DECEMBER 2021

Partial reviews of the **Conservation General Policy and General Policy for National Parks regarding Te Tiriti o Waitangi / the Treaty of Waitangi**

Report of the Options Development Group

Partial reviews of the Conservation General Policy and General Policy for National Parks regarding Te Tiriti o Waitangi / the Treaty of Waitangi

By the Options Development Group
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COVER: Pūriri moth. *Photo: iNaturalist / Uwe Schneehagen CC BY-SA 4.0*

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In memory of Mana Manuera Cracknell

He tohu aroha, he tohu mamae.
He tohu ki a koe kua hinga.
Ko ngā kēkēao e tāiri ana ki runga o Rēkohu, hei Parekawakawa i tō Imi.
Mā mātau ngā waihotanga iho e tangi, hei kākahu roimata mōu.
Tau atu ēnei taonga whakamirimiri ki runga tonu o Māhia
Hao atu koe ki te kupenga a Taramainuku, kia īere ana i te Mangōroa ā tōna wā.
E te Rangatira, moe mai rā! Kua oti te wā ki a koe, engari, ka haere tonu wāu nā mahi!
Haere, haere, haere atu rā!

Members of the Options Development Group (ODG) dedicate this report to our friend and colleague Mana Manuera Cracknell, who passed away shortly after its completion. Mana left this realm on his beloved Rēkohu/Wharekauri/Chatham Islands on 16 January 2022 and was laid to rest in Māhia. We pass on our sincere condolences to his whānau and friends.

A life-long learner and educator, Mana was a master of metaphor. He guided the work of the ODG gently – usually by offering a well-timed quip, adage, or whakataukī distilled from his great knowledge of many cultures and their stories to make his point. The recommendations and options outlined in this report are grounded in the wisdom behind his sage words.

In our time together as the ODG, Mana sensed he wasn't long for this world and made plain to us his deep commitment to completing this task as one of his last great gifts to Aotearoa New Zealand. Below is an excerpt from an email that Mana sent to the ODG in December 2021.

Ahakoa te iti me te nui, te pai me te kino, te māmā me te taumaha, te tere me te pōturi, te whakarongo me te taringa mārō – resilience is a virtue garnered by struggle.

Reflecting on our persistence in the face of challenge and proposing that progress against the report's recommendations should be regularly reviewed, it typifies his approach to life and his important contribution to this document.

The Options Development Group chose the endemic pūriri moth (pictured on the cover of this report) as its tohu arai (beacon) to reflect and guide its mahi. Kaumātua say that when a pūriri moth appears, the atua and tīpuna are visiting to lend support and share the load. The pūriri moth cannot eat and only lives for 2 days, but during that time it produces around 2,000 eggs. Purpose made for the task required, it is the epitome of energy efficiency and functional effectiveness.

Rārangi Kōrero / Contents

Kupu whakataki / Foreword

> *This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.*
>
> Section 4, Conservation Act 1987

This report relates to the work of the independent Options Development Group (**ODG**), which was formed in October 2020 to undertake partial reviews of the Conservation General Policy and General Policy for National Parks (the **General Policies**). The core purpose of the partial reviews is to ascertain improvements to the existing General Policies in order to assist the Department of Conservation / Te Papa Atawhai (**DOC**) to give effect to the principles of Te Tiriti o Waitangi / the Treaty of Waitangi (**Te Tiriti**[1]) in accordance with section 4 of the Conservation Act 1987 (the **Conservation Act**).

The ODG found it deeply concerning that the powerful and directive wording of section 4 of the Conservation Act 1987 has been fundamentally misapplied for so long.

The Supreme Court, in its 2018 decision in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation*,[2] made it clear that DOC's obligation to give effect to the principles of Te Tiriti under section 4 is not overridden by other statutory imperatives set out in the conservation legislation as the General Policies at that time stated. Rather, such other statutory (and non-statutory) objectives must be achieved in a way that best gives effect to the principles of Te Tiriti.[3]

While the offending misdirection in the General Policies was quickly removed following the *Ngāi Tai ki Tāmaki* decision,[4] it is concerning that the primacy of DOC's obligations in respect of Te Tiriti has been misstated for so long in what are the foundational policy documents guiding and, in some cases, directing administration, management and decision making within the conservation estate.[5] However, our review of the General Policies (and the language and perspectives contained therein) and the feedback that we received in our engagement with iwi and hapū around the country were illuminating.

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1 Te Tiriti o Waitangi or Te Tiriti is used throughout this report, rather than the Treaty of Waitangi or the Treaty (except where citing an external source which uses that language). Unless otherwise stated, this is a reference to both the English and Māori texts of Te Tiriti as set out in Schedule 1 of the Treaty of Waitangi Act 1975.

2 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368.

3 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at paras [57] and [76]–[77].

4 In August 2019, following the Supreme Court's *Ngāi Tai ki Tāmak*i decision, the New Zealand Conservation Authority and Minister of Conservation each approved a technical amendment to remove this error from the text in Chapter 2 of each General Policy.

5 The General Policies were each first published with this incorrect direction in 2005.

Despite the guarantees of Te Tiriti, we consider the General Policies have entrenched a Crown-centric view of both the principles of Te Tiriti and their application. Either by accident or design, the General Policies have been constructed and articulated in such a way as to substantially ignore partnership and reduce the role of tangata whenua from Te Tiriti partner to stakeholder in the definition and delivery of conservation within Aotearoa New Zealand.

The principles of Te Tiriti currently articulated within the General Policies are those accepted and approved by the Crown in 1989, and are stated to be the principles of government, self-management, equality, reasonable cooperation and redress. There is no reference to the views of the Crown's Te Tiriti partners, or the findings of the Waitangi Tribunal or Courts regarding the interpretation and application of Te Tiriti and its principles. This narrow articulation is consistent with policy settings under the General Policies (and we think more broadly) where rangatiratanga is viewed as subservient to kāwanatanga, which in turn establishes a framework where it has been to the large part the Crown and its agents who have determined what is right for conservation and who may maintain a relationship with, or exercise interests within, the conservation estate.

We do not believe this is what a living interpretation and application of section 4 of the Conservation Act demands.

The ODG considers that section 4 mandates an active partnership between the Crown and tangata whenua that protects our shared natural and historic heritage based on the guarantees of Te Tiriti, our shared love of and responsibilities to our environment, and our common desire to sustain and regenerate te taiao (the environment) for our children, grandchildren and those that come after. In our view, the current conservation system has neither delivered biodiversity and conservation outcomes of the scale or scope required nor enabled an active and constructive partnership with tangata whenua under Te Tiriti which acknowledges, embraces and elevates the rights, interests and responsibilities of tangata whenua with the lands, waters, species and other taonga within the conservation estate.

Nearly 35 years on from the passage of the Conservation Act, we propose that it is time to engage in a wider dialogue about what conservation means for Aotearoa New Zealand, a Pacific nation in the 21st century. This cannot occur by partially amending the existing General Policies to ensure they reflect the statutory obligation of giving effect to the principles of Te Tiriti. Mere words on a page are insufficient. Rather, we consider that transformative and institutional change is needed.

In our view, this requires a fundamental rethinking of the entire conservation system, including the overarching legislative framework that determines how conservation is defined, governed, managed and delivered in Aotearoa New Zealand. It is only through change of that nature and degree that a more inclusive approach to conservation will be enabled and realised at place with tangata whenua and communities at its heart.

