approach is also not achieving the desired results. As we see it, the preferred approach of the Department is a mainstream approach that should benefit Māori, as opposed to a Māori-specific or kaupapa Māori approach that should also benefit non-Māori.

Vincent Arbuckle said that while setting a Māori-specific target was ‘possible’, it would not be ‘meaningful’ when so many contributing factors are outside the Department’s control.<sup>256</sup> Similarly, Mr Arbuckle said during the hearing that setting specific Māori targets was a ‘valid approach’ that could be done, given the Māori prison population. However, the Department had set a ‘universal goal’ because ‘By focusing on all offenders . . . they equally benefit.’<sup>257</sup> Mr Arbuckle also emphasised ‘some unique characteristics of Māori offenders’, namely the high proportion

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250. Document A33, p 23

251. Document A37, p 15; transcript 4.1.3, p 508

252. Document A37, p 15

253. Document A26(a), pp 29–30

254. Transcript 4.1.3, pp 109–110, 326

255. *Ibid*, p 508

256. Document A33, pp 23–24

257. Transcript 4.1.3, p 447

of Māori prisoners with gang affiliation, whose reoffending rate is higher than non-gang members. This problem was, Mr Arbuckle reiterated, outside the Department's control.<sup>258</sup>

When questioned by the Tribunal on this position, Mr Arbuckle said that the Department realised 'that gap [between Māori and non-Māori reoffending rates] is very significant, it's very persistent, it's very long and it's been running for many, many years'. While achieving significant change in this is 'undoubtedly desirable', he said the Department has hesitated to set a goal because of the challenges he described. As he acknowledged, however, 'Reducing re-offending for the general population is challenging as well and we don't control all those factors either. It's not to say that it's not a worthy idea.'<sup>259</sup>

We appreciate the challenges the Department faces: their position at the end of the criminal Justice Sector 'pipeline'; the need to maintain public safety; the difficult nature of offender behaviour patterns; and socio-economic factors influences involved.<sup>260</sup> The Department, as Mr Arbuckle said, operates within institutional, statutory, budgetary, and policy constraints.<sup>261</sup> We cannot see why these constraints, which presumably also apply to setting an overall target, should prevent the Department from undertaking a Māori-specific target. They did not prevent the Department from setting a general RR25% target, nor the 30 per cent reduction target for participants in Te Tirohanga. The Department's answer to this seems to be that setting a Māori specific target is undesirable because, if the current approach is followed, it does not believe it will succeed. If so, we find this way of thinking hard to reconcile with the Crown's Treaty obligations in the context of increasing disparity between Māori and non-Māori reoffending rates.

The Department's current approach is to set a target to reduce reoffending overall and assume that Māori would respond at the same or better rate as non-Māori. The Crown said that since no previous strategy resulted in major reductions in Māori reoffending, and since achieving success in reaching the RR25% target requires a large reduction in Māori reoffending, it was legitimate to set this target. It said that RR25% had a limited timeframe, and required the reduction of Māori reoffending.<sup>262</sup> In our view, rather than attending to a 'universal goal' that somehow 'focus[es] on all offenders', the priority for the Department should be to narrow their focus to the group of offenders in most urgent need.

The Department's Director Māori, Neil Campbell said the RR25% target was 'relevant to Māori but not specific to Māori'.<sup>263</sup> These specific targets are, as Mr Campbell acknowledged, an important measure of accountability.<sup>264</sup> However, it was Mr

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258. Ibid

259. Ibid, p 472

260. Submission 3.3.6, pp 15–16

261. Transcript 4.1.3, p 468

262. Submission 3.3.6, p 51; doc A33, p 20

263. Transcript 4.1.3, p 631

264. Ibid

Campbell's evidence during the hearing that, as well as accepting the likelihood of a new Māori strategy for the Department, and in addition to a Justice Sector strategy, separate Māori targets for the Department are preferable.<sup>265</sup> We agree.

Subsuming Māori reoffending in an overall target is a model that, with respect, leaves too much to chance. It is our view that the Department needs to specifically target disproportionate rates of Māori reoffending. The Crown, in its submissions in this inquiry, acknowledged that it could set a specific target for reducing Māori reoffending. It has thus far chosen not to.

#### **4.4 THE EXERCISE OF PARTNERSHIP AND THE CROWN'S DUTY TO CONSULT**

The Treaty principle of partnership flows from the Treaty guarantees of *kāwantanga* and *rangatiratanga*. Appropriate consultation with Māori is central to a Treaty partnership undertaken in good faith. The Tribunal in the *Te Urewera* inquiry said 'In attempting to reduce [socio-economic] disparity, however caused, the Crown has an obligation to do so in good faith and partnership' with the Māori groups concerned. It continued, 'It cannot simply present Maori with its own solutions, however well-intentioned they might be'. Rather, 'at minimum it must consult with Maori, and ideally it will either form a partnership with, or deliver funding and autonomy to, Maori organisations'.<sup>266</sup> While the Crown's duty to consult is not absolute, and will depend on the circumstances of each case, it is obliged to make informed decisions regarding matters affecting Māori. Simply being informed, though, is not enough in these circumstances.

It is our view that in matters of great importance to Māori, the Crown has a duty to be in continuing dialogue with Māori in order to understand, and protect, their interests. In the context of long-standing inequity that causes great harm to Māori communities, this calls for mechanisms allowing for partnership with Māori to ensure the protection of their interests occurs in the appropriate way.

In this section we assess the Department's engagement with Māori on strategic and operational matters. We briefly set out the relevant evidence, including the development of *iwi* partnerships and the design of the Department's programmes and initiatives. We then discuss the Māori Advisory Board.

##### **4.4.1 The Department's engagement with Māori**

We heard substantial evidence throughout the inquiry regarding the Department's efforts to form relationships with *hapū*, *iwi* and Māori communities. The Crown said the Department has engaged with Māori through informal and formal relationships at the levels of strategy and operation.<sup>267</sup> The Department's Director Māori, Neil Campbell, gave evidence that the Department has 'ongoing dialogue, consultation, [and] endeavour[s] to include and involve *iwi* in the design and development

265. Transcript 4.1.3, pp 638, 646–647

266. Waitangi Tribunal, *Te Urewera Pre Publication, Part VI* (Wellington: Waitangi Tribunal, 2015), p 659

267. Submission 3.3.6, pp 31–35

of all the programmes we currently have within our programme suites.<sup>268</sup> Further, he said there was no intended change to this approach.<sup>269</sup> The Department's own documentation said much the same. In a section dealing with reintegration efforts, the *Creating Lasting Change Strategy 2011–2015 Year Two* said the Department aims to strengthen its engagement with offenders in the community. One of the ways it would do this was by 'Partnering with iwi and non-government organisations to provide supportive networks within the community that help offenders to complete their sentences and live offence-free lives.'<sup>270</sup>

Mr Campbell discussed the Department's formal relationship agreements, including those arising out of Treaty settlement negotiations with Taranaki Whānui ki Te Upoko o Te Ika, and Te Hiku o Te Ika, as well as its intention to begin engagement with Ngāti Pahauwera.<sup>271</sup> He gave evidence of the Department's non-Treaty settlement relationships with Te Rūnanga o Tupoho, Tūwharetoa Māori Trust Board, Ngāti Naho Kaitiaki Society, Ngāti Rangi Hapū Development Committee, Pukaki ki Te Akitai, Poutini Ngāi Tahu, Rangitāne o Manawatū, Te Rūnanga o Raukawa, Te Tau Ihu o Te Waka, and Te Taumutu Rūnanga. These agreements were signed by the Minister of Corrections, the Chief Executive or operational managers.<sup>272</sup> The agreements, according to Mr Campbell, led to the kaitiaki being 'heavily involved in the design and development of operations leading up to the opening of the facilities and we have maintained the relationship over the years.'<sup>273</sup> For example, kaitiaki played 'a key role in piloting the new Tiaki Tangata reintegrative service.'<sup>274</sup>

The Crown stressed its engagement with cross-sector groups as a part of the Gang Whānau Engagement Framework, which Crown witnesses said is a cross-agency and co-development approach undertaken with the New Zealand Police, the Ministry of Social Development, Te Puni Kōkiri, iwi, community groups, the Wāka Moemoea Trust, and health and staff representatives who have worked with gangs.<sup>275</sup> Its aim, according to Neil Campbell, is 'to promote greater involvement of pro-social gang whānau and/or other pro-social support for gang offenders'. This framework also aims to inform practitioners about how gang influence affects men, women, youth, and children who want to adopt 'a pro-social lifestyle.'<sup>276</sup> Mr Campbell's June 2016 evidence was that the framework's design and development has been completed with practitioner guidelines available soon.<sup>277</sup>

We also heard of the Department's collaborative operational arrangements with Māori communities and groups such as Te Rūnanganui o Ngāti Porou for reintegration initiatives to aid offenders to reintegrate into the tribal area, and of Ngāti

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268. Transcript 4.1.3, p 628

269. Ibid

270. Document A14(a), p 79

271. Document A34, pp 26–28

272. Ibid, p 24

273. Ibid

274. Ibid, pp 24–25

275. Ibid, pp 38–39

276. Ibid, p 38

277. Ibid, p 39

Kahungunu Iwi Incorporated's involvement in the Te Tirohanga programme.<sup>278</sup> Mr Campbell pointed to connections with Whānau Ora and 'dozens and dozens of regional-level initiatives that involve the Department partnering with local Māori communities.'<sup>279</sup> He discussed a working group of service providers from Ngāti Kahungunu and Ngāpuhi to develop components of the Mauri Tu Pae programme.<sup>280</sup> Mr Campbell's evidence was that since 2013 the programme's content was strengthened and its duration extended, with the collaboration with Māori service providers.<sup>281</sup>

Mr Campbell also identified the involvement of an iwi-recognised service provider from Ngāti Kahungunu in the design of Te Ihu Waka. An Advisory Committee consisting of provider representatives and Department staff, including the Māori Services Team, was established to give advice on Te Ihu Waka and its supporting materials.<sup>282</sup> Mr Campbell said he hoped to engage with iwi at a national strategic level in reviewing major developments like Te Ihu Waka. He saw the Māori Advisory Board, which we discuss below, as providing a platform to facilitate this approach.<sup>283</sup>

Benjamin Clark said that in his previous role as Director of Programmes and Interventions, he oversaw much of the consultation process to develop the Te Ihu Waka framework. He described the 'long and at times challenging process to try and build consensus among such a large number of Māori service providers, each of which had been delivering motivational Tikanga Māori programmes in their own way.'<sup>284</sup> In his evidence, the more than two year period of consultation 'was worth it to agree and develop a consistent framework for the delivery of these programmes around the country'. He said he was 'confident that the revised programmes will strengthen identity, increase readiness to change and ultimately help reduce the likelihood of participants reoffending'.<sup>285</sup>

