

This document is Crown Official's and Iwi Adviser Group preliminary thinking on how iwi rights and interests can be recognised in the Marine Protected Area reform policy. This has not been considered by Crown Ministers.

1. Officials propose that the recognition of Iwi rights and interests under the Marine Protected Area Act (the MPA Act) will be expressed through:
 - a. status and involvement of Iwi in the Marine Protected Area (MPA) process
 - b. a Treaty clause; and
 - c. the recognition of customary fisheries rights.
2. The MPA Consultation Document currently provides some direction on the level of recognition that the MPA Act will provide to Treaty settlement provisions, statutory rights and provisions. Specifically this includes:
 - a. a Treaty clause that is consistent with the current levels of statutory recognition of Treaty of Waitangi obligations and responsibilities
 - b. maintaining the integrity of rights and interests recognised under the Marine and Coastal Area (Takutai Moana) Act 2011
 - c. customary rights and values are recognised, ensuring the principles of the Treaty of Waitangi are met and the Crown's Treaty obligations are delivered
 - d. ensuring existing arrangements for non-commercial customary fishing, including taiapure and mātaītai reserves, are fully recognised.
3. During the MPA public consultation process in early 2016 there was general support of the proposals to include Iwi/Māori within the MPA Act, and to ensure that Iwi rights and interests are considered.
4. Officials have been working with the Iwi Advisors Group (IAG) since early 2016, in a series of workshops, to develop approaches to provide for Iwi/Māori involvement in the MPA Act, and the nature of any Treaty clause. IAG are meeting with Iwi/Māori in a second series of regional hui. They have advised that they have received unanimous approval from Iwi/Māori on their preferred options for both these elements at the regional hui.
5. Officials aim to seek final Ministerial preferences on the two options in June 2016.

Status and involvement of Iwi/Māori in the process

6. Two options are set out below and, in diagrammatic form, in the attached A3:
 - a. A partnership approach (which is ILG/IAG preferred option); and
 - b. A participatory approach (which is preferred by officials).
7. The two approaches have a number of elements in common. Both provide for the following:
 - IAG (or an equivalent Iwi/Māori representative group) to be involved in the development of the National Strategy as part of a collaborative group to ensure that Iwi/Māori views involved at the front end of the policy reform. As such IAG will help develop the criteria that are used to assess proposals for MPAs as well as develop guidelines;
 - Local/ regional Iwi/Māori will be involved at the collaborative process/Board of Inquiry stage, and in any groups set up to manage MPAs. As such local/regional Iwi leaders will lead engagement by Iwi/Māori in regional and local processes;
 - IAG could have an advisory role to provide support and technical advice should this be requested by local/regional Iwi/ Māori;

- an assessment on whether each MPA proposal does not derogate Treaty settlements or legislative rights and interests will occur during collaborative and Board of Inquiry processes; and
 - final decision-making authority will be retained by Cabinet.
8. This advice does not cover two matters that the IAG has raised with officials, namely:
- a. Section 9 of the SOE Act being incorporated in to the Public Finance Act to enable the Mixed Ownership Model to be implemented; and
 - b. Section 4 of the Conservation Act which the IAG believes is a specific Treaty provision focussed on conservation and therefore consistent with the intention of marine reserves.
9. The key difference between the two approaches is the potential role that ILG/IAG could play in the MPA process once it has commenced - that is, once proposals are received by the agency responsible for this first step in the process.

Option 1 Partnership approach (Iwi Leaders Group preferred option)

10. The partnership approach provides Iwi/Māori the opportunity to be involved with the MPA at two levels. As well as local/regional Iwi/Maori being involved in particular proposals at the local level, under this approach, the ILG would have a role in discussing:
- the results of all policy steps with Ministers;
 - Ministers' initial decision regarding the pathway for each proposal; and
 - the Ministers' final decision on the outcome of the Board of Inquiry/collaborative process (acknowledging that Ministers make the final decisions)..
11. Where ILG has a role, IAG would have a corresponding role in discussing matters with officials. In particular, IAG would engage with officials, when officials provide advice to Ministers as part of the consideration of proposals. Officials would report to Ministers and in a parallel process IAG would report to ILG.
12. IAG believe that this option demonstrates a true fully informed Treaty-partnership approach rather than engagement or consultation, while ensuring Ministers make final decisions.
13. Officials consider the partnership approach provides for early and meaningful engagement with Iwi/Māori throughout the MPA process at both local and national level.
14. However, while this option could potentially provide benefits to Ministers, by enabling Ministers to access to the views of ILG throughout the process, it could be perceived as enabling ILG views to supersede/or have an additional opportunity to those of the local/regional Iwi who have been involved in collaborative processes/Boards of Inquiry. It raises an additional risk that non-Māori participants in the collaborative process could seek the same level of engagement with Ministers which could jeopardize the collaborative process although recognising that non-Maori participants do not have a Treaty of Waitangi based relationship with the Crown.

Option 2 Participatory approach (officials' preferred option)

15. Officials have a somewhat different view which is expressed in the Participatory approach. Once the actual MPA process starts, when proposals arrive at whichever agency is responsible for receiving them, the participatory approach becomes essentially locally focused. It provides for local/regional Iwi/Māori to be involved in the establishment and management of MPAs, and aligns with current levels of Iwi engagement in processes to develop MPAs.

