

Discussion document

Regulations under the Marine and Coastal Area (Takutai Moana) Act 2011 relating to wardens for promoting compliance with wāhi tapū prohibitions and restrictions

You are invited to provide input to the development of policy for regulations relating to the appointment of wardens associated with wāhi tapū. Such wāhi tapū can be recognised within customary marine title areas under the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act). Wardens will promote compliance with prohibitions and restrictions on public access within wāhi tapū sites.

The first stage of the process for making regulations is the circulation of this consultation paper to canvass the views of iwi and interested parties. Responses will assist the development of policy for the regulations which will be submitted to Cabinet for approval. Regulations are subsequently drafted by Parliamentary Counsel Office and, subject to gaining further Cabinet approval, are likely to be made later this year.

The regulations will apply to wāhi tapū recognised under the Act except those within the rohe of Ngā Hapū o Ngāti Porou¹.

Te Puni Kōkiri, Department of Conservation, Ministry of Culture and Heritage, Land Information New Zealand (LINZ), Ministry for Primary Industries and other government departments have contributed to the development of this paper.

The paper has been sent to all iwi offices listed on Te Kāhui Māngai and to all regional councils. It has also been emailed to:

- National Māori Organisations;
 - Federation of Māori Authorities,
 - New Zealand Maori Council,
 - Maori Law Society
- Seafood New Zealand
- Port companies representative
- ECO - Environment and Conservation organisations
- Forest and Bird

¹ Separate regulations will apply to wardens within the Ngāti Porou rohe because Ngāti Porou and the Crown signed a Deed of Agreement under the Foreshore and Seabed Act 2004 and the provisions relating to wāhi tapū differ from those in the Act.

- NZ Recreational Fishing Council
- Te Ohu Kaimoana
- NZ Marine Transport Association
- Petroleum Exploration and Production Association of NZ
- NZ Institute of Surveyors
- Council of Outdoor Recreation Associations of New Zealand (CORANZ) which represent;
 - New Zealand Federation of Freshwater Anglers (Inc).
 - Public Access New Zealand
 - New Zealand Sports Fishing Council
- Environmental Law Committee of the NZ Law Society
- Surf Life Saving NZ
- Resource Management Law Assoc of NZ
- Federated Farmers of NZ
- Institute of Cadastral Surveying (ICS)

This paper provides background information, discusses a range of matters that could potentially be covered by the regulations and seeks your feedback.

The discussion document is set out in two parts. The first covers the legislative provisions and other background information and is written in the form of questions and answers.

The second part seeks your input and feedback to assist the development of policy for the proposed regulations.

Comments should be emailed or posted to Jacky Challis at the address below. They should reach OTS by July 31 2015. Jacky can also answer any queries or provide further information to assist you to comment.

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This paper is not available in hard copy but can be found on the Ministry of Justice's website (www.justice.govt.nz/maca). If you are aware of other parties that may have an interest we would appreciate you forwarding the paper or directing people to the website.

Part 1: Background

1. What are wāhi tapū and wāhi tapū areas?

The definitions in the Act cross-reference those found in section 6 of the Heritage New Zealand Pouhere Taonga Act 2014. *Wahi tapū* is defined as “a place sacred to Māori in the traditional, spiritual, religious, ritual, or mythological sense”. *Wāhi tapū area* means “an area of land that contains one or more wāhi tapū”.

These definitions allow a wāhi tapū place or wāhi tapū area (henceforth collectively referred to as “wāhi tapū”) to be found:

- (a) at a site in the common marine and coastal area (CMCA)² which has an activity or use occurring on it (e.g. an urupā/burial site or a waka launching site); and
- (b) in areas of the CMCA having spiritual or cultural significance (e.g. a taniwha den or a battle site at which people died).

Under the Act wāhi tapū can be legally recognised and protected *only within customary marine title (CMT) areas*³ (section 78). Iwi, hapū and whānau have two pathways for CMT recognition: through a High Court order, or an agreement with the Crown which is brought into effect by an Act of Parliament (section 96(1)(b)). These regulations will apply irrespective of whether a wāhi tapū is recognised through a Court order or agreement with the Crown.

2. What protection is afforded?

Recognition of wāhi tapū within a CMT area:

- (a) allows prohibitions or restrictions to be imposed on public access including by fishers (see below) and other mariners;
- (b) provides a CMT group with statutory powers to appoint wardens to promote compliance with conditions relating to access; and

² The CMCA is the foreshore and seabed between mean high water springs and the outer limits of the territorial sea (12 nautical miles / 22.2 kilometres) excluding land in private title and certain conservation land.