Mr Campbell also pointed to the participation of service providers from Māori communities into the design and development of the Whare Oranga Ake programme.<sup>286</sup> Mr Campbell said he led engagement with stakeholders so that Māori communities could participate fully in the programme's design and development. He said service providers from the Hawke's Bay and the Waikato, as well as iwi representatives from Ngāti Kahungunu, Ngāti Poporo, Ngāti Naho and Pukaki ki te Akitai, contributed to programme design through workshops.<sup>287</sup> Mr Arbuckle said Whare Oranga Ake was 'distinctively Māori in terms of the kaupapa and design of

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278. Document A34, p 29

279. Ibid, p 31

280. Document A14, p 9; doc A34, pp 2-3

281. Ibid, p 9

282. Document A34, p 10

283. Transcript 4.1.3, pp 628-629

284. Document A39, p 23

285. Ibid

286. Document A34, p 11

287. Ibid

how those units operate'. Mr Arbuckle's evidence was that the Spring Hill facilities in the Waikato were staffed by Corrections staff and an iwi-based provider.<sup>288</sup>

The Department's Chief Psychologist Nicola Reynolds presented evidence to us of a range of treatment programmes 'developed in consultation with Māori staff, supervisors and iwi representatives with relevant expertise'.<sup>289</sup> Benjamin Clark also mentioned an external cultural consultant engaged for the Mauri Toa Rangatahi programme, and consultation with local iwi over the Drug Treatment Unit in the Te Tirohanga programme unit at Whanganui Prison. For Mr Clark, much Department work goes into building constructive relationships to improve the delivery of its interventions.<sup>290</sup>

While the claimant and claimant witnesses expressed optimism regarding elements of these arrangements, they also saw limitations. They had doubts, for example, about the substance of tikanga programmes based on the Risk, Need, Responsivity (RNR) model used by the Department to tailor the urgency of rehabilitative and reintegrative services to each individual to reduce the risk of recidivism.<sup>291</sup> The claimant submitted that 'While the tikanga programmes may have been created in good faith, they are inadequate. Like the "mainstream" rehabilitation programmes, they are based on the RNR model. They are not co-designed with Māori from a Kaupapa Māori foundation'. Rather, 'They simply have a component added to the RNR based programme of cultural identity exploration'.<sup>292</sup> The claimant further submitted that the *Reducing Re-offending by Māori Workplan 2015–2016*, discussed earlier, was 'not the product of co-design with Māori'.<sup>293</sup> It was Shayne Walker's evidence, however, that the Māori Advisory Board, discussed below, were part of discussions over the final draft of the *Reducing Re-offending by Māori Workplan 2015–2016*, and endorsed it at the 29 February meeting with the Executive Leadership Team.<sup>294</sup>

Mr Walker gave evidence that the Māori Governance Board, prior to the advent of the Māori Advisory Board, discussed the issue of restrictions on who could participate in tikanga programmes. He said he disagreed with the restrictions being placed on offenders with a ROC/ROI (the Department's measure used to estimate the 'risk of reconviction' and the 'risk of reimprisonment' for general and violent offences) score that exceeded a set threshold. Mr Walker said he 'challenged the Department to at least test the tikanga programmes with these people with higher ROC/ROI scores' but concluded that he did not 'know where we got with that'.<sup>295</sup>

Dr Fiona Cram said the fact that Māori are the mainstream prison population means that the Department must be responsive to a Māori world view in design

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288. Transcript 4.1.3, p 461

289. Document A38, p 8

290. Document A39, pp 22–23

291. Submission 3.3.4, p 31

292. Ibid

293. Submission 3.3.4, pp 27–28

294. Transcript 4.1.3, p 165

295. Document A26, pp 7–8

and evaluation.<sup>296</sup> Any co-design, Dr Cram said, must engage Māori stakeholders, including inmates and their whānau and iwi, to look for innovative solutions.<sup>297</sup> Dr Cram agreed that prisoners themselves ‘are a vital component of co-design’, but indicated that at present they were, so far as she was aware, not being engaged as such.<sup>298</sup>

Fundamentally, the claimant acknowledged evidence that the Department has working relationships with iwi and hapū. However, he said that without a specific target to reduce Māori reoffending, there was no accountability to these same iwi and hapū.<sup>299</sup> Similarly, Desma Ratima, in support of the claimant, said ‘There is no framework that provides any form of consultation with Corrections locally or nationally that will allow Maori to offer any solutions or recommendations that will assist a successful period of incarceration.’<sup>300</sup>

Having seen evidence and views relating to a range of the Department’s efforts to engage with Māori and Māori communities, we now turn to a recent initiative that was the subject of substantial evidence in this inquiry, the Māori Advisory Board.

#### **4.4.2 The Māori Advisory Board**

The 2015 establishment of the Māori Advisory Board to advise the Department’s Executive Leadership Team on policy issues and service design was central to the Crown’s argument that it was engaging with Māori to address Māori reoffending. Here, we briefly give the background to the establishment of the Māori Advisory Board before giving our view.

In March 2002 the first quarterly meeting of the Chief Executive’s Māori Advisory Group, an early precursor to the Māori Advisory Board, took place. Potential members of the group were nominated by senior Māori staff to provide advice to executives.<sup>301</sup> However, the fact that those members were a collection of individuals rather than iwi group representatives led, according to Vincent Arbuckle, to advice perceived as non-challenging to the direction of Department policy.<sup>302</sup> In 2012, the Department saw a new approach was necessary, and so shifted engagement with Māori communities to a regional management level.<sup>303</sup>

Part of this approach was the establishment in November 2012 of the Māori Governance Board, to assist with the redesign of the five Māori Focus Units.<sup>304</sup> The Māori Governance Board consisted of iwi-mandated representatives from each of the five areas with Māori Focus Units. It aimed to provide advice and

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296. Transcript 4.1.3, p 329

297. Ibid, p 314

298. Ibid, p 332

299. Submission 3.3.4, p 35

300. Document A6, p 3

301. Document A33, p 8

302. Ibid

303. Ibid,

304. Ibid; document A14, p 3

quality assurance on the design, implementation and monitoring of the national Te Tirohanga programme that would guide the running of the units.<sup>305</sup>

In April 2015 Neil Campbell submitted a proposal to the Department's Executive Leadership Team to replace the Māori Governance Board with a Māori Advisory Board with the more expansive purpose to 'provide a formal mechanism for staff to seek authentic guidance from representatives who have the authority to speak on behalf of iwi/Māori communities'.<sup>306</sup> The board would 'maintain oversight of significant Māori initiatives such as Te Tirohanga as part of the continual improvement process and work of the Māori Services Team'.<sup>307</sup> The Executive Leadership Team approved the proposal in May 2015 and letters of invitation were sent to iwi in October of that year.<sup>308</sup>

According to Mr Campbell, Ngāi Tahu, Ngāti Raukawa and Tūhoe declined the invitation, although he could give no reasons as to why they declined. As at June 2016, the board had iwi representatives from Waikato-Tainui, Ngāti Porou, Taranaki Whānui, Te Rūnanga o Tupoho, Ngāti Tūwharetoa, Ngāti Kahungunu, and Ngāpuhi.<sup>309</sup> The Māori Advisory Board therefore retains representatives from the five iwi involved in the Māori Focus Units, but now additionally includes representatives from a further five iwi with the highest proportion of offenders.<sup>310</sup>

A briefing prepared by the Department was provided to the Māori Advisory Board prior to its initial meeting in November 2015 that included a section on 'Our approach to reducing reoffending by Māori'. It stated:

Cultural input during the design of mainstream rehabilitation programmes has been achieved by the establishment of various cultural advisory groups, internal and external 'cultural consultants' to work alongside the programme designers, and the application of Māori cultural frameworks.<sup>311</sup>

The terms of reference for the Māori Advisory Board were finalised and approved by the board in February 2016. The terms stated that 'the initial purpose of the Māori Advisory Board' was to 'Provide advice and input to the Department of Corrections' Executive Leadership Team on the development of policy and the design of Corrections services aimed at reducing re-offending by Māori'.<sup>312</sup> It then stated:

It is the Department's intention to provide board members and the ELT an opportunity to further refine and define the purpose and role of the board as the direction

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305. Document A33, p 8; doc A34, p 35; doc A26, pp 2-3

306. Document A34, p 35

307. Ibid

308. Ibid, pp 35-36

309. Ibid, p 36

310. Document A33, pp 8-9

311. Document A26(a), p 24

312. Document A34(a), p 3

and focus becomes more apparent. For example, there may be opportunities to refine Correction's input into a justice sector response to the over-representation of Māori.<sup>313</sup>

The key accountabilities of the Māori Advisory Board were to 'Represent the interests of iwi Māori constituent groups' and 'Ensure cohesive leadership as a group of iwi Māori leaders engaging with Corrections'.<sup>314</sup>

As at June 2016, the Māori Advisory Board had met four times.<sup>315</sup> Vincent Arbuckle said the Māori Advisory Board was 'now making a meaningful contribution to the Department's strategies and programmes and is acting as the advisory function to the Chief Executive that was anticipated when it was first proposed'.<sup>316</sup> It is, he said, 'developing into an important part of the Department's engagement strategy and is expected to grow in influence and importance in the coming years'. Mr Arbuckle emphasised that the Māori Advisory Board was not designed to sit 'at a distance advising the Department. Rather', he continued, 'the intention is to engage the Board members and their respective communities in the work the Department is doing'.<sup>317</sup>

For Mr Arbuckle, the Department sees in the Māori Advisory Board 'an opportunity for those involved to take more responsibility for the rehabilitation and reintegration of their people, alongside and with the support of the Department'.<sup>318</sup> He clarified, however, that there were 'limits to the extent of the MAB's role that are determined by who is statutorily responsible for the performance of the Department's statutory obligations and thus who has legal accountability'.<sup>319</sup> Despite this, he said he did not consider these statutory limits to be 'a barrier to the Department working in genuine partnership with members of the MAB'.<sup>320</sup>

Neil Campbell was also optimistic about the progress of the Māori Advisory Board. Under cross-examination from counsel for the interested parties, Mr Campbell described the growing influence of the Māori Advisory Board's role as a 'continuum'. The Māori Advisory Board's existence has, he said, shifted from being in a state of coexistence to a state of cooperation and was now 'well on track to collaboration and partnering'.<sup>321</sup> He said there was 'huge goodwill from the chief executive, from the executive leadership team to look at how that capacity develops'.<sup>322</sup>

