

The Chair

Cabinet Policy Committee

**THE GOVERNMENT'S RESPONSE TO THE REPORT OF THE ROYAL  
COMMISSION ON GENETIC MODIFICATION  
PAPER 6: OVERARCHING AND STRUCTURAL ELEMENTS**

**PROPOSAL**

1. This paper proposes a Government response for a subset of the recommendations of the Royal Commission on Genetic Modification, particularly those recommendations relating to the Treaty of Waitangi and Maori participation, grounds for Ministerial call-in of applications, and genetic discrimination.

**EXECUTIVE SUMMARY**

2. This paper proposes a Government response for three of the recommendations of the Royal Commission on Genetic Modification, particularly those recommendations relating to the Treaty of Waitangi and Maori participation, grounds for Ministerial call-in of applications, and genetic discrimination. The advice on these recommendations needs to be seen in the context of other Government decisions on the framework and institutional structures for regulating GM into the future. In particular, Cabinet considered on 29 October recommendations on the Bioethics Council, the Parliamentary Commissioner for Biotechnology, the biotechnology strategy, and the liability system, all of which are key elements of this framework.
3. The Commission recommended strengthening the generic Treaty principles reference in the Hazardous Substances and New Organisms (HSNO) Act 1996. Officials advise that the Government accept the intention underlying this recommendation but implement it in a different way, i.e. review the implementation of s8 of the HSNO Act, in particular the processes for consulting Maori and considering their views, with a view to specifying in statute and policy guidelines how the Treaty principles should be provided for. This is part of a wider package to address the issue of Maori participation in genetic modification processes and is designed to address more specifically the concerns raised by Maori. Overall comment on Treaty of Waitangi implications is provided in this paper.
4. The Commission recommended a series of actions to ensure that society's values and ethical views are incorporated into decision-making. Officials advise that the Government accept the Royal Commission's recommendation that the grounds for Ministerial call-in of applications made under the HSNO Act be extended to include explicit reference to significant cultural, ethical and spiritual effects. Also under this general heading is the Bioethics Council already considered by Cabinet.
5. The Commission recommended that the issue of genetic discrimination be referred to the Human Rights Commission and the Bioethics Council for further consideration. Officials advise that the Government accept this recommendation, noting that genetic discrimination is not a genetic modification issue.

**BACKGROUND**

6. This paper is part of a suite containing officials' advice on the detailed Government response to the Royal Commission's recommendations, and sits within the wider

Government response agreed at Cabinet on 29 October. This current paper considers some of the structural and overarching issues relating to the proposed Government process for dealing with GM issues. These include:

- Treaty issues and Maori participation in the process;
  - Grounds for Ministerial call-in of applications; and
  - Human rights issues related to genetic discrimination.
7. Other structural and over-arching issues were considered by Cabinet on 29 October, including:
- Bioethics Council;
  - Parliamentary Commissioner for Biotechnology;
  - Biotechnology strategy; and
  - Liability issues.

## TREATY ISSUES AND MAORI PARTICIPATION

### *Overall Comment on Treaty of Waitangi Issues*

8. Eight of the 49 recommendations of the of the Royal Commission’s report make specific reference to Treaty of Waitangi or Maori cultural issues. This section is for noting purposes – the specific decisions can be found in related papers. The following table lists the eight relevant recommendations.

<b>REC.</b>	<b>Summary of the content of the recommendation</b>
6.10	To include at least one Maori member on IBSCs
10.3	To establish a Maori Consultative Committee for the Intellectual Property Office
10.4	That New Zealand be proactive in pursuing cultural and intellectual property rights for indigenous peoples internationally
10.5	To review WTO conventions to include a reference to the avoidance of cultural offence as a specific ground for exclusion or reservation
10.6	To resolve the Wai 262 and Wai 740 claims as soon as possible
11.1	To amend section 8 of HSNO Act to give effect to the principles of the Treaty of Waitangi
14.1	Extend call-in powers under HSNO Act to include cultural, ethical and spiritual issues as grounds for call-in
14.2	Establish Toi te Taiao – the Bioethics Council

## Maori views

9. The report notes that the majority of Maori submitters were opposed to genetic modification, and that a minority were open to some forms of genetic modification, subject to tight regulations and for limited purposes. The public opinion survey of New Zealanders carried out by the Royal Commission found that in general Maori public opinion was no different from that of non-Maori.
10. The import of the opposing views is supported by information from related areas, for instance: the submissions made by iwi, hapu and Maori individuals to various applications considered by the Environmental Risk Management Authority since its establishment; the findings of a report commissioned by Te Puni Kokiri on Maori perspective's on genetic engineering, and the three relevant claims before the Waitangi Tribunal, in particular Wai 262, also known as the flora and fauna claim (on which the Commission made a specific recommendation). Most submissions from Maori on the Commission's report have also been critical of GM.
11. The grounds for objection that have been stated by Maori include: a view that genetic modification is contrary to tikanga Maori (particularly in relation to cross-species gene transfer); concern about loss of Maori rights under the Treaty; lack of information and involvement in participation; and concern about the impacts on food, indigenous flora and fauna and Maori intellectual property.