We have accordingly made recommendations that include both interim and immediate actions within the scope of the current system as well as more fundamental reform that should optimally occur over the next 5 years. Our recommendations identify what is needed to achieve a conservation system and supporting legislation in Aotearoa New Zealand that gives effect to a genuine partnership with tangata whenua which recognises and enables the exercise of rangatiratanga and kaitiakitanga for the benefit of te taiao.

The members of the ODG brought to the table diverse perspectives, experiences and expertise. In reaching our recommendations, we worked collaboratively and took decisions by consensus. We examined a wide range of initiatives and processes, nationally and internationally, advocating best practice with regard to recognition of the vital role of Indigenous peoples to conservation. We acknowledge the former Minister of Conservation, the Hon Eugenie Sage, and New Zealand Conservation Authority (**NZCA**) for their decision to conduct the partial reviews and the former Director-General of Conservation, Lou Sanson, for establishing the ODG to undertake that work. We also acknowledge and thank all of those who have contributed to this report, including those that participated in the engagement workshops and provided feedback on our draft recommendations, Kāhui Legal, the DOC Te Pae Whakatere Secretariat and others who supported us in our mahi.

It will, however, fall to the current Minister of Conservation, the Hon Kiritapu Allan – whose support for our work is also acknowledged – the NZCA, and the new Director-General, Penny Nelson, to carefully consider the recommendations in our report and determine the road ahead for conservation in Aotearoa New Zealand.

Like the pūriri moth, the ODG has had a relatively short existence and our task was significant, but we hope that this report will propagate the seeds of change that are required for the future of conservation in Aotearoa New Zealand.

Mauriora

Options Development Group

December 2021

Whakarāpopoto / Executive summary

The ODG was established in October 2020, comprising representatives of tangata whenua and conservation boards and three DOC staff as ex officio members. The ODG's primary task was to assess DOC's obligation to give effect to the principles of Te Tiriti (under section 4 of the Conservation Act) as articulated in the General Policies and make recommendations for their amendment. We were also invited to identify any legal or policy limitations affecting how DOC and others fulfil their Te Tiriti responsibilities in the context of conservation and how any such issues might be remedied.

The formation of the ODG and its terms of reference (which are set out in **Appendix 1** of this report) were driven particularly by the Supreme Court's 2018 *Ngāi Tai ki Tāmaki* decision – the first time in over 20 years that the superior courts had considered DOC's responsibilities under section 4 of the Conservation Act.[6]

In the context of the General Policies, the Supreme Court determined that the obligation under section 4 is not trumped by other relevant considerations contained in conservation legislation (as the General Policies had, at that time, stated[7]) and nor is it merely part of a balancing exercise against other relevant considerations, but rather other statutory or non-statutory objectives under conservation legislation must be achieved "to the extent that this can be done consistently with s 4, in a way that best gives effect to the relevant principles of the Treaty".[8]

As the obligations in section 4 apply not only under the Conservation Act but also to all of the other legislation that DOC is responsible for, including the National Parks Act 1980 and the Wildlife Act 1953,[9] the requirement to give effect to the principles of Te Tiriti permeates and must necessarily influence and direct the conservation system broadly.

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6 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368.

7 Prior to the Supreme Court's Ngāi Tai ki Tāmaki decision, Chapter 2 of each General Policy had included the following statement:

> *The Conservation Act 1987, and all the Acts listed in its First Schedule, must be so interpreted and administered as to give effect to the Principles of the Treaty of Waitangi (section 4, Conservation Act 1987). Where, however, there is clearly an inconsistency between the provisions of any of these Acts and the principles of the Treaty, the provisions of the relevant Act will apply.*

In August 2019, following the Ngāi Tai ki Tāmaki decision, the NZCA and Minister each approved a technical amendment to remove this erroneous second sentence from the above text in each General Policy.

8 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at paras [53]–[55] and [77].

9 As recognised by the Court of Appeal in *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533, which related to decisions under the Marine Mammals Protection Act 1978. There are presently 23 other statutes administered by DOC (as set out in Schedule 1 to the Conservation Act 1987) to which the obligations under section 4 apply.

Other important drivers for the ODG's mandate included:

- the need to reform our conservation approach to achieve better biodiversity outcomes;[10]
- the whole of Government strategy to address the issues and recommendations raised in the Waitangi Tribunal Wai 262 (Flora and Fauna) Report, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (***Ko Aotearoa Tēnei***);[11] and
- a general government priority to build closer partnerships with Māori.

As the ODG, we welcomed the opportunity to undertake this important work that goes to the heart of redefining conservation in Aotearoa New Zealand. The relationship between tangata whenua and the conservation estate is deep, enduring and central to the cultural, spiritual, social and economic wellbeing of tangata whenua.

In assessing the General Policies, it became apparent to the ODG that, although section 4 is a powerful Te Tiriti clause, simply amending the General Policies will not be sufficient to give effect to the principles of Te Tiriti. To genuinely give meaning to the principles of Te Tiriti, those principles need to infuse the infrastructure of the entire conservation system. Tinkering with the General Policies in an isolated silo will not fix the broader systemic issues that inhibit the expression and effect of Te Tiriti.

Consequently, the ODG makes both interim recommendations that can be implemented immediately and recommendations that speak to more fundamental reform that can be implemented over the next 5 years. The interim recommendations focus on the redrafting of the General Policies, changes to the delivery of conservation (including those that flow from the redrafting of the General Policies), and building the capability and capacity of DOC and tangata whenua to give effect to Te Tiriti in the conservation system. The fundamental reform recommendations require changes to both legislation and institutional systems, and the resourcing to implement such changes.

The ODG's recommendations are grouped under seven themes. Those seven overarching themes and the ODG's primary recommendations are:

1. **Fundamental reform**: Transform conservation through fundamental reform of the conservation system.
2. **Purpose of conservation**: Reframe the purpose of conservation to ensure it is fit for purpose for Aotearoa New Zealand.
3. **Kawa, tikanga and mātauranga**: Centre kawa, tikanga and mātauranga within the conservation system.

10 As reflected in *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* (Department of Conservation, August 2020).

11 Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) (***Ko Aotearoa Tēnei***).

4. **Lands, waters, resources, indigenous species and other taonga**: Recast the legal status of conservation lands, waters, resources, indigenous species and other taonga.
5. **Te Tiriti partnership**: Reform conservation governance and management to reflect Te Tiriti partnership at all levels.
6. **Tino rangatiratanga**: Enable the devolution of powers and functions including decision making to meaningfully recognise the role and exercise of rangatiratanga.
7. **Resourcing**: Build capability and capacity within DOC and tangata whenua to give effect to Te Tiriti.

Where appropriate, we have also made between one to five sub-recommendations (17 sub-recommendations in total) within each theme which address more detailed ways in which the primary recommendation may be achieved.

While we have included certain recommendations relevant to the redrafting of the General Policies throughout Themes 2–7, we have not included redrafting the General Policies as a separate or explicit overarching recommendation. However, changes to the General Policies are necessarily required as a consequence of the primary recommendations we have made above.

We have also, as expressly required by our terms of reference, proposed a redrafted Chapter 2, entitled "Te Tiriti o Waitangi/Treaty of Waitangi responsibilities", which is set out in **Appendix 2** of this report. It underscores first, the importance of Te Tiriti, and secondly, the pivotal principle of partnership under Te Tiriti as "the overarching tenet from which other key principles have been derived".[12] This redrafting assisted to frame and drive the broader recommendations in our report and we expand on our consideration of Te Tiriti in a separate chapter of this report.

It is not merely the terms of the General Policies and the implementation of those Policies that must give effect to the principles of Te Tiriti, but the General Policies should themselves be developed through an engagement and decision-making process that itself gives effect to the principles of Te Tiriti. We consider that this process must be one founded on, and guided by, Te Tiriti partnership with tangata whenua.