Claimant witnesses accepted some of these views, and challenged others. We heard substantial evidence from the iwi representative for Ngāti Kahungunu Iwi Incorporated on the Māori Advisory Board, Shayne Walker. Mr Walker said that Ngāti Kahungunu Iwi Incorporated had, over a period of two years, requested that

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313. Document A34(a), p 3

314. Ibid, p 4

315. Document A34, p 36

316. Document A33, p 9

317. Ibid

318. Ibid,

319. Ibid, p 10

320. Ibid

321. Transcript 4.1.3, pp 639-640

322. Ibid, p 640

the Department expand the focus of the Māori Governance Board beyond that of Te Tirohanga. And for two years he said he had no response. Ngāti Kahungunu Iwi Incorporated were eventually invited to participate in the Māori Advisory Board in October 2015.<sup>323</sup>

Mr Walker could not attend the first Māori Advisory Board meeting and sent an email raising his concerns to Chrissie Hape who attended in his absence. Mr Walker expressed the view that the Māori Advisory Board's role should extend beyond an advisory capacity to be consistent with the Treaty principle of partnership, writing 'We are Treaty Partners, not Treaty Advisors.'<sup>324</sup> Mr Walker said the Māori Advisory Board 'can't be a token board to make Corrections look like they are engaging with Iwi. Accountability to the stated intentions needs to be clear.'<sup>325</sup> He said that 'In response to my email, the Terms of Reference have not changed substantively.'<sup>326</sup>

Mr Walker acknowledged the agreement made in the February 2016 Māori Advisory Board meeting to include timeframes and progress on the initiatives in the *Reducing Re-offending by Māori Work Plan 2015–2016* as a 'standard reporting item for future board meetings', and agreed this was a positive development.<sup>327</sup> He said the Māori Advisory Board discussed the three categories of the work plan: the strategic and tactical, practice and operations. Though Mr Walker could not recall the conversation, he accepted that the Māori Advisory Board endorsed the work plan.<sup>328</sup>

During the hearing, Mr Walker said the Māori Advisory Board was 'a good start but it's a bit late.'<sup>329</sup> He accepted that the Chief Executive held ultimate accountability for the Department.<sup>330</sup> He also acknowledged that the Māori Advisory Board held an advantage over the Māori Governance Board in that the Māori Advisory Board could meet directly with the Executive Leadership Team, whereas the Māori Governance Board met with the Director Māori. This was 'a positive.'<sup>331</sup> For Mr Walker, however, the very name of the Māori Advisory Board emphasised its advisory rather than partnership capacity.<sup>332</sup>

Ultimately, Mr Walker considered the 'real tests will be when we start to ask what the Department has done in response to our input. I like to see traction in reducing these poor statistics for our people through effective strategy and policy.'<sup>333</sup> For this reason, he would 'continue to advocate for the Māori Advisory Board to be genuine partnership governance, with the ability to make binding decisions by consensus.'

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323. Document A26, pp 3–4

324. Document A26(a), p 55

325. Ibid

326. Document A26, p 5

327. Transcript, 4.1.3, pp 164–165

328. Ibid, p 165

329. Ibid, p 177

330. Ibid, p 162

331. Ibid

332. Ibid, p 181

333. Document A26, p 6

He said, ‘if the Department is serious about reducing Māori reconviction and reimprisonment, the system would benefit from more than just advisors.’<sup>334</sup>

#### 4.4.3 Our view

We have outlined some of the specific partnership agreements the Department has with iwi. Our view is that these partnership agreements were in a general sense, and in principle, positive. As an example, Crown counsel introduced the Department’s 2013 Memorandum of Relationship Partnership with Te Taumutu Rūnanga as evidence during the hearing. Counsel directed the claimant to several passages in the agreement including the stated purpose:

To provide a mechanism between the parties to enhance our ongoing relationship which will ensure greater success with Māori offenders particularly in reducing re-offending through a primary relationship between the Rūnanga and the Southern Regional Leadership Group . . . [and] To foster harmonious relationships by establishing a formal process between the parties for candid and open sharing of information and confidences [and] To enable process for the Rūnanga to contribute to the decision making of Corrections through appropriate mechanisms.<sup>335</sup>

The claimant accepted that these terms showed ‘meaningful, helpful purpose.’<sup>336</sup> Crown counsel said the obvious intent of the agreement was that ‘the rūnanga are going to be at least assisting in decision making by the Department.’<sup>337</sup>

The ‘Mechanism to enable partnership’ in the agreement stated: ‘Corrections will hui with Te Taumutu Rūnanga and other Māori Communities, hapū and iwi as appropriate to foster strong relationships and support mutual endeavours.’<sup>338</sup> The agreement said that it is ‘a statement of good intention’ and not legally binding.<sup>339</sup> It was, rather, to ‘form the basis of a meaningful, long-term relationship and may be amended and expanded by agreement of both parties.’<sup>340</sup> In September 2015, Mr Campbell said the ‘development of an implementation plan to underpin the intention behind this agreement is currently underway.’<sup>341</sup> As at June 2016, Mr Campbell’s evidence was that the agreement had recently been reviewed.<sup>342</sup>

Benjamin Clark, discussing the Department’s engagement with Te Taumutu Rūnanga during the hearing, noted the 2013 memorandum. He mentioned the draft implementation plan but said ‘dialogue has lapsed over the past few months,’ though he was eager to restart this dialogue and see ‘what we can do differently in

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334. Document A26, p 6

335. Transcript 4.1.3, p 32; doc A14(a), pp 2–3

336. Transcript 4.1.3, p 32

337. Transcript 4.1.3, p 33

338. Document A14(a), p 3

339. Ibid, p 4

340. Ibid

341. Document A14, p 2

342. Document A34, p 25

practice'.<sup>343</sup> Ultimately, Mr Clark accepted this engagement was in its early stages and was, in Mr Clark's words, 'a developing area'.<sup>344</sup>

Judging from this evidence, little progress has been made since the agreement was signed in 2013. Certainly, the existence of the agreement, and its stated intention, is encouraging. We certainly see potential in such arrangements. And there is, of course, a need to be practical and flexible in these arrangements. However, we see a risk that good intentions might go unrealised, as there is little holding these partnerships to account. As we discuss below and in the following chapter, it is our view that an enhanced Māori Advisory Board has the potential to be such a mechanism to hold specific relationships between the Department and iwi to account, to ensure they progress to be productive partnerships.

Department witnesses emphasised that since its inception the Māori Advisory Board had grown in influence.<sup>345</sup> Unlike the earlier Māori Governance Board, the focus of the Māori Advisory Board goes beyond the Māori Focus Units, to providing input and advice on the design of the broader range of the Department's programmes and services aimed at reducing Māori re-offending. Yet the Department said its own statutory obligations, and related issues of accountability, limited the role of the Māori Advisory Board.<sup>346</sup>

During the hearing, Crown counsel suggested the Department's obligation to have regard for public safety limited its ability to act in partnership with the Māori Advisory Board. Counsel suggested that any capability for the Māori Advisory Board to make binding decisions could compromise this obligation.<sup>347</sup> We accept that this is the legislative reality for the Department. Yet, we are also of the view that reducing reoffending through a high-level partnership arrangement and working to ensure public safety should be complementary. The now defunct *Māori Strategic Plan 2008–2013* itself had the stated vision of improving public safety by reducing reoffending through strengthening partnerships.<sup>348</sup> A Treaty-consistent approach entails a commitment to fulfilling the Treaty partnership in this matter affecting so many Māori.

The Māori Advisory Board has evidently had some influence in decision-making on major initiatives already. Both the Department and the claimant have expressed optimism for the Māori Advisory Board and its potential, as well as recognising its limitations. Neil Campbell gave evidence of a Te Tirohanga Governance Committee, running out of national office and led by the Deputy Chief Executive, that had agreed in principle to a revised Te Tirohanga model, but was subject to endorsement from the Māori Advisory Board.<sup>349</sup> Mr Walker, supporting the claimant, agreed this approach suggested the possibility of a working partnership where

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343. Transcript, 4.1.3, pp 564–565

344. Ibid, p 565

345. Ibid, pp 639–640

346. Document A33, p 10

347. Transcript 4.1.3, p 161

348. Document A1(b), pp 504, 517–518

349. Document A34, p 20

iwi are involved in making decisions. Though he was unaware of this particular committee, Mr Walker accepted that, in theory, an approach where major decisions required Māori Advisory Board sign-off suggested a working partnership where iwi are involved in decisions, and this ‘would be the right way to go about things without binding the CEO.’<sup>350</sup> If we view matters narrowly within the Māori Advisory Board’s current terms of reference we agree that this would be a reasonable approach. However, it is our view that there needs to be a mechanism in place to ensure it is not simply signing off on matters that have already been decided. We consider that an enduring and meaningful partnership requires more than the ability to sign off on decisions. Rather, we think the Māori Advisory Board should help make these decisions.

Claimant and Crown witnesses were not so far apart on the potential for the Māori Advisory Board to develop into a partnership. During the hearing, Neil Campbell commented on the positive progression of the involvement of the Māori Advisory Board. With regard to the Māori Advisory Board, he said that ‘a partnering model, whenever you’re talking about Māori and a Crown agency, should ultimately be the goal you’re looking to achieve.’<sup>351</sup> However, he also cautioned against rushing into this arrangement. He said he thought the Department was taking a responsible approach to developing the relationship with the Māori Advisory Board. He recognised the need for other iwi to participate in it. He mentioned, for example, that Tūhoe ‘respectfully declined’ to be part of the Māori Advisory Board ‘at this point.’<sup>352</sup> Mr Campbell said he was ‘confident’ that in ‘due course’ the Department and the Māori Advisory Board could, as counsel for the interested parties phrased it, form a ‘partnership where we’re equal, not advising the dominant group.’<sup>353</sup> We appreciate Mr Campbell’s preference for caution. However, we consider this an urgent matter that requires an urgent response if the Crown is to meet its Treaty obligations. We do not see undue risk in increasing the influence of the Māori Advisory Board.

