chapter ten

New legislation options
This chapter sets out three options for new legislation: to promulgate the Marine Reserves Bill, draft new dedicated marine protected areas legislation or draft new framework oceans legislation which incorporates marine protected areas within a broader marine spatial planning framework. The pros and cons of each of these options are explored in the following sections.

**Option 1:**
**Promulgate the Marine Reserves Bill 2002**

Chapter 8 contained a detailed description and critique of the Marine Reserves Bill. This established that the Bill has some good features. It extends the ability to establish marine reserves into the exclusive economic zone. Its primary purpose, with a focus on the protection of marine biodiversity *as an end in itself*, reflects current thinking about marine protection.

However, there are some potential problems with the Bill as it is currently drafted. These primarily reflect the age of the Bill (it is now almost 10 years old) and the rapid development of international thinking in the field of marine protection over the past decade. These include the failure of the Bill to:

- Give effect to the government’s intention to establish a representative network of marine protected areas, as set out in the Biodiversity Strategy and the MPA Policy. Given the central importance of this target, this is a significant omission.
- Provide for a range of marine protected areas which provide different levels of protection. As described earlier in this report, all the other jurisdictions studied have provided for this. Failure to provide for a range of protection levels will necessitate continued reliance on other ill-targeted tools such as those under the Fisheries Act.
- Adequately provide for the exercise of kaitiakitanga within marine reserves. There is no explicit provision for tāngata whenua input into the management of marine reserves. In addition, the legislation excludes customary fishing activities from marine reserves in all cases. This could result in customary rights being effectively extinguished, and not able to be reasserted, if the reserve status was revoked at a later date.
- Include a classification system for different marine protected areas. Instead, some activities will be regulated strictly (fishing), whilst others will potentially
be permitted on an *ad hoc* basis (mining). This approach does not provide for certainty about the level of protection which marine reserves will enjoy, and also necessitates the continued use of poorly targeted Fisheries Act tools to establish protected areas which allow some fishing activity

- Provide for cultural or recreational objectives. The discussion paper accompanying the Bill suggests that these will be addressed during wider oceans reform, but it seems that the review of the Marine Reserves Act would be a more opportune time to do so

- Provide for a potential link to wider marine management tools such as marine spatial planning

The proposed establishment process continues the adversarial approach employed under the Marine Reserves Act, in which public consultation invites stakeholders to provide reasons why a proposed marine reserve should not be established. This system is a poor fit with the collaborative decision-making process set out in the MPA Policy.

The Bill provides for a sole Ministerial decision-maker, which could help streamline the process for marine reserve creation. However, it is questionable whether the legislation would work in practice, as other ministries may well object to the loss of their power of veto in favour of the Department of Conservation particularly where the process does not provide for strong independent scrutiny.

### Option 2:
### Draft new marine protected areas legislation which provides for an integrated approach to marine protected areas

**Description**

This approach would replace the Marine Reserves Bill with new legislation which provides for the establishment of a comprehensive and representative marine protected areas network. Legislation under this approach could have as its central purpose the achievement of a representative system of marine protected areas.

The legislation would provide for a full range of marine protected area categories, in order that the marine protected area network is managed under
one cohesive system. This is the approach adopted in all of the international case studies considered.

All existing marine protected areas would be incorporated into the system under transitional provisions. New marine protected areas would be established using a classification system analogous to that employed under the Reserves Act 1977 and similar to the IUCN’s marine protected area classification which would set out management objectives and management measures.

The legislation could provide for an integrated process for the establishment of a representative network of marine protected areas and set out a time frame for its completion. This could take the form of a collaborative process, where appropriate. If a collaborative approach were adopted, the legislation should make provision for the development of detailed guidance on process and network design, which could be adopted as regulations. This would enable the current MPA Policy to be further developed in light of the experience of its implementation and developments in international thinking.

In addition, it would be appropriate for the legislation to provide a process for the establishment of individual marine protected areas which may be established primarily to ‘fill in the gaps’ following the completion of the network design process.

The Act could be administered by the Department of Conservation (which would have responsibility for ongoing management of marine protected areas), and the final decision on the establishment of new marine protected areas could be made by the Minister of Conservation on the basis of recommendations from the independent board of inquiry.

The legislation could provide that where the recommendations for new marine protected areas are the result of a collaborative process, the board of inquiry would be responsible for considering the group’s final recommendations. The board of inquiry’s terms of reference could be limited to those matters which have not been agreed by consensus, to provide an incentive for stakeholders to collaborate effectively.

**Assessment**

This approach would give legislative recognition to the marine protection goals set out in the Biodiversity Strategy and would provide all the tools required to develop a representative network of marine protected areas. It would enable a clear distinction to be made between measures which are aimed at marine protection (those available under the new legislation) and measures that are aimed at other
goals but may achieve marine protection indirectly, such as Fisheries Act tools which would not be used for marine protection within the network.

The approach would ensure that one agency is responsible for managing the network and that all management measures are underpinned by the objective of marine protection. The approach would also enable the establishment of a flexible system which provides for the realisation of a range of benefits, including recreational and cultural ones.

This option would overcome the main procedural problems with the current approach under the MPA Policy, where the legislative tools available have their own establishment processes, which do not interface well with the MPA Policy.

It would also allow for the development of more detailed policy and processes building on experience with the MPA Policy, which would enable any new collaborative processes to improve upon previous experiences. New processes could be tailored to the resources available and developed over time.