## Comment

12. Given the views described above, officials consider there is a risk Maori submitters will reject the strategic direction of the Commission's response. However, the response to the Treaty of Waitangi issues as proposed by officials goes beyond the scope of the Commission's recommendations. In addition to this advice, officials propose targeted communication to Maori communities and provision of information on genetic modification is a priority for the communications strategy.

## ***Royal Commission Recommendations***

*Royal Commission recommendation 11.1: that section 8 of the HSNO Act be amended that effect is to be given to the principles of the Treaty of Waitangi*

13. The Hazardous Substances and New Organisms (HSNO) Act assesses applications to import, develop, field test or release GM organisms in New Zealand. The current requirement is that the principles of the Treaty of Waitangi be "taken into account".
14. The Royal Commission's rationale is to ensure that the Treaty principles (of active protection and cooperation in particular) are adequately incorporated into decisions made under the HSNO Act. However, the report does not highlight areas in the implementation of the HSNO Act, where it thinks there are deficiencies. Given that the Commission was satisfied that ERMA carries out its functions conscientiously and soundly, it is unclear precisely what problem the recommendation is intended to address.
15. Ministers should note that the Royal Commission opted not to recommend an amendment to section 6 of the HSNO Act that would provide for stronger protection for Maori values than currently exists. It stated that it would be contrary to the spirit and the principles of the Treaty of Waitangi if one Treaty partner's spiritual and cultural values were given pre-emptive standing over the other. In the Commission's view, the spiritual and cultural values of all New Zealanders ought to be taken into account.

16. The recommendation seeks to strengthen an already generic provision, rather than to specify how Treaty principles can be more adequately incorporated into the Act. Therefore, it is not clear whether implementing the recommendation would achieve the Commission's objective of ensuring that the Treaty principles are adequately incorporated into decision-making processes made under the HSNO Act.
17. Amending section 8 of the HSNO Act also carries a number of other risks. Any amendment is likely to be contentious with Maori for not going far enough, and with applicants who have difficulty interpreting the current requirements and are likely to see this, on its own, as providing no clarity or guidance. There is a significant precedent risk with a legislative amendment, particularly in relation to possible pressure to strengthen the Treaty section in the Resource Management Act. Amending section 8 may also raise compliance costs for applicants. Any increase in compliance costs should be outweighed by the benefit from the increased compliance requirements, and the process review will be necessary to determine what, if any, additional compliance requirements are justified in terms of this criteria. An amendment prior to this review may increase compliance costs for no material benefit.

#### Officials' Advice

18. Officials recommend that Ministers agree with the Royal Commission's intention, which is to ensure that Maori views are sought and appropriately incorporated into decision-making under the HSNO Act.
19. To achieve the Royal Commission's intention, officials recommend Ministers agree to a review of the implementation of section 8 of the HSNO Act, in particular processes to consult Maori and consider their views. The review would also include consideration of the implementation of section 6(d) and how culturally sensitive information is managed. The outcome envisaged would be to specify in statute and policy guidelines how the principles of the Treaty of Waitangi should be provided for. This approach is consistent with the approach taken in the New Zealand Public Health and Disability Act 2000, and the Hauraki Gulf Marine Park Act 2000. With this approach, there could be specific, practical and positive amendments that offer assurances to Maori that their interests in genetic modification activities are included in the HSNO Act. In addition to legislative change, more specific guidelines and policies could be produced.
20. The review of the decision-making process should be seen as part of a wider package of measures to increase Maori participation in decision-making in the HSNO Act and in other GM processes to make the process work more effectively for Maori and non-Maori alike. Other measures that contribute to this package include:
  - explicit inclusion of cultural, ethical and spiritual grounds for Ministerial call-in of applications (current paper)
  - consideration of Maori-specific ethical, cultural and spiritual issues by the Bioethics Council (considered by Cabinet on 29 October)
  - Maori representation on the Bioethics Council (considered by Cabinet on 29 October)
  - Maori representation on Institutional Biological Safety Committees considering delegated HSNO Act applications (Paper 2)
  - research into the socio-economic and ethical impacts of GMOs (Paper 2)
  - strengthening the protection of Maori cultural and intellectual property (Paper 5).