16. Under this approach ILG would not have direct involvement in the processes once the National Strategy has been finalised. ILG would not be involved in the consideration of proposals by officials at key decision points or have direct input to Ministerial decisions. However, ILG could continue to meet regularly with Marine Ministers and if so, would be updated/have the opportunity to discuss the overall progress of MPA implementation.
17. Officials consider this approach provides for two key elements. It will provide for IAG to continue to work with officials to develop the National Strategy at the front end of the process. It also provides for ILG and Ministers could continue to meet and discuss/evaluate the overall MPA process/implementation.
18. In terms of outcome, however, officials consider that this approach will provide greater transparency as to the various roles of the key players in Boards of Inquiry or collaborative process. The outcomes of their deliberations (which could take some months and will involve the consideration of a considerable amount of information) will be considered only by Ministers, who will have three options: to agree that the proposal meets the criteria set out in the National Strategy, to find that the proposal does not meet those criteria or send it back to the group.

Treaty clause

19. Officials have considered two approaches to the form of Treaty clause that will be included in the MPA Act.

Option 1 General Treaty clause (IAG's preferred option)

20. IAG has advocated for a Treaty clause akin to Section 9 of the State Owned Enterprises Act 1986. This section states that, "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."
21. A Treaty clause of this nature is outcome focussed in relation to Iwi/Māori involvement and requires a decision-maker to act consistently with the principles of the Treaty of Waitangi. This approach aligns with the proposed partnership approach (IAG's preferred approach) to Iwi/Māori involvement and would also acknowledge the settlements entered into by the Crown and iwi.
22. This option provides for an active Treaty partnership approach, and allows for adaptability during the different aspects of the MPA process. It ensures that the Crown must be cognisant of the Treaty relationship during the establishment and management of MPAs.
23. A clause of this nature provides a high threshold for Iwi/Māori involvement and Treaty recognition, providing a broad avenue for Iwi/Māori to hold the Crown accountable rather than providing clear and specific direction. It is consistent with the Treaty clause in the RMA. The legal meaning of such a clause is well tested.
24. IAG also expects that in addition to this clause, the statute would also include provisions that have explicit recognition of Treaty Settlements entered into by iwi and the Crown and ensure that the establishment of MPAs does not derogate from those settlements, requiring that any undue intrusion is by agreement with the iwi/tangata whenua of the proposed marine protected area and those Iwi whose settled treaty rights are impacted by any proposed marine protection area. For the Fisheries Settlement the IAG requires a continuance of the thresholds in the Marine Reserves Act – it must not unduly interfere with commercial fishing and it must not unduly interfere with customary non-commercial fishing as well as a continuance of the current government processes to ensure active protection of those thresholds for the Fisheries Settlement. The decision by Ministers will not unduly affect the full set of rights held by iwi and hapu under Treaty of Waitangi settlements which includes the Fisheries Settlement, Treaty of Waitangi Deeds of Settlement and settlement legislation and the Marine and Coastal Area Act.

25. We expect that what constitutes undue intrusion will be identified through work carried out by officials and engagement with Iwi and also reflected in the Act and the National Marine Strategy,

Option 2 Contemporary Treaty clause (officials' preferred option)

26. A Treaty clause of this nature would state specific provisions that provide for the recognition and respect of the Crown's responsibility to give effect to the Treaty of Waitangi. It would be in line with the relatively recent Treaty clause within section 7 of the Heritage New Zealand Pouhere Taonga Act 2014.
27. The Treaty clause in the MPA Act would include cross references to the explicit obligations set out in the Act in order to recognise and respect the Crown's responsibility to give effect to the Treaty, such as:
- a) reference to provisions setting out how Iwi/Māori will be involved in MPA processes from development of a MPA proposal through to management
 - b) references to provisions clarifying the role of the Minister of Māori Development as a key decision-maker for MPA establishment decisions, including recommending specific membership of all collaborative groups and Boards of Inquiry
 - c) reference to relevant rights and interests recognised in other legislation as outlined in paragraph 24 above.
 - d) reference to provisions for a process to enable customary fishing activities and the management of important fishing areas to be considered during any collaborative processes/Boards of Inquiry and provisions that provide ability for these to be given effect
28. There has been a move away from a general Treaty clause (preferred by Iwi leaders) in recent years, as it does not provide certainty or specificity to the Crown on how this clause can be given effect to in a practical sense. The Crown Law Office supports the approach taken in the Heritage New Zealand Pouhere Taonga Act.
29. A contemporary Treaty clause can clearly provide for an active Treaty partnership approach. It can ensure from the outset that the Crown is cognisant of the Treaty relationship during the establishment and management of MPAs.
30. IAG has expressed concern that the Crown could be selective in the provisions included in a Treaty clause, leaving out more problematic provisions. However, a contemporary Treaty clause does provide Crown accountability by naming specific provisions for Iwi/Māori involvement that the Crown must adhere to.
31. The MPA Consultation Document expressly referred to the principles of the Treaty. The removal of the word "principles" in the MPA Act itself would mitigate potential ambiguity around interpretation of principles.