Mr Walker emphasised that the terms of reference for the Māori Advisory Board, which the board itself approved, were ‘initial purposes’ and it is ‘getting closer to making robust decisions alongside of the CEO.’<sup>354</sup> He identified a risk in becoming ‘tick the box advisors’ to strategies already agreed by the Crown.<sup>355</sup> In this regard he had ‘not lost sight of the need or the desire to change [the initial purpose of the Māori Advisory Board] from advisory to governance.’<sup>356</sup> We agree that this is a potential risk if the board is left undeveloped. Mr Walker saw potential for a group representing iwi such as the Māori Advisory Board acting separately and independently

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350. Transcript 4.1.3, p 179

351. Ibid, p 640

352. Ibid, p 641

353. Ibid, p 640

354. Ibid, p 164

355. Ibid, p 181

356. Ibid, pp 181–182

from the Department, in order to ‘monitor and hold the Department accountable to their statutory obligations.’<sup>357</sup>

Under cross-examination Mr Walker said that he was ‘not suggesting that the Māori Advisory Board could make binding decisions over the chief executive’. Rather, he said that in a genuine partnership ‘we should be able to make decisions together, rather than solely providing advice for the chief executive to consider.’<sup>358</sup> Dr Tracey McIntosh also agreed with Crown counsel that the Māori Advisory Board was a positive development for how iwi could be engaged in agreements with the Department, but they ‘will be less effective without a full blown Māori strategy.’<sup>359</sup>

We acknowledge the Māori Advisory Board is a positive development, but a strengthening of its role would allow the stronger expression of Māori voices at a high level. We think this is needed, particularly in areas where the Department’s methods have not found success. Witnesses emphasised the lengths the Department has gone to address the role of gangs in reimprisonment figures. And yet Dr Johnston said the success that the Department had in these efforts was ‘almost zero.’<sup>360</sup> We understand this is a difficult area. We did not hear enough about the Gang Whānau Engagement Framework to comment further, though this sounded promising.<sup>361</sup> Another encouraging sign for us was the involvement of the Māori Advisory Board in recent discussions over working with gang communities, and the apparent priority this is given in Māori Advisory Board meetings.<sup>362</sup> We understand that this is a work in progress. We think, given the urgency of the situation, that this engagement would be more effective, better informed, and more likely to bring about Māori-centred change if the Māori Advisory Board had more substantial influence in these discussions.

It is our view that for the Department to achieve its desired results there should be an appropriate Māori presence, commensurate to the weight of the problems the Department faces in reducing Māori reoffending rates. We see justification for an enhanced Māori Advisory Board to form part of the Department’s strategic thinking in this regard. A Treaty-consistent approach would see the Executive Leadership Team work with the Māori Advisory Board to determine the role of the board going forward, including the place for the Māori Advisory Board in discussing Māori-specific strategic thinking and any high level Department documents that might arise from that.

On the evidence we have received of the Department’s efforts to engage Māori, we do not think Mr Walker’s initial fears that the Māori Advisory Board will be a ‘token board’ have been borne out. Yet, thus far, neither have his hopes that it will provide ‘genuine partnership governance, with the ability to make binding

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357. Ibid, p 186

358. Ibid, p 161

359. Ibid, p 111

360. Ibid, p 511

361. Document A34, pp 38–39

362. Document A26(a), pp 86–87

decisions by consensus' or to be partners rather than advisers.<sup>363</sup> Our concern as it stands is the Department's ability to circumscribe the scope or influence of the Māori Advisory Board. There are sound reasons for the Māori Advisory Board not to have binding decisions on the Chief Executive. However, we see reason to say that it can play a constructive role as a partner in strategic decision making. We think it is important that the Māori Advisory Board is able to present independent ideas and initiatives to the Department, and be given the opportunity and space to develop those ideas.

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363. Document A26, p 6

## HEI TINEI: FINDINGS AND CONCLUSION

The central issue in this inquiry is reflected in statistics relating to Māori reoffending and reimprisonment, which we have referred to at different points in this report. The claimant and interested parties said the gross overrepresentation of Māori in the criminal justice system has been so persistent it now appears as normal. It is not, and cannot be considered, normal.

We reiterate at the outset Neil Campbell's statement to the Tribunal that 'despite these negative statistics let's not forget that at any given time 95 per cent of Māori aren't being managed by Corrections'.<sup>1</sup> This is indeed an important point to keep in mind. However, the fact remains that Māori make up 15 per cent of the nation's population but constitute around half the nation's prisoners. The persistently disproportionate position that Māori hold in New Zealand's criminal justice system has been known to the Crown for several decades. We have seen evidence of a range of inquiries, reports, and recommendations regarding New Zealand's criminal justice system since the 1980s. These include the 1988 report by Moana Jackson and Justice Roper's report in 1989. Too little has changed since that time.

It is our statutory requirement to inquire into claims against the Crown submitted by Māori. Our task is first to assess whether Crown acts or omissions have been consistent with Treaty principles. Where inconsistency is found, we must identify if this has caused or is likely to cause prejudice. If so, the Tribunal may make recommendations to the Crown for how to remedy this prejudice. This chapter sets out our conclusions on the evidence with regard to the Treaty principles identified as relevant to the issues before us. These principles, arising out of the fundamental Treaty exchange of kāwanatanga and rangatiratanga, are those of active protection, equity, and partnership.

### 5.1 OUR GENERAL CONCLUSIONS

Throughout the inquiry, witnesses for the claimant and interested parties raised concerns over a number of broad issues. One issue raised by the interested parties was Māori sovereignty. Specifically, the interested parties submitted that the report on stage 1 of the Te Paparahi o te Raki inquiry found that 'the understanding upon

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1. Transcript 4.1.3, p 607

which past Treaty/Tiriti principles were based, that is, that Māori ceded sovereignty to the Crown, was wrong.’ According to the interested parties, this finding means ‘the Crown cannot claim a legitimate kawanatanga right to represent Māori on matters of incarceration on the back of a cession of sovereignty, given that it has now been found that a cession of sovereignty by Māori did not occur.’<sup>2</sup> This issue is outside the scope of our inquiry. We note for clarity, however, that the Te Raki report concluded that the Bay of Islands and Hokianga rangatira who signed te Tiriti in February 1840 did not through that act cede their sovereignty. That Tribunal said that by agreeing ‘to share power and authority with the Governor’, those rangatira agreed to a relationship in which they and the Governor were to be ‘equal while having different roles and different spheres of influence.’<sup>3</sup> That report said nothing about what that agreement means in contemporary circumstances, an issue currently before that Tribunal in stage 2 of the Te Raki inquiry.

Claimant witnesses also gave evidence on broader socio-economic and historical issues. These related variously to the effects of colonisation on the position of Māori in the criminal justice system; the structural causes of offending; questions of systemic racism; and the reformation of the criminal justice system as a whole. It is possible that the Tribunal’s proposed kaupapa inquiry into justice issues might address some of these issues. Though they are all clearly important to the claimant and the interested parties, this inquiry was granted urgency to focus on what the Crown, through the Department, is doing now to address the disproportionate rates of Māori reoffending.

We now address how the evidence of Crown actions discussed in the preceding chapter can be assessed in terms of their consistency with the relevant Treaty principles identified.

### 5.1.1 Kāwanatanga and rangatiratanga

The Department’s statutory rights and responsibilities are set out in the Corrections Act 2004. At the core of the Act is the maintenance of public safety, and this includes managing those in the Department’s care. The issue for us to consider is the need for the Department to balance its statutory and Treaty responsibilities. The Crown is constrained in what it can do by its governing legislation. It is also clear that the Crown has a Treaty obligation to take reasonable steps to reduce Māori reoffending rates. What is reasonably expected of the Crown must be seen in context, which in this case is the persistently, and unacceptably disproportionate rate of Māori reoffending.

We accept the Department cannot act in conflict with its governing legislation. We also accept that the Crown’s kāwanatanga rights allow it to choose from a range of policy options. Yet, any option taken must also be consistent with Treaty

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2. Submission 3.3.5(a), p 23

3. Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o te Raki Inquiry* (Wellington: Legislation Direction, 2014), p xxii

principles. That is, the Crown, through the Department, must appropriately balance its kāwanatanga responsibility with the ability of Māori to exercise their rangatiratanga.

It is clear to us that the Crown, through the Department, has a Treaty responsibility to reduce Māori reoffending in order to reduce current inequities between Māori and non-Māori reoffending rates, and the detrimental effect on Māori communities this has had, and will have as long as this situation persists. Recent evidence suggests this gap is widening. This does not mean that the Department is not making efforts. It does mean that more must be done and, so long as this inequity continues, the Department must make the reduction of Māori reoffending an urgent priority.

### 5.1.2 Active protection and equity

As we see it, in this inquiry the Treaty principles of equity and active protection are two sides of the same coin. The current inequity between Māori and non-Māori reoffending rates heightens the Crown's obligation actively to protect Māori interests. This situation demands that balance be restored. The Crown submitted that where a taonga is threatened, it may need to take 'especially vigorous action'.<sup>4</sup> It is our conclusion that this action is needed now.

The Department has stated that reducing Māori reoffending is a key priority. Vincent Arbuckle said the Department's underpinning idea was 'if we are to succeed overall we must succeed with Māori'.<sup>5</sup> Yet it clear to us that if the Department is seriously to tackle Māori reoffending rates, this needs to be a top priority in and of itself, not simply included within a general goal. We accept that the Department's efforts to address Māori reoffending are not insignificant. We have noted a range of rehabilitative and reintegrative programmes and initiatives aimed at reducing reoffending in general, and Māori reoffending in particular. These include so-called mainstream programmes as well as programmes specifically including Māori cultural elements. Some can be singled out. Te Tirohanga – both the whare that house the tāne and the overall programme that guides how these whare are run – and Whare Oranga Ake are examples of very promising initiatives. We also note the efforts of the Māori Services team, headed by the Department's Director Māori, and including the *Reducing Re-offending by Māori Work Plan 2015–2016*.

We have also discussed issues relating to these programmes. These include the limited numbers of Māori able to attend these programmes, either through restrictions placed on eligibility or through the availability of placements. We understand the need for caution in restricting eligibility to meet the Department's statutory duties to ensure public safety. Yet the current numbers of Māori able to attend these programmes considerably restrict their ability to make the fundamental changes needed. The main point, however, is the absence of a focused, measureable

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4. Submission 3.3.6, p 40

5. Transcript 4.1.3, p 431

Māori-specific framework with a dedicated budget from which to coordinate the design and implementation of programmes, in partnership with Māori.