In this latter regard, the ODG also emphasises that the ODG partial review process and this report do not represent an exhaustive expression of, nor do they replace, the ongoing and evolving obligations of partnership under Te Tiriti. The specific recommendations for change – both in terms of the review of the General Policies and more fundamental reform – will need to be further developed within, and in accordance with the obligations that arise from, that Te Tiriti partnership.

12 Cabinet Office Circular *Te Tiriti o Waitangi / Treaty of Waitangi Guidance* (22 October 2019) CO 19/5 at 5.

Te hātepe mō ngā arotake whāiti / Process for partial reviews

Terms of reference

The terms of reference for the partial reviews of the General Policies were confirmed in February 2020 by the Minister of Conservation (the **Minister**) and the NZCA after receiving feedback from tangata whenua. The full terms of reference are set out in **Appendix 1** of this report.[13] The parameters for the partial reviews were to:

- consider how Te Tiriti responsibilities are currently reflected in the General Policies;
- update the description of Te Tiriti principles in the General Policies;
- consider how the General Policies should reflect the recommendations made in the Waitangi Tribunal's 2011 *Ko Aotearoa Tēnei* report;[14]
- identify areas where the two General Policies could be more consistent in the language around Te Tiriti responsibilities; and
- identify if changes are needed to legislation or other policies to remove any limitations to how DOC and others fulfil Te Tiriti responsibilities.

While the terms of reference focused somewhat on redrafting the General Policies, there was also scope for the ODG to inquire into what a Te Tiriti consistent conservation system might look like more broadly. This included whether changes were needed to legislation or other policies (acknowledging that any legislative change would require government agreement and parliamentary support).

Membership

In June 2020, the Director-General of Conservation (the **Director-General**) asked for nominations for people to work with DOC on the ODG. In September 2020, the Director-General appointed to the ODG eight members nominated by whānau, hapū, iwi and Māori organisations, four New Zealand conservation board members, and three DOC ex officio members to undertake the partial reviews. Members of the ODG have subject matter expertise and do not purport to be representative of iwi and hapū. The appointees were:[15]

13 *Giving better effect to the principles of the Treaty of Waitangi Partial reviews of the Conservation General Policy and the General Policy for National Parks: A background paper about the process and main issues* (Department of Conservation, June 2020).

14 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011).

15 For more information, see **www.doc.govt.nz/our-work/partial-reviews-of-conservation-general-policy-and-general-policy-for-national-parks/options-development-groups/members-of-the-options-development-groups/**.

Te ao Māori members	Conservation board members	DOC ex officio members
Hoani Langsbury	Mana Cracknell	Dr Kayla Kingdon-Bebb
Tame Malcolm	Vicky Dombroski	Jeff Flavell
Aroha Mead	Nicole McCrossin	Karl Beckert
Beverley Nawarihi Hughes	Dr Barry Wards[16]	
George Riley		
Dr Valmaine Toki		
Dion Tuuta		
Steven Wilson		

Approach

The ODG held seven 2-day wānanga between October 2020 and July 2021 to develop draft recommendations for change. One of the specific challenges that Ngāi Tai ki Tāmaki (with the support of Ngāi Tahu) set for us was to "push the waka out and be bold" in terms of our thinking when it comes to Te Tiriti partnership and principles in conservation.

Over the course of the review process, the ODG came to appreciate the significant and system-wide inconsistencies between the Crown's Te Tiriti obligations and Aotearoa New Zealand's current conservation system. It became readily apparent that amending the General Policies would not be sufficient to give effect to the principles of Te Tiriti, and nor would such amendments result in the change necessary to reframe and create a more effective conservation system for Aotearoa New Zealand. Our ultimate recommendations accordingly reflect our view of the broader need for transformation within conservation.

16 Due to other personal commitments, Dr Barry Wards withdrew from the ODG prior to the final report being completed.

In carrying out our task and developing our recommendations, the ODG reviewed and gave careful consideration to:

- primary legislation, including the Conservation Act 1987 and the 23 other statutes set out in Schedule 1 of that Act, which DOC administers;[17]
- wider DOC policy settings, including the General Policies, previous DOC draft policies,[18] and DOC statements on Te Tiriti;[19]
- general government policy and independent advice, including government guidance on Te Tiriti,[20] current biodiversity strategies and information,[21] and reports such as *He Puapua*;[22]
- domestic case law and an extensive number of Waitangi Tribunal reports;[23] and
- relevant international instruments and resolutions.[24]

These matters are further discussed, where most relevant to the partial reviews, in more detail in this report.[25]

17 The General Policies explicitly contain unified policy to implement the Conservation Act 1987 and the following Acts which are presently set out in Schedule 1 of the Conservation Act 1987: National Parks Act 1980; Wildlife Act 1953; Marine Reserves Act 1971; Reserves Act 1977; Wild Animal Control Act 1977; and Marine Mammals Protection Act 1978. The remaining Acts in Schedule 1 (to which the section 4 obligations also apply) are Canterbury Provincial Buildings Vesting Act 1928; Game Animal Council Act 2013; Harbour Boards Dry Land Endowment Revesting Act 1991; Kapiti Island Public Reserve Act 1897; Lake Wanaka Preservation Act 1973; Mount Egmont Vesting Act 1978; Native Plants Protection Act 1934; Ngāi Tahu (Tūtaepatu Lagoon Vesting) Act 1998; Queen Elizabeth the Second National Trust Act 1977; Queenstown Reserves Vesting and Empowering Act 1971; Stewart Island Reserves Empowering Act 1976; Sugar Loaf Islands Marine Protected Area Act 1991; Trade in Endangered Species Act 1989; Tutae-Ka-Wetoweto Forest Act 2001; Waitangi Endowment Act 1932–33; Waitangi National Trust Board Act 1932; and Waitutu Block Settlement Act 1997. Schedule 1 also included the West Coast Wind-blown Timber (Conservation Lands) Act 2014 until it was repealed in 2019.

18 For example: *Ngā Akiakitanga Nuku Kaupapa Māori ā Te Papa Atawhai (Kaupapa Māori Strategic Policy Initiatives)* (Department of Conservation, February 2001).

19 For example, *2014 Statement of Treaty principles* (Department of Conservation, 2014).

20 Cabinet Office Circular *Te Tiriti o Waitangi / Treaty of Waitangi Guidance* (22 October 2019) CO 19/5.

21 *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* (Department of Conservation, August 2020).

22 *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* (1 November 2019).

23 This case law and relevant Waitangi Tribunal reports are discussed in more detail later in this report in the "Te Tiriti o Waitangi / Treaty of Waitangi" section.

24 For example, *United Nations Declaration on the Rights of Indigenous Peoples* (GA Res 61/295, 2007) and the resolutions and standards of the International Union for the Conservation of Nature.

25 A full list of references is included at the end of this report; refer "Ngā tohutoro / References".

Within our terms of reference and set engagement parameters and requirements, and with the support of a DOC secretariat, we were able to determine our own method for developing draft recommendations. We applied a conventional policy analysis lens, including the use of intervention logic models, to assess the policy issues and develop recommendations. This involved identifying the current state of play and a desired future state within a Te Tiriti responsibilities framework. A gap analysis was then undertaken so that policy objectives could be developed to "close the gap", align with Te Tiriti responsibilities and make recommendations directed to achieving change.

The ODG initially identified four primary themes, which included:

- Te Tiriti o Waitangi framework;
- partnership approaches to conservation;
- use and access to resources; and
- mātauranga and biodiversity outcomes.