A board of inquiry process would enable proposals to undergo independent scrutiny outside of the Department of Conservation, and provide all stakeholders with the opportunity to make submissions and be heard in person. In circumstances where the proposals are the result of a collaborative process, limiting the Board’s power to matters which are not agreed by consensus would help to ensure that the collaborative decision-making process is meaningful and that stakeholders will remain committed to achieving agreement.

Option 3:
Draft new framework oceans legislation which provides for marine spatial planning incorporating marine protected areas (oceans reform)

Description
This option comprises broader reform of New Zealand’s marine management system. Provision for new marine protected areas would be contained within a new Oceans Act which would have as its purpose the integrated management of the territorial sea and exclusive economic zone. This approach would recognise that marine protected areas should be nested within a wider system designed to manage the marine area in a strategic and integrated manner.
This is the approach taken in the United Kingdom and Australia where broad marine management legislation governs decision-making about where activities in the marine area should take place, and incorporates both marine spatial planning and marine protected areas.

In New Zealand, new legislation could comprise a common set of management principles; detailed policies (expressed in a marine policy statement); spatial plans, including those taking in the interface between the terrestrial catchment and the coastal marine area (which could be incorporated as part of the marine policy statement); and marine protected areas which apply to the country's entire oceans domain including the territorial sea and exclusive economic zone. Decision-makers under other legislation, such as the Resource Management Act, Fisheries Act, Maritime Transport Act, Reserves Act and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act, could be required to make decisions which are consistent with this legislation.

Such an approach enables an integrated management approach whilst many activities remain regulated under sectoral legislation. It would need to be well-designed to avoid creating uncertainty and a more cumbersome regulatory system.

The legislation could provide for an ‘Oceans Agency’ similar to the United Kingdom’s marine management organisation. It would be responsible for marine management including overseeing marine spatial planning and marine protected area design.

Under this option the Ministry for the Environment could be responsible for the development of marine policy, whilst the Department of Conservation, Ministry for Primary Industries and other relevant ministries are responsible for advocating for their own particular areas of concern.

The legislation and/or regulations could set out processes for the design of the marine protected area network and for the establishment of individual marine protected areas. This could be undertaken separately from the marine spatial planning initiative, with identified marine protected areas then folded into the broader marine plans. Alternatively marine protected areas could be identified as part of the marine spatial planning process.

**Assessment**

Oceans reform, and the establishment of a marine spatial planning system, would clearly be a wider project than the establishment of marine protected area
legislation alone. But it would provide the best means of achieving an effective marine management system reflecting ecosystem-based approaches.

An over-arching legislative framework providing for marine spatial planning could help achieve a more integrated planning framework, without requiring additional environmental consents. Such an approach has already been applied to the Hauraki Gulf Marine Park and associated catchments, where a common set of matters of national significance and management objectives applies to fisheries, resource management and conservation management (although not to management under the Maritime Transport Act).

This approach could contribute significantly to the effectiveness of marine protection measures, as it would enable managers to plan for and control the impacts of activities which occur outside the marine protected area. In addition, it may provide a means of addressing the displacement of users from the protected area, as the wider spatial planning process should enable all interests to be provided for. The approach would enable managers to plan for future activities and environmental effects and to identify the best ways to manage them to ensure ocean health. Providing for integration with coastal planning should help to manage the threat of land-based activities on the marine area.

The establishment of an Oceans Agency with responsibility for marine management measures would have a range of benefits: it would replace the current fragmented, sector-based system with one where there is a clear separation between environmental regulation and resource extraction, and would provide an independent decision-making system that can cut across the current adversarial, interest-based approach.

The adoption of a new Oceans Act would recognise the fact that, on a global scale, marine spatial planning and integrated marine management are becoming well established as the best means by which to manage competing activities in the ocean and to ensure that ocean health is maintained. Marine spatial planning initiatives overseas have often been precipitated by particular pressures on the local marine environment. As activities in New Zealand waters diversify, and activity increases, there will be greater pressure to undertake reform. However, experience overseas indicates that although it may seem easier to wait until reform is urgently needed, in actual fact it would be easier to act earlier, so that a planning and management framework is in place that can address problems before they arise.
Conclusion

Our analysis indicates that the Marine Reserves Bill is no longer adequate and should not be promulgated in its current form. New dedicated marine protected areas legislation could readily provide for many of the elements of a world-leading approach to marine protection. We therefore recommend that such legislation be promulgated without delay.

However, such dedicated legislation would not enable marine protected areas to be integrated within a broader marine management system, and this would need to be achieved through broader oceans reform which we recommend should be pursued in the longer term.

Figure 10.1: Summary of legislative options

<table>
<thead>
<tr>
<th>Enabling the establishment of marine protected areas in entire marine jurisdiction</th>
<th>Promulgate Marine Reserves Bill</th>
<th>New legislation providing for integrated approach</th>
<th>New framework oceans legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enables the establishment of marine protected areas in entire marine jurisdiction</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Provides for establishment of representative network of marine protected areas</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Provides for the establishment of marine protected areas which protect biodiversity as an end in itself</td>
<td>Yes but Fisheries Act tools and others would still be used as well</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Recognises all relevant values including recreational and cultural values</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Provide for range of marine protected areas with different levels of protection</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Manages the impacts on marine reserves of activities occurring outside the protected area including on land</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Provides for collaborative decision making</td>
<td>No</td>
<td>Potentially</td>
<td>Potentially</td>
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