We cannot say that the *Māori Strategic Plan 2008–2013* itself met these criteria. In the absence of relevant evidence, it is unclear to us what its effectiveness was. The Crown offered several reasons why the *Māori Strategic Plan 2008–2013* was replaced by *Creating Lasting Change*. It was, the Crown said, inaccessible and no one read it, it was not measured for effectiveness, and it lacked firm reoffending targets, while *Creating Lasting Change* provided a stronger collective focus on priority areas. While these may be adequate reasons to have dropped that particular Māori strategy, they are not, in our view, sufficient reasons to abandon the idea of having a Māori-specific strategy altogether. We remain unclear why the *Māori Strategic Plan 2008–2013* was never measured for effectiveness, or what, if any, consultation occurred in the decision to let it lapse.

In any case, we see the urgent need for a new and improved Māori-specific vision that is fit for purpose. That is, a long-term, targeted, and measureable strategic commitment to coordinate Department programmes and resources in order to substantially reduce Māori reoffending rates.

A question for us is how the current lack of a Māori-specific strategic plan affects the ability of the Crown to act consistently with its Treaty obligation actively to protect Māori interests. Without an appropriate Māori strategy, the Department has been lacking a Māori-specific framework to guide its efforts, its resources and the focus of the Department and its staff. It knows where it wants to go, but is currently giving itself little direction in how to get there. As we see it, this is reflected in the fact that, besides that relating to relatively small cohort of offenders participating in Te Tirohanga, the Department has been unwilling to commit to a Māori-specific target to reduce reoffending.

We consider the setting of Māori-specific targets to be a necessary part of an effective strategy for reducing Māori reoffending. The setting of targets was one of the supposed benefits of *Creating Lasting Change* over the *Māori Strategic Plan 2008–2013*. The Department obviously sees value in strategic planning and targets, but these must be designed so as to be consistent with the Crown's Treaty obligations to Māori. We received evidence that the RR25% target was made at an executive policy level and that there was no empirical basis from which the Department could have expected to achieve the target set for it. We should be clear that criticising the Department for setting inherently unrealistic targets – and then failing to meet them – is not a criticism of setting targets as such. Setting targets, even ambitious targets, can demonstrate the commitment needed for long-term changes in Māori reoffending rates. However, these must be based on data, they should be measureable, and tied to a specific strategic direction designed with Māori. They should also be appropriately resourced in budget and appropriately trained staff.

Even if it had been successful – and we now know this was unlikely from the outset – the design of the RR25% target did not specifically require a reduction in Māori reoffending. It ought to have. It was, despite some words to the contrary,

designed in such a way that reducing Māori reoffending was not explicitly prioritised, despite the undisputed gravity of Māori reoffending statistics. This general reoffending reduction target seems to have been made under the assumption that Māori offenders would respond at the same or better rate as non-Māori. If the number of Māori in prison came close to being proportionate to the national population figures, the Department's approach might have been understandable. As it stands, attempting to reduce reoffending overall without a specific, tailored approach to the group of New Zealanders most obviously overrepresented inverts the order of priority. It is our view that acting equitably in this situation does not mean targeting all reoffenders equally. It means acting fairly in the circumstances. The RR25% target was, in our view, inequitable in design. It targeted all reoffenders as one grouping. Clearly, they are not.

Mr Arbuckle said the Department's commitment was evident in the stated concern to reduce reoffending by Māori in the RR25% *Strategy 2014–2017 Year Two*, and the necessity of reducing Māori reoffending in meeting that goal.<sup>6</sup> There is, however, a difference between recognising the reality of what must happen to achieve a goal, and committing to the necessary measures to achieve it. The Department seems to have wanted it both ways. It accepted it must reduce Māori reoffending to achieve its targets, but it also said that setting Māori targets would not be meaningful as too much is beyond its control. We remain unconvinced as to why a target should be set for reoffenders as a whole, but not for Māori specifically. We say that in these circumstances a Treaty-consistent position is one that prioritises a strategic and targeted commitment to reducing Māori reoffending rates.

The Crown has said that the Department is doing all it reasonably can to address Māori reoffending. We have concluded that it can and must do more. The grossly disproportionate, decades-long, and increasing Māori overrepresentation in the nation's prisons is a devastating situation for Māori, and for the nation. Disproportionate Māori reoffending and reimprisonment rates contribute to this. That this has come to be seen as normalised only heightens the need for the Crown to meet its obligations under the Treaty principles of active protection and equity.

The narrow nature of our inquiry has meant we have primarily focused on the time period since 2012. We do not think the Department's recent efforts to reduce Māori reoffending since this time are merely superficial. However, on a close reading of the evidence, we have concluded that the Crown is not sufficiently prioritising the active protection of Māori interests, or the achievement of equitable outcomes between Māori and non-Māori. Given the severity of the situation, to choose not to commit to a measurable strategy with a dedicated budget and a target to reduce Māori reoffending rates is a significant omission, and unjustified in the circumstances. The Crown's actions and omissions in this regard constitute breaches of the Treaty principles of active protection and equity.

The situation being what it is, bringing Māori reoffending in line with that of non-Māori is more than desirable. It is necessary, and it is urgent. Continuing a

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6. Transcript 4.1.3, p 431

course of widening disparity of reoffending rates between Māori and non-Māori is unsustainable. There are obvious difficulties in making the necessary changes. There are also opportunities.

### 5.1.3 Partnership

In our view, the current situation of disparity between Māori and non-Māori reoffending rates calls for a more thorough exercise of the Treaty partnership between the Crown and Māori. This needs to be a partnership that goes beyond the Crown simply informing itself of Māori interests. The Department must work together with Māori at a high level to achieve their mutual interests in reducing Māori reoffending. We cannot foresee a satisfactory resolution to this situation without Māori being at the table to design and implement both strategic level documents and Māori-centred programmes and initiatives.

We note that partnership arrangements have been made in some cases, and this is encouraging. The Department clearly recognises the need to create effective and lasting partnerships. Vincent Arbuckle, under questioning from the Tribunal, accepted that, notwithstanding the organisational difficulties inherent in the particular circumstances of the prison environment the Department works in, if the Department was to achieve its goals it must be open to a ‘bold approach’ that embraces a ‘different kind of thinking . . . Māori culturally-based thinking’.<sup>7</sup> In Mr Arbuckle’s words, the Department is ‘committed and we want to do more and we welcome the opportunity to partner with iwi’.<sup>8</sup> He said there was a desire and a commitment to embrace Māori culture in the Department and to make Māori cultural concepts central to the Department.<sup>9</sup>

We see possibilities for an enhanced Māori Advisory Board to allow this partnership to develop. During the hearing Shayne Walker, in support of the claimant, accepted it was too soon to say whether the Māori Advisory Board had made any real difference to reoffending figures.<sup>10</sup> We agree with him, however, that it has shown real and potential benefits in allowing iwi to engage with the Department’s Executive Leadership Team, and that it represents a ‘good start’.<sup>11</sup> We also agree with Neil Campbell that the scale of Māori reoffending required a national conversation between Māori and the Crown at the highest strategic level, a conversation that he accepted was overdue.<sup>12</sup> Mr Campbell told us he saw partnership models between Māori and Crown agencies as the ultimate goal and that in ‘due course’ there was potential for a partnership with the Māori Advisory Board of equality rather than providing advice to a dominant group.<sup>13</sup> We say the time for this national conversation between Māori and the Crown has come.

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7. Transcript 4.1.3, p 467

8. Ibid

9. Ibid, p 468

10. Ibid, p 188

11. Ibid, p 177

12. Ibid, p 627

13. Ibid, p 640

This is all the more so when the Crown's partner is actively seeking greater involvement. A number of claimant witnesses in positions of influence expressed their desire to work more closely in the Department's decision-making process. Toro Waaka said that Māori communities need more involvement in the rehabilitation of Māori offenders. In Mr Waaka's words: 'We are their whānau, hapū, iwi and, if they have not received the help they need, [their] future victims. It is not right that we cannot be part of ensuring that they come back into the community having had every opportunity to make a positive change.'<sup>14</sup>

Similarly, Ngāhiwi Tomoana said 'we are prepared and we're still prepared to work alongside the Department of Corrections but we must do it through a tikanga and whakapapa lens to make any real difference . . . We are whānau iwi and we want to help.'<sup>15</sup> Mr Tomoana was 'very confident' that Māori could shift reoffending statistics if they were given 'the equal support and . . . some resources to work alongside the Department to evolve better practices on a tikanga basis.'<sup>16</sup> However, he said the Department and Māori were not meeting eye to eye. He said that 'We are completely fluent in what our partner does.'<sup>17</sup> For Mr Tomoana, the situation required making their Treaty partner 'more fluent in how we can do things and . . . how we can koha our tikanga and kawa in order to improve the lot of our community and our country'. Ultimately, he considered the Crown to be 'indifferent'.<sup>18</sup>

We do see some hesitancy in the Department to commit to the bold approach to partnership that is surely necessary if the Crown is to meet its Treaty obligations. Mr Arbuckle said the Department was 'always looking for . . . innovative ways in which we can partner with other organisations and iwi to get better outcomes . . . we're very open to engaging with people that genuinely want to engage with us.'<sup>19</sup> We were heartened by Neil Campbell's understanding of his role as Director Māori as guiding the Department towards a position of understanding and arriving at a position where tikanga programmes can be truly co-designed from a position of partnership.<sup>20</sup> Mr Campbell told us that the position of Māori as partners in this process is under review.<sup>21</sup> All of these statements are positive. But the matter is urgent and requires action now.

We consider that in this situation, where Māori interests are so threatened, consultation with Māori in the design of high-level Department strategies to reduce the disproportionate rate of Māori reoffending is essential. These must be integrated into a broader strategic vision guided by a clear commitment to Treaty principles. This approach presents bureaucratic challenges, but there are ample possibilities existing within these. We do not think that commitment to a more fundamental partnership with Māori can be deferred due to institutional difficulties. The

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14. Document A21, p 11

15. Transcript 4.1.3, p 216

16. Ibid, p 227

17. Ibid, p 228

18. Ibid

19. Ibid, p 462

20. Ibid, pp 633–634, 641–642

21. Ibid, p 637

evidence of some good work cannot be taken as sufficient when the discrepancy between Māori and non-Māori reoffending rates persists. The present circumstances affect Māori disproportionately, and call for a Māori-centred solution.

The Crown said the Māori Advisory Board can now be used to monitor the Department's work and hold it accountable.<sup>22</sup> We agree it has the potential to do this, but to ensure this happens the terms of reference need amendment in order to, as the addendum to the original terms of reference stated, 'further refine and define the purpose and role of the board as the direction and focus becomes more apparent'.<sup>23</sup> It is clear to us that the Māori Advisory Board's role needs to be more substantial than providing advice, or signing off on particular documents. This does not mean the Māori Advisory Board's role needs to conflict with the Crown's kāwanatanga as exercised by the Department. However, it must allow for a balance of rangatiratanga and kāwanatanga that attempts to restore equity to the Treaty relationship. It must also provide space for iwi and hapū to act in a partnership of equality, just as the Department's Director Māori suggested.