Working groups were established for each of these themes to develop options and recommendations. The draft recommendations from each working group were then collated and refined by the ODG as a whole, before being synthesised into a set of high-level draft recommendations to be tested through engagement hui.

Engagement

Our draft recommendations were tested in a series of targeted hui and workshops held across the motu and online from April to June 2021.[26] These hui and workshops comprised:

- 20 hui with whānau, hapū and iwi;
- 13 hui with the conservation boards;
- 1 hui with conservation stakeholder groups; and
- 1 hui with the NZCA.

Feedback and discussion were recorded at the hui and later collated for our consideration. Members of the ODG are grateful for the time taken by those who participated in our hui and for the feedback we received both during and after these hui; it has been vital in informing this report.

The key messages that we received from the engagement hui and written responses are set out in **Appendix 4** of this report. Some of the common feedback that we received included:

- general positive support for the need for both fundamental reform and meaningful interim changes;

26 In person hui were held in Rāpaki; Ōtākou; Te Tau Ihu (Motueka); Tauranga; Rotorua; Whakatāne; Wairoa; Kerikeri/Te Tai Tokerau; Gisborne; Whanganui; Manawatu; Hawke's Bay; Taranaki; Thames; and Hamilton.

- that the recommendations should be progressed as a complete package (noting interim recommendations should be pursued immediately);
- that there is a need to reflect contemporary issues including climate change and biodiversity outcomes so that we can create solutions for these together;
- general frustration with how DOC is delivering on its Te Tiriti responsibilities;
- concern with how the recommendations will be received by the wider public and acknowledgement that care needs to be taken to bring the public along, giving them comfort and knowledge, on this journey; and
- desire to be involved in the implementation process and ensure that an implementation pathway is responsive to different circumstances and places around the motu.

All feedback was considered by the ODG before our recommendations were finalised for inclusion in this report.

Constraints

The ODG has sought to be ambitious and wide-ranging in our recommendations to truly reflect what it means to give effect to Te Tiriti in a conservation context. That is what is required of DOC. In making our recommendations, we have tried to strike a balance between broader sweeping transformational change and specific suggestions to amend the General Policies and the delivery of conservation within the current legislative framework.

In undertaking this balancing exercise, we were selective in our focus as there was insufficient time to make comprehensive recommendations on the full suite of conservation-related legislation and policies and other current processes were beyond our terms.[27] We therefore targeted key issues at the heart of the change that is required. To ensure that Te Tiriti is given effect throughout the conservation system, we consider that a more extensive technical review process is required within the wider work programme leading to fundamental reform. Acknowledging the importance of the partnership under Te Tiriti, tangata whenua should be intimately involved in the design, conduct and implementation of that further review process.

In making this last point regarding the process for further review, several iwi expressed concern that the ODG process did not in their view reflect a Te Tiriti partnership.[28] Some iwi also expressed a preference that DOC work with them directly on the partial reviews of the General Policies rather than through an independent review panel.

27 For example, the ODG is aware of several review workstreams that DOC is currently undertaking in addition to the partial reviews of the General Policies, including the review and reclassification process for stewardship lands and the management planning systems review.

28 Some iwi expressed concerns that the engagement hui felt rushed, that information was not circulated prior to the hui to allow iwi to meaningfully engage, and that there was not adequate awareness and promotion of the importance of the work being done.

The ODG is empathetic to these concerns and we reiterate our gratitude for the quality of engagement of those iwi and others who were able to participate in parts of our process. We also note the process for reviewing and amending the General Policies is dictated by the Conservation Act and National Parks Act and, within those constraints, DOC has made its best effort to ensure the establishment and work of the ODG is consistent with its obligations under Te Tiriti. However, there is always room for improvement and we emphasise that this report and the ODG's partial reviews process do not replace the need for DOC to engage directly on these issues and give effect to Te Tiriti partnership moving forward.

This report provides a starting point to inform change with the goal of upholding and giving best effect to Te Tiriti in conservation. We affirm the importance of direct engagement with tangata whenua both to finalise the outcomes of the ODG partial reviews process and to design and implement any further, more transformative changes that ensue.

The ODG notes that in August 2021 the Environmental Defence Society (**EDS**) published a report entitled *Conserving Nature: Conservation Reform Issues Paper*, which also identifies issues with the present conservation management system and the need for urgent reform. The EDS report was released after the substantive completion of the ODG's work and it was beyond the reasonable scope and capacity of the ODG to comprehensively review and comment on its contents. However, as a broad assessment, it appears that there is significant consistency between many of the concerns identified by the ODG and those identified by the EDS. In particular, we note the EDS' identification of [a] significant implementation gap in giving effect to the principles of Te Tiriti and fundamental misalignment between current conservation practice and mātauranga Māori"[29] and its view that any new conservation system for Aotearoa New Zealand should, among other things:[30]

- implement and support the Crown's enduring partnership with Māori;
- recognise tangata whenua (iwi, hapū and whanau) as rangatira and kaitiaki; and
- recognise the role of mātauranga.

Next steps

In terms of the process going forward, this report is being presented to the Director-General who will then consult with the Minister and the NZCA on its recommendations. Our hope and expectation is that this report will become publicly available as soon as possible.

29 Environmental Defence Society, *Conserving Nature: Conservation Reform Issues Paper* (August 2021) at 144.

30 Environmental Defence Society, *Conserving Nature: Conservation Reform Issues Paper* (August 2021) at 153.

In terms of the ODG's recommendations insofar as they relate to the General Policies themselves, the Director-General is legally required to publicly notify any proposed changes to the General Policies. It is therefore anticipated that once the Minister and the NZCA have given feedback on the ODG's recommendations, any proposed revisions to the General Policies will be drafted and then subject to public consultation, including engagement with tangata whenua. The final decision-makers for any changes to the General Policies are the Minister (for the Conservation General Policy) and the NZCA (for the General Policy for National Parks) who will review any feedback received and make any further changes necessary before approving the final form of the General Policies.

However, in terms of consideration and adoption of the recommendations in this report, it is the aspiration and intention of the ODG that the recommendations should be viewed as a whole package. The recommendations are overlapping and, in the view of the ODG, selecting specific recommendations in isolation would not result in the more fundamental and system-wide change required to give best effect to the principles of Te Tiriti.

To ensure that change can at least begin to be made in the immediate term, the ODG's recommendations have been grouped into:

(a) interim recommendations that can be implemented immediately (following engagement with tangata whenua); and

(b) more fundamental reform recommendations that can be implemented over the slightly longer period of the next 5 years.

Our interim recommendations concern:

- redrafting the General Policies;
- changing the delivery of conservation (including those changes that flow from the redrafting of the General Policies); and
- building the capability and capacity of DOC and tangata whenua to give effect to Te Tiriti in the conservation system.

Our fundamental reform recommendations concern legislative and wider system changes, and the resourcing of such changes. However, the ODG anticipates that initial steps towards these more fundamental changes should still commence immediately with a view to implementation within the 5 years. Needless to say, if fundamental review and reform do occur, the future status of the General Policies will also need to be determined.