21. Ministers should note that some Maori groups are calling for a stronger Maori voice in decisions made under the HSNO Act. There is a risk that a review of ERMA processes and subsequent legislative changes or policy guidelines, may not satisfy these groups unless it is clear that it would lead to different outcomes from previous decisions.

## **INCORPORATING CULTURAL, ETHICAL AND SPIRITUAL VALUES**

22. Under this general heading, the Royal Commission recommended:
- That section 68 of the HSNO Act be extended to include significant cultural, ethical and spiritual issues as grounds for the Minister’s call-in; and
  - That the Government establish Toi te Taiao: the Bioethics Council.
23. It appears that the Royal Commission’s intention behind these two recommendations is to enhance public participation in decision-making, foster debate and ensure ethical views are incorporated into decision-making processes now and into the future. Officials’ advice on ethics and decision-making structures complements advice, contained in other Cabinet papers in the suite, on undertaking research and strengthening ethical controls on animal and medical research.
24. The need for, and scope of, the Bioethics Council was considered by Cabinet on 29 October.

### ***Extending Ministerial Call-in***

*Royal Commission recommendation 14.1: that HSNO section 68 be extended to include significant cultural, ethical and spiritual issues as grounds for the Minister’s call-in powers*

25. Section 68 of the HSNO Act enables the Minister for the Environment to call-in and decide an application if she considers it will have:
- Significant economic effects; or
  - Significant environmental effects; or
  - Significant international effects; or
  - Significant health effects; or
  - Significant effects in an area in which the Authority lacks sufficient knowledge or experience.
26. To some extent, cultural, ethical and spiritual grounds are already captured within these call-in criteria. The HSNO Act definition of “environment” includes, *inter alia*, “ecosystems and their constituent parts, including people and communities; and ... the social, economic, aesthetic, and cultural conditions” which affect or are affected by the natural environment. In addition, as noted above the grounds for call-in currently include “significant effects in an area in which the Authority lacks sufficient knowledge and experience”. Extending the grounds for call-in as recommended by the Royal Commission therefore, would not be a radical departure from existing provisions, and it would offer explicit recognition of cultural, ethical and cultural effects. The Minister for the Environment is currently able to appoint anyone with relevant knowledge or experience (which could include one or more Bioethics Council members) to sit with the ERMA to exercise the power of a member of the Authority for that application.
27. Officials note that even though the Minister makes the decision on a called-in application, under the current HSNO Act, it is not a political decision as such. The Minister must

have regard to the report of the Authority and her reasons for calling in the application and must justify any decision not to follow the ERMA's advice on the application. The Minister's final decision is subject to judicial review.

#### Officials' Advice

28. Officials advise that Ministers accept in principle the Royal Commission's recommendation to extend the Ministerial call-in grounds to include significant cultural, ethical and spiritual effects. Further work will be needed to clarify the appropriate wording. While this will not change the basis of decision-making, it may have strong perception value and enhance community trust in the HSNO Act.
29. Explicit inclusion of these criteria in the call-in grounds may lead to pressure for more use of the Ministerial call-in power. As a benchmark, the call-in power under the HSNO Act has not been used since the Act came into force, and it has only been invoked once in the 10 years that the Resource Management Act has been in force. Even if an application met one of the criteria for call-in, the Minister is not obliged to call it in. Also, it would not mean that undue weighting would be given to the grounds for call-in in the consideration of the application. At the very least, it would ensure that the grounds for call-in were given some weighting. Officials do not believe the extension of the call-in grounds would justify any significant increase from this benchmark.

#### **HUMAN RIGHTS ISSUES**

*Royal Commission recommendation 12.1: that Toi te Taiao: the Bioethics Council, in association with the Human Rights Commission, address the issue of genetic discrimination*

30. While this matter was briefly addressed by the Royal Commission, it is not strictly a GM issue. Rather it is about the use of genetic information in a manner that may discriminate against, for example, those with a high propensity for certain diseases. It is potentially a major issue for the life insurance and medical insurance industries.

#### Officials' Advice

31. Officials consider that the issue is best addressed in the context of a wider discussion of New Zealand's human rights priorities. The Human Rights Amendment Bill recently introduced into the House of Representatives requires the Human Rights Commission "to develop a national plan of action, in consultation with interested parties, for the promotion and protection of human rights in New Zealand." It is expected that this process, which will involve consultation with a wide range of stakeholders, will result in a strategic blueprint for the further development of human rights protections in New Zealand. One of the outcomes is likely to be recommendations for legislative change. It is possible that these may include recommendations concerning the grounds of prohibited discrimination.
32. Officials recommend that the Government ask the Human Rights Commission to include consideration of genetic discrimination in the course of its work on a national plan of action. If the Bioethics Council is established, then this consideration could be done in conjunction with the Council.