We are persuaded that an enhanced Māori Advisory Board could allow the Crown's Treaty partner to be at the table to meaningfully engage in designing Departmental strategy, policy and programmes that affect Māori, to apply Māori concepts meaningfully in and across programmes. It could also allow the Māori Advisory Board to hold the Department accountable for its partnership arrangements with specific iwi and hapū, and to measure the progress of these according to criteria set in a Māori-focused strategy. The opportunity is there for the Department and Māori to exercise a workable partnership. It must be taken.

From the evidence before us we cannot conclude that the Crown, through the Department, has at this point acted inconsistently with the Treaty principle of partnership. We say this because of the potential we see in the relationship agreements the Department has engaged in, and the role of the Māori Advisory Board. We wish to show confidence in the will of the Department to put a bold approach to partnership into practice. We are taking the Department at its word. It is crucial that the Department's relationship agreements move on to build real and lasting partnerships. This requires clear measures of accountability with the specific iwi and hapū party to these agreements, including clear targets, mechanisms and timeframes for achievement. There is a risk, as we have outlined, that the potential of these partnership agreements will go unfulfilled. If this potential does not materialise, if these agreements fail to show progress against measures and targets set at a strategic level, the Department might then have breached its partnership obligations.

## 5.2 FINDINGS

Our findings are summarised from the above discussion as follows:

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22. Submission 3.3.6, p 50

23. Document A34(a), p 3

- ▶ The Crown, through the Department, by failing to make an appropriately resourced, long-term strategic commitment to reducing the rate of Māori reoffending has not sufficiently prioritised the protection of Māori interests. We therefore find that in this respect the Crown has breached the Treaty principle of active protection.
- ▶ The Crown, through the Department, has not sufficiently prioritised or appropriately targeted the reduction of Māori reoffending rates in line with that of non-Māori in the context of persistent and grossly disproportionate Māori reoffending rates. We therefore find that the Crown has breached the Treaty principle of equity.
- ▶ With regard to the Treaty principle of partnership, the Crown is currently making good faith attempts to engage with iwi and hapū through relationship agreements, and through the Māori Advisory Board. We see potential in these and we wish to see this potential develop. We find that the Crown has not breached the Treaty principle of partnership as it relates to Crown efforts to reduce Māori reoffending. However, as discussed, in the event that the Crown fails to live up to its statements of commitment to developing its partnerships with iwi and hapū, its actions will likely be in breach of its partnership obligations.

### 5.3 PREJUDICE

The Crown's failure to adequately address the disproportionate rate of Māori reoffending prejudicially affects whānau, hapū, and iwi, and the ability of Māori communities to sustain their wellbeing, their culture and their mana. We agree with the claimant that this prejudice affects those far beyond the offenders and reoffenders themselves. We heard evidence that perhaps 10,000 Māori children have a parent in prison. This presents a grave risk that the impacts of reoffending will reverberate through the generations, creating a destructive cycle. There is a growing threat to Māori culture presented by the normalisation of Māori reoffending and reimprisonment rates.

Though we have largely concentrated on the period since 2012, we are well aware that this issue is situated against the backdrop of longstanding Māori overrepresentation in the criminal justice system. We also take into account the potential for future prejudice if the current situation is not addressed.

### 5.4 RECOMMENDATIONS

Having concluded that the Crown has acted inconsistently with the Treaty principles of active protection and equity, and found resulting prejudice, we now turn to our recommendations.

First, we wish to acknowledge here the Government's December 2016 announcement that the youth justice age will be raised from 17 to 18. The change is to be

introduced by 2019 and will mean lower-risk 17-year-old offenders are dealt with by the Youth Court. 17-year-old offenders charged with serious offences such as murder, manslaughter, sexual assaults, aggravated robbery, arson, or serious assaults will still be dealt with by adult courts. Given that, as noted in chapter 2, some 65 per cent of youth in prison are Māori youth, we welcome this change.

We have set out what the claimant, interested parties and the Crown have said with regards to recommendations in chapter 2. We do not repeat these in full. We do note the claimant's key recommendation was 'that the Crown undertake a far reaching and fundamental review of the corrections system, with a view to addressing the most effective way to reduce Māori re-offending and the disproportionately high rates of Māori incarceration.'<sup>24</sup> The suggested form of this was a Royal Commission of Inquiry or a National Forum.

We have considered this question, and the Crown's response to it at length. We agree there could be merit in holding a Royal Commission into these issues. The gravity of the situation certainly warrants it. The potential risk we wish to avoid is that a Royal Commission, or something like it, could take more time than the urgency of this situation requires. Action must be taken now, and cannot be deferred. To this end we have made practical recommendations to the Crown for how it might remedy the prejudice identified in a timely way.

#### **5.4.1 Revise the terms of reference of the Māori Advisory Board**

We recommend the Department's Executive Leadership Team and the Māori Advisory Board work together in the immediate future to revise the Māori Advisory Board's terms of reference to form a more balanced partnership arrangement. We think an enhanced Māori Advisory Board should have the status to act as partners alongside the Department of Corrections in high level discussions in order to best protect Māori interests.

#### **5.4.2 Design and implement a revised strategy with the Māori Advisory Board**

We have identified the need for a revised and improved strategic focus. We have also identified the benefits of expanding the Māori Advisory Board's terms of reference to create an opportunity for it to play a major role in designing, developing and implementing this new strategy focus. The ultimate form this takes will be a matter for the Crown and Māori to decide together. The education and health sectors set Māori-specific strategies and targets and we see no convincing reason why the Department cannot do the same, and do it soon.

We recommend that the revised Māori Advisory Board work together with the Department of Corrections to design and implement a strategy that addresses Māori reoffending specifically. This need not wait for the Justice Sector Māori Strategy, which we welcome, but can be designed alongside it.

We recommend that this revised strategic thinking, whatever form it takes, include a continued focus on widening the iwi membership of the Māori Advisory

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24. Submission 3.3.4, p 43

Board. We heard evidence that some groups, such as Tūhoe, were approached but, in the Director Māori's evidence, declined the invitation for the time being. The absence of groups such as Tūhoe is a concern. We hope that revising the Māori Advisory Board terms of reference will encourage those not currently involved to engage. Again, the Department's Director Māori voiced his aspiration that these groups would take part in the Māori Advisory Board. We hope this happens. We also recommend that the revision of the Māori Advisory Board's terms of reference extend to the co-design of rehabilitative and reintegrative programmes and initiatives operating within any high level strategic vision.

#### **5.4.3 Include measureable targets in the Māori strategy and relationship agreements**

Measureable targets to reduce Māori reoffending must be included in any new strategic vision in order to hold the Department to account. It cannot be an option to defer setting Māori-specific targets due to difficulties on the one hand, while claiming that the Department's programmes are working adequately on the other. We have noted the evidence of the Department's Director Māori that separate Māori targets for the Department are preferable.<sup>25</sup> We agree. We recommend the Crown, through the Department, set, and commit to, data-driven and measureable targets to substantially reduce Māori reoffending rates within reasonable timeframes. We also recommend that the Department regularly and publicly report on the progress made towards meeting this target.

We also recommend that any new strategy aimed at reducing Māori reoffending and reimprisonment rates involve, as discussed above, the setting of more concrete mechanisms, targets and resourcing for the iwi and hapū relationship agreements already in place. These agreements are too important to be without measures to hold the Department accountable, and to demonstrate practical outcomes in achieving mutually agreed goals. The Department expressed goodwill in this regard, and a new strategic vision for Māori should provide the means to put this will into action.

#### **5.4.4 Include a dedicated budget**

At present the Department sets no dedicated Māori-specific budget. We understand that setting such a budget has its difficulties as there are areas of the Department's operations that have no clear line separating programmes, resources, and facilities used by Māori. However, given the evident need for renewed Māori-specific strategic thinking and targets, we also see the need for an allocated budget to ensure these are adequately resourced to have every chance of success. How this budget will be dedicated should be matter for the Māori Advisory Board and Executive Leadership Team to discuss. Achieving substantial and lasting reductions in Māori reoffending rates is, and should be treated as, a core priority of the Department. A budget dedicated to achieving this goal should reflect this fact. We recommend

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25. Transcript 4.1.3, p 638

that the Crown allocate an adequate and appropriate budget to resource the Department's new strategic thinking, and component programmes and measures.

#### **5.4.5 Provide greater Treaty-awareness training for senior level Department staff**

The apparent lack of Treaty awareness among senior Department staff concerned us. Vincent Arbuckle, for example, said that the Department's top tier 'had some training and advice' from the Director Māori, but he 'couldn't point to a recent Treaty training programme that we've attended recently'.<sup>26</sup> Department staff accepted they have Treaty-based obligations, but we are unclear how they go about informing themselves of what these obligations are, and how they are to meet them. Treaty-based thinking in Crown Departments cannot be based on a fragmentary, ad hoc approach. It must be part of Departmental culture, especially so where Māori constitute such a significant part of the Department's responsibilities. We see positive signs in the role and influence of the Director Māori and the Māori Service Team. However, New Zealand prisons are to a significant extent, at this point in time, Māori spaces. Staff training needs to account for this. We recommend that the Crown provide the available resources for senior level Department staff to receive appropriate advice and training in how to incorporate mātauranga Māori and awareness of the Crown's Treaty obligations into the Department's practice and operations.

#### **5.4.6 Amend the Corrections Act 2004**

Reading the Corrections Act 2004, the only mention of Māori is a section relating to the translation of correspondence into te reo. Besides this, the tangata whenua go unmentioned, despite the obvious fact of their disproportionate presence in the nation's correctional facilities, and their status as the Crown's Treaty partners. We recommend that the Corrections Act 2004 be amended to state the Crown's relevant Treaty obligations to Māori as addressed in this report.

### **5.5 CONCLUSION**

The Department has a difficult task. Throughout the inquiry process we saw undeniable evidence of the sincerity and commitment of Department staff who are working hard to achieve their goals. The Department also has a unique opportunity. It has responsibility for thousands of men and women, for 24 hours a day, often for years at a time. We do not seek to minimise the challenges involved in this, but without a fresh approach, the normalisation of high Māori reoffending figures will become further established, and Māori communities will continue to pay the cost disproportionately.