Finally, in terms of process going forward, the ODG emphasises that te taiao and conservation are of such significance to tangata whenua that any changes, whether to the General Policies or more fundamentally, should be progressed in partnership with tangata whenua. As the Waitangi Tribunal affirmed in its *Ko Aotearoa Tēnei* report:[31]

> *Given the importance of the environment under DOC control to the survival of the Māori culture, Treaty principle requires that partnership and shared decision-making between the Department and kaitiaki must be the default approach to conservation management.*

The issue of who the Crown should engage with as the Te Tiriti partner does not always have an easy answer. While noting the 2018 Cabinet approved "Guidelines for engagement with Māori", which provides some assistance when considering the issue of engagement in accordance with the principles of Te Tiriti,[32] the ODG considers that the future engagement required in the present context sits at very high end of the spectrum and requires co-design and meaningful partnership with tangata whenua. The ODG's recommendations traverse matters of local, regional and national significance, so that engagement with whānau, hapū, iwi and other Māori organisations with relevant interests in te taiao and conservation is required, in addition to any public consultation or consultation with Māori generally.

We consider that the Minister should engage with tangata whenua at the very beginning of any reform process and before any material policy decisions are made to determine the potential for an advisory body appointed by tangata whenua to work with the Minister and DOC to:

(a) develop a co-design process for the fundamental review of the conservation system; and

(b) guide and drive that review and the implementation of any reform outcomes.

31 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011), Volume 1 at 372.

32 Te Arawhiti, *Guidelines for engagement with Māori* (October 2018).

Ngā whakaohooho / Why is reform required?

The current conservation model in Aotearoa New Zealand is not working

Biodiversity in Aotearoa New Zealand is in a state of crisis and our indigenous ecosystems and species are in a rapid state of decline.[33] There are around 4,000 species that are threatened or at risk of becoming extinct, which means we could lose more than 80 percent of our reptiles, frogs, bats and birds.[34] Furthermore, 59 of our bird species have disappeared since humans first arrived here and we continue to lose fundamental ecosystems and habitats like tussock grasslands, sand dunes, indigenous scrubland and indigenous forests,[35] with less than half of Aotearoa New Zealand remaining in indigenous vegetation cover.

DOC is responsible for one-third of lands and waters in Aotearoa New Zealand and is currently the key player in biodiversity and conservation efforts. That equates to more than 8 million hectares and includes native forests, rivers, mountains, wetlands, and other landscapes and ecosystems. Although our country has an unusually large land conservation estate, under generations of Crown administration biodiversity has continued to decline and there are some areas, such as the Raukūmara forest, that have been severely neglected.[36] The currently underfunded and Crown-centric model of conservation is not living up to DOC's vision that Papatūānuku (Earth mother) thrives.

Opportunity to create a unique Aotearoa New Zealand approach to conservation

Many New Zealanders feel a strong connection to our indigenous ecosystems and species. We have a collective responsibility to safeguard our biodiversity for present and future generations.

In line with Te Tiriti, as a nation we need to redefine and adopt a unique ethic and practice of conservation that is apt and effective for Aotearoa New Zealand.

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33 *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* (Department of Conservation, August 2020) at 12–13.

34 *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* (Department of Conservation, August 2020) at 4–5 and 18. See also *New Zealand's Environmental Reporting Series: Our Land 2018* (Ministry for the Environment and Stats NZ, April 2018); and *New Zealand's Environmental Reporting Series: Environment Aotearoa 2019* (Ministry for the Environment and Stats NZ, April 2019).

35 *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* (Department of Conservation, August 2020) at 17. See also *New Zealand's Environmental Reporting Series: Our land 2018* (Ministry for the Environment and Stats NZ, April 2018); and *New Zealand's Environmental Reporting Series: Environment Aotearoa 2019* (Ministry for the Environment and Stats NZ, April 2019).

36 See, for example, Veronika Meduna, "How to fix the Raukūmara" *(New Zealand Geographic*, January–February 2021).

Tangata whenua have a deep and enduring relationship and understanding of the natural world and te taiao (the environment). The identity, culture and mātauranga of tangata whenua are intimately linked to the natural environment of Aotearoa New Zealand. In te ao Māori, all things, animate and inanimate, are connected by whakapapa (kinship) and the people see themselves as an intrinsic part of the natural environment as they are connected to it through whakapapa. This whakapapa extends back to the primordial parents Ranginui (sky father) and Papatūānuku and their kin, most of which represent features of the natural world.

For tangata whenua, all elements of nature, including birds, plants, rivers, lakes and mountains, are their whanaunga (ancestral kin) and have a mauri (life essence). This entails obligations to care for, nurture and protect the natural world, as reflected in the concept of kaitiakitanga. The ethic and obligation of kaitaikitanga is related to the interconnected whakapapa relationship that tangata whenua have to te taiao. This relationship is a reciprocal one with the overall aim of balance. Use of the natural environment is essential for the wellbeing of tangata whenua as people and is critical for cultural survival. Conversely, the health of the environment is reliant on the wellbeing of the people and their ability to look after it.

Tangata whenua, and their tikanga and mātauranga, have historically been overlooked in conservation management and decision making. This is to the detriment of indigenous biodiversity. However, DOC increasingly appreciates that even the limited involvement of tangata whenua in conservation management to date has produced beneficial results.[37] This is reflected in the strategic direction outlined in *Te Mana o Te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020*.[38] It is also supported by international research that suggests that lands owned or managed by Indigenous peoples have better environmental outcomes than those that are not.[39]

The ODG considers that a conservation model for Aotearoa New Zealand would appropriately draw on mātauranga and tikanga and have indigenous biodiversity and Te Tiriti at its centre. Section 4 of the Conservation Act already provides a strong backbone in the form of a legislative directive upon which a conservation framework for the future can be built. Giving effect to Te Tiriti and its principles is the starting point for reconsidering and redefining how we do conservation in Aotearoa New Zealand, so that our environment and our relationships with the natural world can flourish.

The current conservation crisis is too big for any one of us to address on our own. Genuine partnership with tangata whenua and collaboration with others is the only viable solution. This will ultimately benefit the environment and all of Aotearoa New Zealand.

37 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011), Volume 1 at 346.

38 *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* (Department of Conservation, August 2020).

39 See, for example, ES Brondizio, J Settele, S Díaz, and HT Ngo (eds), *Global Assessment Report* on *Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (Intergovernmental Platform on Biodiversity and Ecosystem Services, 2019).

Impetus for change

There has long been a call from the community for changes to be made to the conservation system. This need was recently reinforced in the EDS report, *Conserving Nature: Conservation Reform I ssues Paper*. The ODG's work, and the further work and change that the ODG says should follow, is long overdue.

As already noted, a key driver for the partial reviews was the Supreme Court's decision in *Ngāi Tai ki Tāmaki*.[40] In that case, Ngāi Tai ki Tāmaki challenged DOC's granting of two commercial concessions for guided walking tours on Motutapu and Rangitoto islands. The Supreme Court considered DOC's responsibilities under section 4 of the Conservation Act and found that DOC did not properly give effect to the principles of Te Tiriti in its decision to grant the concessions because DOC failed to properly consider the economic interests of Ngāi Tai ki Tāmaki and mana whenua and the possibility of affording them a preference.[41] The Court directed DOC to reconsider their decisions in light of its judgment.[42]

Although this case was specifically about concessions, at its heart was the meaning, strength and effect of section 4. In this respect, the Supreme Court stated:[43]

> *[54] We acknowledge that s 4 does not exist in a vacuum and a number of other factors must be taken into account in making a decision on a concession application. For example, in the present case, the direction given in s 4 must be reconciled with the values of public access and enjoyment in the Reserves Act designations relating to the Motu. … But s 4 should not be seen as being trumped by other considerations like those just mentioned. Nor should s 4 merely be part of an exercise balancing it against the other relevant considerations. What is required is a process under which the meeting of other statutory or non-statutory objectives is achieved, to the extent that this can be done consistently with s 4, in a way that best gives effect to the relevant Treaty principles.*
>
> *[55] How these observations are applied to a particular decision will depend on which Treaty principles are relevant and what other statutory and non-statutory objectives are affected.*

40 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368.