³ CMT is recognised if an iwi, hapu or whanau has, in accordance with tikanga, exclusively used and occupied a part of the CMCA from 1840 to the present without substantial interruption (or received an area through customary transfer). It provides a property interest in land in the CMCA but not the right to sell the land, or to exclude the public (other than in wāhi tapū areas). A number of rights are associated with CMT including the right to permit or decline to permit others to use the area (with exceptions) and the ownership of certain minerals.

- (c) prevents a resource consent being granted which is contrary to the conditions in a CMT order or agreement (section 104(3)(c)(iv) of the Resource Management Act 1991 (RMA)).

3. *Under what circumstances can wāhi tapū be recognised under the Act?*

Recognition of wāhi tapū depends on a CMT applicant first deciding it is comfortable that the location of the wāhi tapū will be made public (if not already). A CMT group will then need to decide what prohibitions or restrictions on access are necessary to protect the wāhi tapū (section 79).

Decisions on the legal recognition of wāhi tapū are then made by the court or the Crown and depend on a CMT group providing evidence to establish:

- (a) the connection of the group with the wāhi tapū in accordance with tikanga; and
- (b) that the group requires the prohibitions or restrictions on access to protect the wāhi tapū (section 78(2)).

Case law under the Resource Management Act 1991 (RMA) suggests there ought to be evidence of a widely held belief by a group that an area is wāhi tapū⁴.

If a CMT group decides that restrictions or prohibitions on access under the Act are not necessary to protect a wāhi tapū site, it may nevertheless decide other types of statutory protection are desirable (or already have these in place). These other options are covered in question 12 below.

4. *Size of a wāhi tapū site*

At this stage there is no case law under the Act relating to the size of wāhi tapū sites. Case law under other Acts suggests wāhi tapū are generally small, discrete areas⁵.

5. *What information is included in the court order or agreement with the Crown?*

When a wāhi tapū is recognised, the following conditions must be set out in the CMT order or agreement:

- (a) the boundaries of the area;
- (b) the prohibitions or restrictions that are to apply and the reasons for them; and
- (c) any exemption for specified individuals to carry out a protected customary right recognised under the Act in relation to, or in the vicinity of, the area,⁶ and any conditions applying to the exercise of the exemption.

⁴ *Ngati Hokopu Ki Hokowhitu v Whakatane D.C.9 ELRNZ 111*

⁵ For example, *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC 120 and *Minhinnick v Minister of Corrections* A043/2004, 6 April 2004.

A total prohibition on access may not be needed in all cases. Conditions attached to a wāhi tapū could, for example, provide for limited access through a designated route.

Wāhi tapū conditions do not apply to the CMT group when it is carrying out kaitiakitanga responsibilities in the area. Conditions prohibiting or limiting access apply to fishers except in certain circumstances (refer question 10).

6. Is it mandatory to appoint wardens?

It is not mandatory to appoint wardens. A CMT group decides whether or not to appoint wardens. In many cases a notice near a wāhi tapū site will be considered sufficient to ensure compliance with access conditions, particularly if a site is remote and has few visitors. Depending on geography and ownership of adjacent land, there may be instances where landward access to a wāhi tapū is able to be limited by fences or gates located on dry land.

The presence of wardens may be helpful when there have been concerns about lack of compliance or desecration of a wāhi tapū or at a site that experiences periods of high visitor numbers. Wardens could also play an educational role (e.g. talking to schools, boating and fishing clubs).

7. What functions does a warden perform and what skills and competencies should they have?

The main functions of a warden are to patrol in the vicinity of a wāhi tapū to ensure that conditions on access are complied with and to maintain relevant records. A warden promotes compliance through:

- education;
- advising the public of prohibitions or restrictions on access;
- warning people to leave a wāhi tapū;
- recording the name, contact details and date of birth of a person a warden believes is intentionally failing to comply with a prohibition or restriction;
- reporting cases of intentional non-compliance to a police constable; and
- acting as the key witness in any court trials.

Additional functions which are related to the above functions can be prescribed in the regulations. The regulations may also set out any duties and powers to be exercised by wardens for the purpose of performing these functions.

A warden's role carries with it significant responsibilities. It will be important that wardens understand their functions and powers and act within these.

⁶ A protected customary right is an activity, use or practice in the CMCA (such as the collection of hangi stones or a waka launching site) that is given legal recognition and protection under a court order or agreement with the Crown.