We remain at the point where *The Offender Assessment Policies Report* concluded in 2005. That Tribunal, in the context of Māori offending rates, noted:

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26. Transcript 4.1.3, p 455

The erosion of latent Maori 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.<sup>27</sup>

This sentiment sadly applies to reoffending in 2016, as it did to offending in 2005. The nation cannot afford for this situation to continue.

*Hohou te takapaunuku  
Hohou te takapaurangi e i!  
The sacred mat has been restored.*

Embargoed

Embargoed

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27. Waitangi Tribunal, *The Offender Assessment Policies Report* (Wellington: Legislation Direct, 2005), p153



## ADDENDUM

### **A.1 THE CROWN'S NEW EVIDENCE AND OUR REPORT**

Just as we were at the point of signing off our report, including the findings and recommendations we have outlined above, we received a memorandum from the Crown.<sup>1</sup>

In this memorandum, Crown counsel stated that on 2 February 2017, the Crown had 'announced a package of measures intended to reduce crime and make communities safer'. This package, counsel said, was called *Safer Communities*. Among the measures introduced in the package would be a 'justice sector target for reducing Maori reoffending'.<sup>2</sup> In addition to adopting a target, Crown counsel noted that the Justice Sector had plans to 'work with Māori to develop strategies to achieve the Māori reoffending target'. Both the setting of a target and the planned development of a strategy were significant, counsel said, given that their absence from Department of Corrections planning was a particular focus of our inquiry. Crown counsel said that a supplementary affidavit could be provided by Vincent Arbuckle, which would provide context to the new package.

The Crown's memorandum created procedural difficulties for us. Accepting the evidence raised the possibility of reopening the inquiry at the very point of releasing our report. This could have resulted in significant delay. However, what we were told about the new package was significant enough to warrant our consideration. We therefore asked the Crown to file the supplementary affidavit, which we received on 15 March.<sup>3</sup>

Having considered the affidavit, we decided the best approach – given its contents – would be to consider and report on the new package by way of an addendum to the report. It was clear to us that while the *Safer Communities* package signalled a development in the Crown's approach, we were satisfied that our findings and recommendations would remain substantially the same. We considered that we could report on the *Safer Communities* package in light of our findings and recommendations. Our assessment of the evidence we received during the substantive proceedings of our inquiry would therefore stand.

We asked the parties to make submissions on any of the matters we had raised in the Crown's new evidence, including our proposed approach. We received one response from counsel for the claimant.<sup>4</sup> This confirmed to us that the best approach was to deal with this new evidence and submissions by way of an addendum to our findings and recommendations.

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1. Memorandum 3.1.56

2. Ibid, p 1

3. Document A33(e)

4. Memorandum 3.1.58

We now proceed to set out the evidence on the Crown's new package before giving our view.

### **A.2 THE SAFER COMMUNITIES PACKAGE**

In his affidavit, Mr Arbuckle said the *Safer Communities* package 'includes a justice sector target for reducing Māori re-offending'.<sup>5</sup> Strategic leadership for the package would be provided by the Justice Sector Leadership Board, made up of leaders from Justice Sector departments and ministries.<sup>6</sup>

Mr Arbuckle outlined the evidence provided during the hearing about the efforts of the wider Justice Sector to reduce Māori reoffending. He noted that the focus of our inquiry was the Department. He reiterated his reservations about a Māori-specific target to bring Māori reoffending in line with non-Māori for the Department alone, given the factors outside the Department's control. He also emphasised the 'continuing development of the sector's Māori justice outcomes strategy', which he said 'has provided an opportunity to set a Māori-specific target that all justice sector agencies will contribute towards achieving, including the Department'.<sup>7</sup>

The *Safer Communities* package itself, Mr Arbuckle said, is aimed at 'reducing crime and preventing re-offending by addressing the drivers, rather than the symptoms, of crime'. It involved:

- ▶ 'Funding for 1,125 extra policy staff, including 880 sworn police officers'
- ▶ 'extra funding for the wider justice sector, including extra funding for the Department to enhance rehabilitation and reintegration programmes and staffing'.<sup>8</sup>

In addition to extra resourcing, Mr Arbuckle said the package included additional 'performance targets' for the Justice Sector. This included a target to 'reduce Māori re-offending by 25 per cent by 2025'. He added that work was 'underway to develop measures for the purpose of reporting on progress against this target to the Cabinet Social Policy Committee every six months'.<sup>9</sup>

Mr Arbuckle said a crucial part of the sector's Māori justice outcomes work is 'collaborating with iwi/Māori to develop a strategy that represents a collective vision on criminal justice'. This included 'early engagement' with the Commissioner of Police's Māori Focus Forum to develop a Māori Justice Sector strategy and 'possible associated targets and measures'.<sup>10</sup> Discussions towards this strategy, we were told, were due to take place on 15 March. In addition to these discussions, there were plans to 'analyse the cumulative impact of all Māori-specific initiatives underway in the justice sector'. This analysis, we were told, would guide how sector activities

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5. Document A33(e), p 1

6. Ibid, p 2

7. Ibid, p 3

8. Ibid, p 4

9. Ibid

10. Ibid

could ‘contribute to achieving the 2025 target, and how to prioritise future investment in this area.’<sup>11</sup>

Finally, Mr Arbuckle noted that in addition to the new Justice Sector target to reduce Māori reoffending by 25 per cent by 2025, a review was underway of the Better Public Services targets – which included RR25% – with the intention of setting new targets in the near future.<sup>12</sup>

### A.3 THE CLAIMANT’S RESPONSE

In response to the Crown’s evidence, counsel for the claimant acknowledged that the ‘absence of a specific target for reoffending is a matter for concern’. However, he maintained that ‘the claim addressed important wider issues about the Corrections system as well’.<sup>13</sup>

Counsel noted that the *Safer Communities* package was ‘largely a \$388 million, four year funding package for police’.<sup>14</sup> He said that no evidence had been provided for how this extra police funding would ‘reduce Māori reconviction statistics’.<sup>15</sup>

The Department itself was due to receive an extra \$64 million over the next four years. Of this, \$52 million was earmarked for ‘prison based custodial services’, and \$8.8 million for generic services to reduce reoffending. According to counsel, the package indicates that spending towards reducing reoffending will be geared towards ‘core rehabilitation, industry, treatment and learning programmes and activities that meet the needs of the forecast increase in prisoner numbers’. Counsel argued that this indicated that the additional spending would be towards ‘the same kinds of rehabilitation efforts already in place’, which had been ‘criticized heavily by claimant witnesses as being ineffective, especially for Māori’.<sup>16</sup> Counsel added that nothing in the new announcement ‘gives any indication of how the Justice Sector expects to reduce Māori reoffending by 25 percent when it has failed dismally in respect of the 25 percent general reoffending target’.<sup>17</sup>

From this counsel concluded that ‘the Crown is simply spending more money on what it is doing already’, and that nothing in the new policy indicates a ‘long term commitment to bring the number of Māori serving sentences in line with the Māori population generally’, or with other ethnicities.<sup>18</sup>

### A.4 OUR VIEW

We welcome the announcement of the Crown’s *Safer Communities* package. The Crown clearly recognises the need for collaboration across various Justice Sector

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11. Ibid, p 5

12. Ibid

13. Memorandum 3.1.58, p 1

14. Ibid; memorandum 3.1.59

15. Memorandum 3.1.58, p 1

16. Ibid

17. Ibid, p 2

18. Ibid

agencies, as it told us during the inquiry. It has also committed further resources to meet this end. The particular focus of the package, it seems to us, is on how Police will work with other parts of the Justice Sector. The bulk of the new funding that was announced is targeted at Police.

The Crown has also indicated that it is prepared to commit to an ambitious target for reducing Māori reoffending. This also appears to be a welcome development. However, the principal concerns we have outlined in our report remain.

First, we note that the wording around the new target is to 'reduce Māori reoffending by 25 per cent by 2025'.<sup>19</sup> However, we are unclear whether this refers to a reduction in the total number of individual Māori reoffenders, or to a reduction in the rate at which Māori offenders are reoffending. As we stated in our report, there appears to be fewer individual Māori reoffenders since 2011, but they are reoffending at a faster rate. The issue is not simply one of reducing raw numbers of reoffenders. It is also a matter of the Crown's Treaty obligation to act equitably. Obviously, we want to see the number of Māori reoffenders decrease. Our concern is that if the number of Māori reoffenders decreases at a slower rate than that of non-Māori reoffenders, the stark disproportion between the two will only grow, and the prejudice suffered by Māori will remain. It is for this reason that we have urged that high Māori reoffending rates become an urgent priority for the Department, such that its efforts go toward reducing Māori reoffending to a rate in proportion to that of non-Māori.

Secondly, as we have explained in the report, any target must be tied to an appropriate strategic approach to ensure every chance of success in meeting the target. Currently, as the Crown acknowledges, the Māori-focused sector strategy has yet to be developed and implemented. The Crown says that it has begun working with the Commissioner of Police's Māori Focus Forum, but we have no evidence of the results of this collaboration. Clearly, there is much work yet to be done before a meaningful strategic approach can be said to be in place.

Thirdly, while collaboration across the Justice Sector is welcome, we do not consider that this should be at the cost of developing a strategic approach specific to the Department. We were told during the inquiry that the Justice Sector strategy was in development. Our stated conclusions on this matter therefore stand. While a cross-sector approach would ideally complement that of the Department, it cannot be a substitute for it. This is partly because, as we understand it, the Department has specific roles and responsibilities for addressing reoffending as defined by statute. In addition, as we heard during our inquiry, the Department has a range of programmes and initiatives designed to address Māori reoffending rates. We consider that as a priority, the Department should focus on bringing greater coherence to these programmes and initiatives. Developing cross-sector collaboration cannot be at the expense of this work.

As it stands, we have concerns about how the Department is supposed to contribute to the targets and measures outlined in the *Safer Communities* package,

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19. Document A33(e), p 4

which seems primarily focused on Police. Mr Arbuckle cited the Minister of Police's Cabinet Paper, specifically the target that Police would contribute to a 25 per cent reduction in reoffending by Māori. We remain unclear as to how the responsibilities for meeting this target would be divided between the different Justice Sector agencies, how and for what each agency would be accountable, and to what extent. This applies to how the new target is proposed to be measured by six-monthly reporting. We are unclear as to the Department's role in contributing to such assessments, and the extent to which they hold the Department accountable.