41 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at para [73].

42 In 2020, DOC retook one of the concession decisions at issue in the *Ngāi Tai ki Tāmaki* case. Upon review, it was decided that the application should have been declined. In light of the Supreme Court's guidance, it was determined that the decision-maker wrongly excluded taking preference or economic interests for mana whenua into account in the initial decision, when it was required under section 4 of the Conservation Act. The other concession application at issue in the case was withdrawn.

43 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at paras [54]–[55].

Furthermore, in respect of the General Policies themselves, the Supreme Court commented that:[44]

> *[76] The Conservation General Policy published by DOC includes the following statement under the heading "Treaty of Waitangi Responsibilities":*
>
> > *The Conservation Act 1987, and all the Acts listed in its First Schedule, must be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi (section 4, Conservation Act 1987). Where, however, there is clearly an inconsistency between the provisions of any of these Acts and the principles of the Treaty, the provisions of the relevant Act will apply.*
>
> *[77] We disagree with that statement, which effectively says s 4 is trumped by other statutory provisions. As noted earlier, what is required is that those other statutory provisions be applied consistently with the s 4 requirement.*

The Supreme Court decision therefore confirmed that section 4 is a "powerful" Te Tiriti clause that should not be narrowly construed.[45] As such, DOC must give effect to the principles of Te Tiriti in every aspect of its work, and the section 4 obligation applies to and therefore must inform and influence the entire operation of conservation legislation (including the administration of the 24 Acts for which DOC is responsible).[46] The *Ngāi Tai ki Tāmaki* decision was a timely reminder and direction that the Courts were prepared to enforce the section 4 legislative anchor that centralises Te Tiriti in conservation in Aotearoa New Zealand.

Another driver for the partial reviews was the Government's strategy announced in August 2019 to address the issues and recommendations raised in the Waitangi Tribunal's 2011 *Ko Aotearoa Tēnei* report. *Ko Aotearoa Tēnei* is a significant report that followed a wide-ranging Tribunal inquiry that, in very broad terms, addresses the place of Māori culture, identity and traditional knowledge in Aotearoa New Zealand's laws and in government policies and practices. Chapter 4 of *Ko Aotearoa Tēnei* specifically considers DOC's responsibilities regarding conservation issues related to Te Tiriti.

The Waitangi Tribunal found that despite the Conservation Act containing in section 4 one of the strongest legislative requirements in terms of the Crown being required to give effect to its Te Tiriti obligations, the principles of Te Tiriti were not adequately reflected in DOC's guiding policies and, as a result, they did not adequately infuse DOC's day-to-day work. Having regard to the *Ngāi Tai ki Tāmak*i decision and the feedback that we received during our engagement, it is not apparent that matters have materially improved since 2011.

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44 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at paras [76]–[77].

45 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservatio*n [2018] NZSC 122, [2019] 1 NZLR 368 at para [52].

46 As set out in Schedule 1 of the Conservation Act 1987, noting that the earlier decision of the Court of Appeal in *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 558 and 560 confirmed the application of section 4 to those Schedule 1 statutes.

The Waitangi Tribunal made several recommendations in its *Ko Aotearoa Tēnei* report relevant to conservation, including amending the General Policies, with recommendations concerning:[47]

- the involvement of iwi and hapū in conservation decision making and partnership with DOC;
- the reflection of the Te Tiriti principles in the General Policies;
- the co-management of customary use (harvest of and access to flora and fauna);
- the ownership of protected wildlife and taonga works derived from protected wildlife; and
- commercial activity on the conservation estate and a reasonable degree of preference for tangata whenua interests in taonga.

In making our recommendations as the ODG, we drew on several of the Tribunal's recommendations in *Ko Aotearoa Tēnei*. We did not, however, adopt the Tribunal's recommendations in their entirety. While *Ko Aotearoa Tēnei* provides valuable direction, there have been further developments in jurisprudence and thinking in the intervening 10 years since that report was released.

47 Waitangi Tribunal, *Ko Aotearoa Tēnei*, Volume 1 at 372–373.

Te pou tarāwaho onāianei / Existing conservation framework

Conservation Act 1987

In the mid-1980s, there was a major restructuring of Aotearoa New Zealand's conservation estate that culminated in the Conservation Act 1987 and the creation of DOC to take over the conservation functions previously exercised by a number of other agencies.[48]

Under the Conservation Act, DOC became responsible for administering the National Parks Act 1980 and another 22 Acts listed in Schedule 1 of the Conservation Act.[49] Conservation legislation establishes the administrative framework for the management of public conservation lands and waters, and historic and natural resources, including protected species, in Aotearoa New Zealand. The 25 Acts under DOC's control have only been tinkered with since they came into force and there has been no attempt to rethink or update the fundamental policy positions behind them.[50]

Of particular note is that there is no explicitly stated purpose in the Conservation Act 1987. The long title to the Act states that it is "[a]n Act to promote the conservation of New Zealand's natural and historic resources, and for the purpose to establish a Department of Conservation". The definition of conservation in the 1987 Act is:[51]

> ***conservation*** *means the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations*

48 This included the Department of Lands and Survey, the New Zealand Forest Service, and the Wildlife Service. See Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011) at 298; and Waitangi Tribunal, *Te Urewera Report* (Wai 894, 2014) Volume 5 at 2255.

49 See footnote 17 above for a list of these statutes.

50 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011) at 299.

51 Conservation Act 1987, section 2.

This reflects a Eurocentric preservation and protection ethic that was first introduced in Aotearoa New Zealand in the second half of the 19th century as the Waitangi Tribunal discussed in its *Te Urewera* report, where it considered the antecedents to the establishment of the Te Urewera National Park.[52] Māori are not alone internationally in terms of the adverse effects of colonisation and associated "western" perspectives of conservation on indigenous rights, interests, values and wellbeing. Consistent with international experience, this history and ideology has seen tangata whenua, like Indigenous peoples in other nations with a colonial past, dislocated and disconnected from their lands and waters through conservation policy, with adverse consequences for both tangata whenua and the environment, which has in turn led to calls for an approach which, in effect, "decolonises conservation".[53] In Aotearoa New Zealand, that process must have Te Tiriti and its principles as its touchstone.

The primary functions of DOC are set out in section 6 of the Conservation Act, including to manage, advocate for and promote the conservation of natural and historic resources, preserve and protect freshwater fisheries and habitats, provide conservation information, foster recreation, allow tourism, and advise the Minister on conservation matters. The Conservation Act establishes governance and advisory bodies such as the NZCA, conservation boards[54] and Fish and Game councils, which allow for representation of interests at national and regional levels. The Minister appoints members to the NZCA and conservation boards. The NZCA is comprised of 13 members, one of which is nominated by Ngāi Tahu.[55] In addition, Te Tiriti settlements have put in place specific arrangements for tangata whenua representation on 10 out of 15 conservation boards.

However, the reality remains that apart from individual Te Tiriti settlements (for example, Te Urewera and Te Awa Tupua) and the as yet unfulfilled promise in section 4 of the Conservation Act, tangata whenua have had very limited visibility, and little material input and influence within the conservation system.

52 Waitangi Tribunal, *Te Urewera Report* (Wai 898, 2017), Volume 5, Chapter 16 (Te Kapua Pouri – Te Urewera National Park) and Volume 7, Chapter 21 (Ka Koingo Tonu Te Iho o te Rohe – Environment and Waterways).