Wardens will also require knowledge of relevant provisions in the Privacy Act 1993, and the relevant rights and freedoms under the New Zealand Bill of Rights Act 1990. Decisions made or actions taken by wardens that are unlawful or unreasonable could be subject to judicial review. The same applies if a CMT group steps outside its powers.

Wardens will need to have good judgement and strong interpersonal skills in dealing with the public. There are likely to be occasions when they have to exercise discretion when applying the prohibitions or restrictions and when deciding whether a member of the public has complied.

Training in the above areas will be provided to wardens. This is discussed below.

8. What happens if an offence is committed?

Wardens will provide a report to police setting out details of an alleged breach of the wāhi tapū conditions in cases where the warden has reason to believe that the failure to comply is intentional.

Fisheries officers and honorary fisheries officers may also report to police a failure to comply with a prohibition or restriction but only in relation to breaches by fishers.

Decisions by police as to whether charges should be filed will be made with consideration to the Solicitor-General's Prosecution Guidelines 2013.

If the Judge convicts the person then he or she is liable to a fine of up to \$5,000 (section 81(2)).

9. How will the public, including mariners, be aware of a wāhi tapū?

The public will become aware of wāhi tapū (and the relevant prohibitions and/or restrictions that apply) through a range of means that depend on whether the wāhi tapū is located on, or can be accessed from, the foreshore or whether it is completely offshore (see below). Such means could include:

- signs in the vicinity of the wāhi tapū;
- the presence of wardens in the wāhi tapū area (if the wāhi tapū is located offshore, wardens would need access to a boat in order to patrol the area);
- identification on nautical charts (refer below);
- provision by the CMT group of Global Positioning System (GPS) coordinates to local clubs (fishing, boating, kayaking etc) and publishing on relevant web sites;
- information being included in the "MarineMate" smartphone app developed by Waikato Regional Council (note this would not be sufficient public notice for a prosecution to succeed if an offence is committed by a mariner); and
- advice to fishers provided by fisheries officers. Section 80(3) of the Act provides that where fishing in a wāhi tapū is in breach of conditions imposed under section 79, fisheries officers or honorary fisheries officers may have a compliance and enforcement role. Section 80(4) provides fisheries officers with a right of access into wāhi tapū for this purpose.

Section 81 of the Act provides that a local authority in the area must, in consultation with a CMT group, take appropriate action that is reasonably necessary to encourage public compliance with wāhi tapū conditions. The second part of this paper seeks your views on what action a local authority could reasonably be expected to take.

Navigation through a wāhi tapū could occur only if allowed by the conditions attached to a CMT order or agreement. OTS is currently in discussions with Land Information New Zealand (LINZ) on options for marking wāhi tapū on nautical charts.

LINZ advise it is possible that wāhi tapū will not be able to be marked on small scale charts (covering a large area with minimum detail). This is because information marking a wāhi tapū must not obscure critical safety information. The more remote an area is, the less likely it is that an appropriately scaled chart will be available. It is possible, however, that wāhi tapū coordinates could be included as a chart title note.

Large-scale charts (i.e. covering a small area with a lot of detail) provide more flexibility for noting the location of wāhi tapū. However, the majority of these charts are in busy/popular ports, harbours and coastal areas where CMT and wāhi tapū may be less likely to be located.

We are unclear whether any applications are likely to be made to cover wāhi tapū in areas permanently covered with water. Our understanding is that when areas of water become tapū (e.g. after a drowning) a rāhui is imposed which excludes access for a temporary period only (as water dissipates the effect of tapū). The intent is that wāhi tapū on foreshore would be permanent.

10. How will fishers be affected?

All fishers (commercial, recreational and customary) need to comply with conditions which prohibit or restrict entry to a wāhi tapū area.

Such conditions must not be so restrictive they prevent commercial fishers from taking their lawful entitlement in a quota management area (QMA) or fisheries management area (FMA). Since wāhi tapū areas are expected to constitute a very small part of a QMA or FMA it is unlikely that lack of access would prevent fishers taking their quota or daily bag limits.

11. What is the penalty for non-compliance?

It is an offence to intentionally not comply with a prohibition or restriction notified for a wāhi tapū place or area. If convicted, a person is liable for a fine of up to \$5,000.

12. How do wāhi tapū under the Act differ from wāhi tapū protected under other statutes?

Other mechanisms for providing legal protection to wāhi tapū in the CMCA include:

- (i) Protection under the Heritage New Zealand Pouhere Taonga Act 2014.