Our conclusions on the need for a specific Departmental approach also apply to how the Crown intends to work with Māori in developing strategies for meeting the new target. Mr Arbuckle referred to work currently underway with the Commissioner of Police's Māori Focus Forum. The Cabinet Paper itself, in its consultation section, makes no mention of any consultation with Māori, specifically on how the target for them was set. However, Mr Arbuckle's evidence suggests that Māori – through the Māori Focus Forum – are now at least being engaged over ways to meet that target. The Māori Focus Forum was only briefly mentioned during our inquiry, so we have little evidence on which to make an assessment. It appears to be a relationship forum established specifically for the Commissioner of Police to work with Māori. Mr Arbuckle's evidence suggests the Forum is now intended to be the platform by which the wider Justice Sector intends to engage with Māori and develop the planned strategic approach.

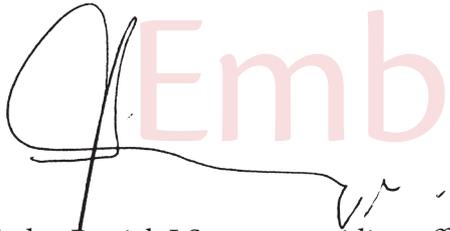
The new Crown evidence does not discuss the role of the Department of Correction's Māori Advisory Board in this process. It is our view that as the Department has its own statutory obligations, it needs to develop its own relationships with Māori in meeting these obligations. As we have explained, we see a partnership arrangement with an enhanced Māori Advisory Board as an appropriate way of achieving this. Justice Sector-level engagement with Māori would contribute to the coordination of Justice efforts as a whole, and is to be welcomed. However, it cannot absolve the Department from conducting its own engagement on the matters for which it is responsible.

Finally, we agree with claimant counsel that nothing in the extra funding announced in the new package appears to signal a commitment to address issues specifically relating to Māori reoffending rates. It appears to us that a 25 per cent reduction in Māori reoffending by 2025 poses a significant challenge, and a target of this ambition requires a budget to reflect this ambition, and the urgency of reducing Māori reoffending rates. A focused strategic approach must be supported by specific additional resources. Again, our concern with the Cabinet Paper is that the focus of the new package is on Police, and we cannot see how the ambitious new target can be met without greater focus and specific accountabilities for the Department in those areas for which it is statutorily responsible.

For these reasons, our findings and recommendations outlined above remain.



Dated at *Wellington* this *7<sup>th</sup>* day of *April* 2017



Judge Patrick J Savage, presiding officer



Professor Derek Lardelli, member



Tania Te Rangingangana Simpson, member



William M Wilson QC, member





APPENDIX

**SELECT RECORD OF INQUIRY**

**RECORD OF PROCEEDINGS**

**1. STATEMENTS**

**1.1 Statements of claim**

1.1.1 Tom Hemopo, statement of claim, 31 August 2015

**1.4 Statements of issues**

1.4.1 Peter Andrew, Roimata Smail, Jennifer Braithewaite, Phoebe Monk, Geoffrey Melvin, Aaron Perkins, and Kate Stone, joint statement of issues, 15 April 2016

**2. Tribunal memoranda, directions, and decisions**

**2.5 Pre-hearing stage**

2.5.4 Judge Patrick Savage, memorandum granting urgency, 11 November 2015

2.5.5 Chief Judge Wilson Isaac, memorandum appointing panel, 22 December 2015

**3. SUBMISSIONS AND MEMORANDA OF PARTIES**

**3.1 Pre-hearing stage**

3.1.1 Roimata Smail and Phoebe Monk, memorandum concerning urgency, 31 August 2015

3.1.5 Geoffrey Melvin, Daniel Perkins, and Kate Stone, Crown submissions opposing application for urgency, 29 September 2015

**3.1.7**

(a) Department of Corrections, 'Topic Series: Young Offenders', April 2015

**3.1.31**

(a) Agreed up-to-date statistics for Wai 2540 inquiry, received 8 July 2016

**3.1.47**

(a) Addendum to agreed up-to-date statistics for Wai 2540 inquiry, received 22 August 2016

**3.1.56** Aaron Perkins and Geoffrey Melvin and Kate Stone, Crown memorandum seeking leave to file supplementary evidence, 15 March 2017

**3.1.58** Peter Andrew and Roimata Smail, memorandum of counsel concerning further Crown evidence

**3.1.59** Peter Andrew and Roimata Smail, memorandum of counsel concerning error in relation to further Crown evidence

**3.3 Submissions: opening, closing, and in reply**

**3.3.1** Peter Andrew and Roimata Smail, opening submissions on behalf of the claimant, 19 July 2016

**3.3.4** Peter Andrew, Roimata Smail, and Jennifer Braithewaite, closing submissions on behalf of the claimant, 8 August 2016

**3.3.5**

(a) Annette Sykes and Jordan Bartlett, closing submissions on behalf of the interested parties, 8 August 2016

**3.3.6** Aaron Perkins and Geoffrey Melvin, Crown closing submissions, 15 August 2016

**4. TRANSCRIPTS AND TRANSLATIONS**

**4.1 Transcripts**

**4.1.3** Transcript of urgency hearing, Waitangi Tribunal offices, 25–29 July 2016

**4.1.4** Transcript of closing submissions, Waitangi Tribunal offices, 23 August 2016

**RECORD OF DOCUMENTS**

**A SERIES**

**A1** Tom Hemopo, affidavit, 24 August 2015

(b) Exhibit M: Department of Corrections, *Māori Strategic Plan 2008–2013*

Exhibit O: Julie Miller, letter concerning Official Information Act request, 11 June 2013

Exhibit S: Julie Miller, letter concerning Official Information Act request, 29 August 2013

Exhibit T: Department of Corrections, *Creating Lasting Change Strategy 2011–2015 Year One*

Department of Corrections, *Creating Lasting Change Strategy 2011–2015 Year Two*

Department of Corrections, *Creating Lasting Change Strategy 2011–2015 Year Three*

Exhibit GG: Vincent Arbuckle, letter concerning Official Information Act request, 25 June 2014

Exhibit KK: Ministry of Justice webpage regarding rehabilitation and reintegration

Exhibit PP: Vincent Arbuckle, letter concerning Official Information Act request, 19 August 2015

A2 Margaret Opie, affidavit, 23 July 2015

A4 Toro Waaka, affidavit, 24 August 2015

A6 Desma Ratima, affidavit, 25 September 2015

A7 Jean-Pierre de Raad, affidavit, 29 September 2015

A8 Wallace Haumaha, affidavit, 29 September 2015

A9 Peter Johnston, affidavit, 29 September 2015

A10 Vincent Arbuckle, affidavit, 29 September 2015

(a) Exhibit 3: Executive leadership team papers

A11 Anthony Fisher, affidavit, 29 September 2015

A12 Benjamin Clark, affidavit, 29 September 2015

A13 Richard Smidt, affidavit, 29 September 2015

A14 John Campbell, affidavit, 29 September 2015

(a) Exhibit 1: Memorandum of relationship partnership between Department of Corrections Ara Poutama Aotearoa and Te Taumutu Rūnanga

Exhibit 4: Department of Corrections, *Creating Lasting Change Strategy 2011–2015 Year Two*

A16 Donna Awatere-Huata, affidavit, 1 December 2015

A17 Peter Andrew, Roimata Smail, Jennifer Braithewaite, Phoebe Monk, Geoffrey Melvin, Daniel Perkins, and Kate Stone, joint statement of agreed facts, 14 April 2016

A18 Fiona Cram, brief of evidence, 6 May 2016

A19 Ngāhiwi Tomoana, brief of evidence, 6 May 2016

A20 Adele Whyte, brief of evidence, 6 May 2016

A21 Toro Waaka, brief of evidence, 9 May 2016

A22 Desma Ratima, brief of evidence, 9 May 2016

A23 Rawiri (David) Waretini Junior-Karena, brief of evidence, 6 May 2016

- A24** Tracey McIntosh, brief of evidence, 6 May 2016
- A25** Margaret Opie, brief of evidence, 9 May 2016
- A26** Mathew Shayne Walker, brief of evidence, 9 May 2016  
(a) Exhibit c: Meeting pack of inaugural meeting of Māori Advisory Board, 30 November 2015  
Exhibit c: Shayne Walker, email to Uarnie More and Chrissie Hape, 29 November 2015  
Exhibit G: Minutes of meeting of Māori Advisory Board, 29 February 2016
- A27** Tom Hemopo, supplementary brief of evidence, 6 May 2016  
(a) Annexure A: Peter Johnston, internal memorandum – update on progress towards RR25 target, 14 December 2015
- A28** Moana Jackson, brief of evidence, 4 May 2016
- A29** Julia Whaipooti, brief of evidence, 6 May 2016
- A30** Donna Awatere-Huata, brief of evidence, 6 May 2016
- A31** Te Aroha Henare, brief of evidence, 11 May 2016
- A32** Kim Workman, brief of evidence, 12 May 2016
- A33** Vincent Arbuckle, brief of evidence, 13 June 2016  
(e) Vincent Arbuckle, further supplementary affidavit, 15 March 2017
- A34** John Campbell, brief of evidence, 14 June 2016  
(a) Exhibit JNC1: Department of Corrections, reducing reoffending by Maori Work Plan 2016–2016 (final draft for discussion)  
Exhibit JNC2: Maori Advisory Board – terms of reference
- A35** Darius Fagan, brief of evidence, 13 June 2016
- A36** Anthony Fisher, brief of evidence, 13 June 2016
- A37** Peter Johnston, brief of evidence, 14 June 2016  
(b) Peter Johnston, supplementary brief of evidence, 27 July 2016
- A38** Nicola Reynolds, brief of evidence, 17 June 2016
- A39** Benjamin Clark, brief of evidence, 23 June 2016
- A42** Tracey McIntosh, brief of evidence in reply to Crown evidence, received 7 July 2016

**A43** Common bundle of documents

Tab 1: Committee of Inquiry into the Prisons System, *Prison Review: Te Ara Hou / The New Way – Ministerial Committee of Inquiry into Prisons System* (Wellington: Crown, 1989)

Tab 2: Dame Sian Elias, Annual 2009 Shirley Smith Address: ‘Blameless Babes’

Tab 6: Department of Corrections, Māori Advisory Board meeting pack, 10 May 2016

**A44** John Copeland, on behalf of Mahi Tahī Akoranga Trust, 27 July 2016

**A45** Canterbury District Health Board, ‘Health Action Plan 2016–17’

**A46** Taranaki District Health Board, ‘Te Kawau Mārō: Taranaki Māori Health Strategy 2009 to 2029’

**A47** Ministry of Education, ‘Ka Hikitia: Accelerating Success 2013–2017’

**A48** Ministry of Health, ‘The Guide to He Korowai Oranga Māori Health Strategy 2014’

Embargoed

Embargoed