53 See, for example, Lara Domínguez and Colin Luoma, "Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment" (2020), ***Land 9***(3) at 65.

54 There are currently 15 conservation boards across the motu and each board can have no more than 12 members. Members are appointed for experience and expertise in conservation, natural earth and marine sciences, and recreation. The Minister must have regard to the interests of tangata whenua of the area when making appointments. Treaty settlements have put in place specific arrangements for tangata whenua representation on 10 conservation boards.

55 The Te Rūnanga o Ngāi Tahu nomination reflects the fact that the major proportion of public conservation land, including eight national parks, is within the takiwā of Ngāi Tahu.

Ngā Akiakitanga Nuku Kaupapa Māori ā Te Papa Atawhai

In 2001, DOC developed a suite of draft policies to enhance its ability to build and support partnerships with tangata whenua. The draft policies were called *Ngā Akiakitanga Nuku Kaupapa Māori ā Te Papa Atawhai (Kaupapa Māori Strategic Policy Initiatives) (**Ngā Akiakitanga**)* and consisted of four policy papers:[56]

- *Giving Effect to the Principles of the Treaty of Waitangi in the work of the Department of Conservation: Policy Guidelines;*
- *Wāhi Tapu Policy Guidelines;*
- *Customary Use of Indigenous Plants, Animals and Traditions Materials: Policy Guidelines; and*
- *Te Kete Taonga Whakakotahi, a conservation partnerships toolbox.*[57]

Final drafts of *Ngā Akiakitanga* were prepared following consultation with tangata whenua and key stakeholders, and they informed the development of the first iteration of the General Policies. However, *Ngā Akiakitanga* were never formally adopted and have been sitting idle for 20 years. Despite their age, the papers within *Ngā Akiakitanga* address many of the key issues in the partial reviews and they were considered closely by the ODG in the partial reviews process.

General Policies

The Conservation General Policy and General Policy for National Parks were created in 2005, but the existence of such policy was envisioned from the time of the passage of the Conservation Act in 1987. The General Policies set the vision and direction for how DOC fulfils its responsibilities under conservation legislation, including how DOC:

- works with tangata whenua and the wider community, including managing public access or recreational activities in certain areas;
- identifies the issues and opportunities relating to conservation values, and prioritises conservation work nationally and within regions;
- sets conservation objectives, policies, outcomes and milestones for specific places;
- considers applications for concessions and permits (and similar decisions related to authorising activities); and

56 *Ngā Akiakitanga Nuku Kaupapa Māori ā Te Papa Atawhai (Kaupapa Māori Strategic Policy Initiatives)* (Department of Conservation, February 2001).

57 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011) Volume 1 at 328–329: The *Kete* is a guidance document intended to assist staff to develop relationships, rather than a formal policy document that must be followed. The *Kete* describes a 'partnerships continuum', ranging from informing and consulting to involvement in decision making, all the way to devolution of authority and transfer of title. It refers to 'partnership concepts' as covering five areas: building relationships; involvement in consultation processes; participation in decision-making; delegation and devolution of decision-making authority; and sharing in practical conservation activities.

- classifies land for particular conservation purposes.

The Conservation General Policy is approved by the Minister and contains unified policy to implement six pieces of legislation: the Conservation Act 1987; Wildlife Act 1953; Marine Reserves Act 1971; Reserves Act 1977; Wild Animal Control Act 1977; and Marine Mammals Protection Act 1978. It provides guidance for the administration and management of all lands and waters and all natural and historic resources managed under the above Acts (excluding reserves administered by other agencies under the Reserves Act 1977). It sits above and guides conservation management strategies, conservation management plans and sports fish management plans.

The General Policy for National Parks is approved by the NZCA and implements the National Parks Act 1980. It provides guidance for administering national parks across the country through conservation management strategies and national park management plans.

A close relationship exists between the two General Policies, owing to the common administration by DOC, shared boundaries between national parks and other public conservation lands and waters, and the passage of species between different places regardless of land status. Therefore, the General Policies cover many of the same topics to ensure integrated and coherent management. This includes a replica Chapter 2 in both General Policies that is titled "Treaty of Waitangi responsibilities" and guides DOC on how to give effect to the principles of Te Tiriti.

The current principles identified in Chapter 2 are limited to:

- the principle of government;
- the principle of self management;
- the principle of equality;
- the principle of reasonable cooperation; and
- the principle of redress.

This list of Te Tiriti principles has been taken from the Government's 1989 publication "*Principles for Crown Action on the Treaty of Waitangi*". The glossary in the General Policies, wrongly in the ODG's view, states that the term "Principles of the Treaty of Waitangi" means "The principles of the Treaty of Waitangi identified from time to time by the Government". To the contrary, the principles of Te Tiriti are not for determination or identification by the Crown, but rather arise from extensive consideration and articulation of the principles by the Courts and Waitangi Tribunal, which are continually evolving as Te Tiriti is a living document.

Te Tiriti settlements

For over 25 years, the Crown and tangata whenua have been engaged in a process of settling historical Te Tiriti claims and grievances. As of 30 June 2021, there were 94 negotiated Te Tiriti settlements (81 with settlement legislation enacted and 13 with a signed deed of settlement), with most of those featuring conservation redress. Approximately 30 further settlements are yet to be concluded (21 currently under negotiation and the remainder either only having deeds of mandate recognised or yet to commence negotiation).[58]

Conservation redress is often an important part of Te Tiriti settlement redress for iwi and hapū (with conservation protocols and the vesting of certain conservation land sites being the most universal form of such redress) and it forms an important part of the way that conservation is managed in Aotearoa New Zealand. However, there is also significant variation in the nature and relative degree and strength of conservation redress across Te Tiriti settlements which gives rise to its own challenges and potential inequities.

To date, DOC responsibilities through cultural redress packages have included the following conservation-related instruments:

- **Return of ownership of public conservation land**, which is commonly subject to a range of conservation protections depending on its conservation values (for example through a reserve classification or a conservation covenant). It is rare for land to be returned unencumbered. As at August 2018 (being the latest date on which figures were readily available to the ODG), more than 720 sites had been transferred to iwi comprising approximately 39,000 hectares as shown in the table below, with a further 32,000 hectares being symbolically transferred to iwi and then "gifted back" to the Crown.

Land returned to iwi through settlement	38,252.51 hectares
Land returned to iwi and then "gifted back" to the Crown	32,375.49 hectares
Land returned jointly to iwi	556.03 hectares

  However, these figures can be starkly contrasted with the amount of land that tangata whenua owned and controlled around 1840, which was over 26 million hectares (i.e. most of Aotearoa New Zealand). 95 percent of this land was subsequently lost through confiscation, private and Crown purchasing, and the operations of the Native Land Court, many of which actions have been subsequently found by the Waitangi Tribunal to have been in breach of the principles of Te Tiriti.

- **Increased participation in co-governance/co-management of conservation land**, either for specific places or across a whole rohe.

58 *Te Arawhiti, Te Kāhui Whakatau (Treaty Settlements) 12 Month Progress Report,* 1 July 2020 – 30 June 2021.

Co-authored chapters in Conservation Management Strategy (CMS)	7 settlements
Conservation Management Plan (CMP) approval	6 settlements
Joint Te Papa Atawhai – Iwi Statutory Committees/Boards	1 governance/management board – Te Urewera 1 Conservation board – Te Hiku 7 committees/boards over public conservation land / iwi-owned protected land 3 wider multi-agency bodies in which DOC is a participant

- **Statutory instruments to recognise iwi values** in respect of Crown-owned land administered by DOC.