- (ii) Listing in a regional coastal plan heritage schedule under the RMA with each site protected and managed through appropriate regional rules. Such sites may or may not be included in the New Zealand Heritage List (Rārangi Kōrero) under the Heritage New Zealand Pouhere Taonga Act 2014.

The Act provides further protection over and above other statutes by allowing prohibitions or restrictions on access. This is the sole departure from the general provision in section 26 of the Act which provides access to the CMCA without charge to all individuals⁷.

The Act also provides for the CMT group to be the primary compliance agents. This is in contrast to other resource management statutes where local authorities have the principle compliance role. It recognises the special status of CMT holders deriving from their interest in land in a CMT area.

13. Are wardens paid?

The regulation making powers in section 118 of the Act provide that it is the responsibility of the CMT group to fund the employment of wardens. A CMT group must therefore decide the basis of any funding and could:

- appoint wardens on a voluntary basis with no reimbursement of expenses; or
- fund only the direct expenses of wardens (such as travel costs and provision of identity badges); or
- pay an hourly rate in addition to direct expenses.

Whether wardens are funded will be dependent on the circumstances of each group and the level of involvement by wāhi tapū wardens that a CMT group requires.

Once the regulations are made, OTS will provide written and/or web-based training material for wardens covering relevant law and interaction with the public and police. A code of conduct may also be appropriate. The second part of this paper asks for feedback on these proposals and on any additional training that may be needed.

⁷ Subject to any restrictions imposed through the operation of other enactments (e.g. exclusive occupation granted as a condition of a coastal permit under the RMA).

Part 2: Questionnaire to assist the development of regulations

Please respond to the questions below that are relevant to you or your group or on which you have a view.

Applicants

Questions

Have you or your group made an application for customary marine title and if so, did it indicate you wish to seek recognition and protection of wāhi tapū?

Do you or your group intend to make an application for customary marine title in the future and if so, are you likely to seek recognition and protection of wāhi tapū?

Are any wāhi tapū in the common marine and coastal area within your rohe located off-shore (rather than on the foreshore)?

Appointment of wardens

Responsibility for appointment of wardens lies with the CMT group. The CMT group is the applicant group to which a CMT order applies or which has a recognition agreement with the Crown.

A CMT group could delegate responsibility for managing wāhi tapū wardens under section 60-61 of the Act. For example, if the CMT holder is an iwi, it could delegate responsibility for appointment and management of wardens to the appropriate hapū or whānau. Alternatively, a CMT group could transfer a CMT order or agreement to hapū or whanau.

It is proposed that the process by which wardens are selected and appointed not be specified in the regulations. The regulations would instead provide that the CMT group must, through consultation with its members, determine a process by which appointments are made that has the support of the majority of the CMT group.

The regulations would provide that upon selection, the CMT group must provide the warden with a letter of appointment. This would specify:

- the nature of the position;
- the powers, functions and duties of a warden under the Act and regulations;
- that powers, functions and duties are to be exercised under the control and supervision, and subject to any express directions of, the CMT group;
- the boundaries of the wāhi tapū area within which the warden would exercise the functions;
- the term of appointment;
- expectations relating to hours of work;
- whether the appointment is on a voluntary basis or as an employee;

- any remuneration or allowances;
- arrangements for training; and
- arrangements for supervision.

The Employment Relations Act 2000 and the Health and Safety in Employment Act 1992 will have some application depending on the nature of wardens' appointments. The Maritime Transport Act 1994 may apply to any on-water patrol activities.

Questions

Do you have any comment on the proposed policy relating to the appointment of wardens?

Qualification for appointment

Two options are suggested for addressing the qualities and skills needed by a warden:

Option 1 – the regulations would provide that the CMT group may appoint a person to be a warden where satisfied that the person has the personal qualities, skills and experience to undertake the functions of a warden; OR

Option 2 – the regulations would prescribe the qualities and skills needed by a person to qualify for appointment. The following are some examples:

- Is a member of the appointing group and resides in the vicinity of the wāhi tapū area.
- Is recognised as having a good knowledge of tikanga and kawa associated with the group.
- Is of good character.
- Has good interpersonal skills.
- Has respect for different cultural backgrounds.
- Is likely to avoid activities (whether connected to the warden role or otherwise) that might bring the warden role into disrepute.
- Is not bankrupt.
- Has current knowledge of (or the ability to become familiar with) relevant law relating to the exercise of warden duties.