#### **FINANCIAL IMPLICATIONS**

33. There are no fiscal implications from the recommendations in this paper.

## **LEGISLATIVE IMPLICATIONS**

34. A number of the recommendations in this paper have legislative implications, principally changes to the HSNO Act. Combined with legislative changes recommended in other papers in this suite, these will likely form part of a wider HSNO Amendment Bill for introduction in early to mid 2003. The detail of these legislative implications will be discussed in more detail when officials report back on what specific legislative changes are required.

## **REGULATORY IMPACT STATEMENT**

35. The recommendations in this paper are, necessarily, at a high level, with significant further work on the detail to be undertaken before a regulatory impact statement can be prepared.
36. However, some early judgements of regulatory impact can be made. The review of processes for Maori participation may increase compliance costs, depending on the final measures agreed to address the issues raised. However, if the interaction between Maori and applicants can be streamlined or improved, compliance costs may decrease. Similarly, the extension of Ministerial call-in powers may also increase compliance costs, if those powers are used. Any increases in compliance costs must be balanced against the Royal Commission's intention of increasing public participation and public confidence in the system. Other than possible increases in compliance costs, the recommendations in this paper are unlikely to have economic costs such as a negative impact on innovation.
37. As part of the report-backs for each policy initiative, a regulatory impact statement and business compliance cost statement will be prepared as appropriate.

## **TREATY IMPLICATIONS**

38. The Treaty of Waitangi implications of the recommendations in this and other papers are detailed in the section entitled "Treaty Issues and Maori Participation".

## **HUMAN RIGHTS ACT**

39. The Human Rights Act implications of the recommendations in this paper are detailed in the section entitled "Human Rights Issues".

## **PUBLICITY**

40. A separate communications strategy is being developed for the whole package of Government decisions on the Royal Commission's report.

## **CONSULTATION**

41. The following departments were involved in the preparation of this paper: Ministry of Agriculture and Forestry, Ministry of Consumer Affairs, Department of Conservation, Ministry of Economic Development, Ministry for the Environment, Ministry of Foreign Affairs and Trade, Ministry of Health, Ministry of Justice, Department of Prime Minister and Cabinet, Ministry of Research, Science and Technology, State Services Commission, Te Puni Kokiri, and the Treasury. Amendments were made to this paper at the direction of the office of the Minister for the Environment, by the Ministry for the Environment in consultation with some other agencies. These amendments were required as some matters previously referred to in this paper were considered in Paper 1 at Cabinet on 29 October 2001.

## **RECOMMENDATIONS**

42. It is recommended that Cabinet:

### **Overall Framework and Institutional Structure**

1. **note** that the recommendations in this paper form part of the overall framework and institutional structure for regulating the use of genetic modification into the future
2. **note** that other components of this framework and institutional structure were considered by Cabinet on 29 October, namely:
  - 2.1. Liability issues related to GM [Recommendation 12.2]
  - 2.2. Toi te Taiao: Bioethics Council [Recommendation 14.2]
  - 2.3. Parliamentary Commissioner for Biotechnology [Recommendation 14.3]
  - 2.4. Biotechnology strategy [Recommendation 14.4]

### **Maori Participation**

3. **agree** to a review of the implementation of section 8 of the Hazardous Substances and New Organisms (HSNO) Act 1996, in particular processes to consult Maori and consider their views for new organisms applications, with a view to specifying in statute and policy guidelines how the principles of the Treaty of Waitangi should be provided for [Recommendation 11.1, paragraphs 13 - 21]
4. **direct** officials (Ministry for the Environment lead) to report back to FIN Committee by end February 2002 on the terms of reference and membership of a Maori Focus Group for the review in recommendation (3) above

### **Ministerial Call-in**

5. **agree** to amend section 68 of the HSNO Act 1996 to include significant cultural, ethical and spiritual effects as grounds for Ministerial call-in of an application [Recommendation 14.1, paragraphs 25 - 29]
6. **direct** officials (Ministry for the Environment lead) to undertake further work to define the grounds in recommendation (5) above for implementation into the legislation as part of the proposed HSNO Amendment Bill for introduction in early to mid 2003

### **Human Rights/Genetic Discrimination**

7. **agree** to refer the matter of genetic discrimination to the Human Rights Commission for further consideration as part of the development of a national plan of action for protecting human rights which the Human Rights Commission is required to undertake in accordance with the provisions of the Human Rights Amendment Bill currently before the Justice and Electoral Committee [Recommendation 12.1, paragraphs 30 - 32]

Hon Marian L Hobbs  
**MINISTER FOR THE ENVIRONMENT**