Questions

Which option do you prefer for addressing a candidate's qualifications for appointment?

If you prefer Option 2, please indicate those qualities and skills that you consider should be specified in the regulations.

- Is willing and available to act as a witness in court.

Term of appointment

Two options are proposed for addressing the term of appointment:

Option 1 – the regulations provide that appointments are for a specified term (for example: “every warden shall be appointed for a term not exceeding 3 years and is eligible for reappointment”); OR

Option 2 – the regulations provide that the CMT group must decide whether or not to specify a term of appointment, the length of any term and whether a person can be reappointed.

Question

Which option in relation to the term of appointment do you prefer and why?

Termination of appointment

It is proposed the regulations provide:

- the CMT group may at any time remove a warden from office for incapacity affecting performance of duty, neglect of duty, or misconduct;
- a warden may resign by giving written notice to the CMT group; and
- a warden must on the expiration of any term of appointment, or on removal from office or resignation, surrender to the CMT group his or identify card or other form of identification.

Question

Do you have any comment or additional grounds for termination of appointment?

Functions

Under section 80(2) of the Act a warden is responsible to the CMT group for the following functions:

- (a) to assist in implementing any prohibition or restriction:
- (b) to enter a wāhi tapū or wāhi tapū area for the purpose of performing the warden's functions:
- (c) to advise members of the public of any applicable prohibition or restriction:
- (d) to warn a person to leave a wāhi tapū or wāhi tapū area:
- (e) to record—
 - (i) any failure to comply with a prohibition or restriction if the warden has reason to believe that the failure is intentional; and
 - (ii) the name, contact details, and date of birth of a person who the warden has reason to believe is intentionally failing to comply with a prohibition or restriction:

- (f) to report to a constable any failure to comply with a prohibition or restriction in any case where the warden has reason to believe that the failure is intentional.

The regulation making powers provide for additional functions to be specified that are reasonably incidental to the functions specified above.

The following are possible additional functions of wardens that are related to those in the Act and which could be included in regulations:

- Inform and educate the local community and visitors about the reasons for protecting the wāhi tapū, their obligations and the role of a warden.
- A requirement to advise OTS when appointed and prior to cessation of an appointment (to enable OTS to maintain a register for reporting purposes).
- Advise OTS of appointment/cessation of appointment as a warden.
- Maintain statistics on non-compliance and report to OTS as required.
- Give evidence when required in Court.

Questions

Do you agree with any or all of the proposed additional functions?

Can you suggest any others?

Duties or powers to be exercised for the purpose of performing functions

The regulations may specify duties or powers to be exercised by wardens for the purpose of performing their functions. Such duties and powers may include:

- A duty to exercise powers under the control and supervision, and subject to any express directions of, the appointing group.
- A duty to carry formal means of identification at all times while working and to produce when requested.
- A power to question a person within a wāhi tapū area and require them to provide details of their identity or identification (note that under the Act a person could not be prosecuted for non-compliance with such requests).
- A power to erect signs in the vicinity of the wāhi tapū area (note such signs may require resource consent).

Questions

Do you agree with any or all of the proposed additional duties and powers?

Can you suggest any others?

Method of identification

It is proposed that the regulations provide that wardens be required to carry an identity card displayed on their person at all times when on duty. Cards will be provided at a national level by OTS to be used by all wardens across the country. It will state the warden's name and role, the legislation under which appointments are made and the contact address of the CMT group that appointed him or her.

Questions

Do you have any comment on this proposal?

Directions relating to the management of wardens by the CMT group

The Act provides that directions can be provided to CMT holders who will be responsible for the appointment and retention of wardens.

Questions

Can you suggest any matters not already covered by the proposed regulations where direction or guidance to a CMT group would be useful?

Action by local authority to encourage compliance

Section 81(1) of the Act provides that a local authority that has statutory functions in the location of a wāhi tapū subject to a protection right, must, in consultation with the relevant CMT group "take any appropriate action that is reasonably necessary to encourage compliance with any wāhi tapū conditions".

Question

What action do you think would be appropriate for a regional or unitary council to take to encourage compliance?

Training

Part 1 of this questionnaire indicated that OTS would provide written and/or web-based training material for wardens covering relevant law and interaction with the public and police. It is also proposed that a code of conduct be developed in consultation with CMT groups.

Question

Do you consider the proposed training assistance to be appropriate?

If not, what else would you consider to be appropriate?