Overlay classifications[59]	101 across 35 settlements
Statutory acknowledgements[60]	889 across 56 settlements
Deeds of recognition[61]	479 across 46 settlements

- **Relationship documents**, commonly protocols, accords or relationship agreements with the Minister and Director-General, providing a framework for future engagement: 62 settlements (which also include cultural harvest provisions in a few cases[62]).

59 Overlay classifications generally recognise iwi statements of values, set protection principles that DOC and the NZCA must have particular regard to, and guide actions the Director-General must undertake at the site.

60 Statutory acknowledgments are often linked to iwi statements of significance and enhance the ability of an iwi to participate in specified Resource Management Act 1991 and Heritage New Zealand Pouhere Taonga Act 2014 processes.

61 Deeds of recognition, which are also often linked to iwi statements of significance, generally comprise an acknowledgement by the Minister of Conservation of the cultural associations of an iwi with a particular site or area and an agreement to consult and have regard to the views of an iwi in relation to matters relating to that site or area.

62 For example, there is provision for a flora cultural harvest plan within conservation protected areas in section 63 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

Recently, Te Tiriti settlements have also resulted in the legal re-designation of areas or natural resources as legal entities or legal persons in their own right. To date, this includes Te Urewera (which was previously a national park) and Te Awa Tupua (which comprises the whole of the Whanganui River and its tributaries, including those parts within the conservation estate).[63] However, a similar re-designation of Taranaki Maunga as a legal person, which will include the present Egmont/Taranaki National Park, is presently in the final stages of negotiation between the Crown and Ngā Iwi o Taranaki.[64]

As can be seen, conservation redress received across Te Tiriti settlements is seemingly ad hoc and often based on the confluence of events and other factors at the point of settlement of each individual group. This includes varying priorities (both of the settling group and the Crown), the politics at play at the time, the history of the settling group and the perceived relativity or severity of their grievances, and even the individual dynamics and expertise/experience of the negotiators.

Conservation redress mechanisms have also developed and expanded significantly over time, with the initial 1995 Waikato Raupatu Lands Settlement containing no "cultural redress" as it has since become known. Accordingly, many early Te Tiriti settlements did not include the types of relationship redress (such as a natural resource being deemed to have legal personality or being subject to innovative co-governance and co-management arrangements) that have subsequently been obtained by some groups.

In these circumstances, the ODG sees Te Tiriti settlements as reflecting a negotiated position that can provide a starting point for a Te Tiriti relationship at a base, and certainly that should not be derogated from as a basic principle. However, such Te Tiriti settlement redress relating to conservation should not be viewed as an exhaustive expression of the relationship and associated rights and responsibilities between the Crown and iwi and hapū under Te Tiriti (just as iwi post-settlement governance should not reasonably be seen as usurping the customary rights and interests and exercise of mana by the hapū and marae within an iwi). That relationship and those rights and interests under Te Tiriti go well beyond the terms of any Te Tiriti settlement. Similarly, he Crown's obligations under Te Tiriti are not frozen at any particular point in time or limited to any single document. Instead, settlements merely provide a base to build upon and the relationship between tangata whenua and the Crown under Te Tiriti should continue to develop and grow as the principles of Te Tiriti demand.

63 Te Urewera Act 2014, sections 11–13; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, sections 12 and 14.

64 *Te Anga Pūtakerongo*, Record of Understanding between the Crown and Ngā Iwi o Taranaki, dated 20 December 2017, clause 5.2.

Te Tiriti is a living relationship and DOC has a legislative responsibility to give effect to the principles of Te Tiriti regardless of whether a formal Te Tiriti settlement is in place or not. The way DOC gives effect to the principles of Te Tiriti accordingly needs to be transparent, equitable and consistent at a national level, while also allowing for flexible relationships and arrangements to be agreed between the Crown and iwi and hapū at a local level through both Te Tiriti settlements and the ongoing expression and exercise of kawa, tikanga and mātauranga as guaranteed under Te Tiriti.

Ngā take whakarae / Key concerns with the existing framework

The Conservation Act contains one of the strongest legislative requirements for the Crown to give effect to its Te Tiriti obligations. However, the Waitangi Tribunal has found that the principles of Te Tiriti, as they have been defined by the Courts and by the Waitangi Tribunal, are not adequately reflected in DOC's guiding policies and, as a result, they do not adequately infuse DOC's day-to-day work.[65]

As recognised by the Waitangi Tribunal:[66]

> *Since DOC controls access to and relationships with these taonga, it sits between Māori and their exercise of kaitiakitanga. In other words, it controls the relationship between Māori and the places and species among which their culture developed. And, while DOC is required by legislation to give effect to these principles of the Treaty, many Māori see the department as actually preventing the enjoyment of article 2 rights.*

In 2001, DOC developed a short paper that summarised the messages received from consultation with tangata whenua over the preceding 10 years. The consistent messages DOC heard at that time were:

- **Te Tiriti claims**: The resolution of Te Tiriti claims are a priority for tangata whenua;
- **Section 4**: DOC needs to deliver on section 4 of the Conservation Act. Fundamental to this is tangata whenua being distinguished as a true Te Tiriti partner and enabled to exercise rangatiratanga and kaitiakitanga in conservation management processes;
- **Partnership**: Partnership with DOC for tangata whenua means having a significant or equivalent role in decision making and conservation management policy planning and delivery processes;
- **Involvement in management**: Tangata whenua are seeking greater involvement in all aspects of conservation and historic heritage management and need this role to be adequately supported and resourced;
- **Consultation**: Consultation by DOC has generally fallen short of expectations. Tangata whenua are not always asked to engage at formative stages, too little time is allocated for consultation and tangata whenua have insufficient resources (and have not been resourced) to contribute effectively;
- **Management**: There is a need for more effective tangata whenua management and advisory structures within or parallel to DOC to give voice to tangata whenua concerns and enable tangata whenua leadership and involvement in conservation policy. These need to be resourced and accountable to iwi;
- **Customary use**: Tangata whenua have a right to customary use of traditional materials and native species and want to exercise greater control with respect to access, ownership, use and restoration;

65 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011), Volume 1 at 372.

66 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011) Volume 1 at 300.

- **Historic heritage and wāhi tapu**: Tangata whenua want to look after and manage their own historic heritage and taonga, with a tangata whenua heritage agency providing leadership and policy with iwi, hapū and whānau responsible for on the ground protection;
- **Tangata whenua knowledge**: Tangata whenua knowledge or mātauranga needs to be respected and appreciated as a valid contribution to conservation management; and
- **DOC understanding and attitudes**: A lack of understanding or knowledge and the paternalistic attitude of some DOC staff presents a barrier to improving relationships between DOC and iwi, effective consultation, and involvement of Māori in conservation management.

The above messages are generally consistent with the concerns advanced by the claimants in the *Ko Aotearoa Tēnei* report, with the experience and knowledge of ODG members, and with the feedback the ODG received from tangata whenua during its engagement hui.

Conservation legislation is significantly oriented around ownership and management concerns and control, and less around the innate notion of conservation itself. To the extent that conservation is mentioned, as already noted, it is founded on Eurocentric values and views, resulting in a preservationist or protectionist approach to conservation. The tangata whenua conservation ethic – of kaitiakitanga, reciprocity and sustainable use, and the exercise of tino rangatiratanga in respect of environmental taonga as recognised and required under Te Tiriti – is not provided for. There is no mention of tikanga or mātauranga concepts in conservation legislation and, as a result, tangata whenua do not see themselves as part of the conservation system.

Furthermore, beyond the redress provided in Te Tiriti settlements, the conservation system does not acknowledge or address the history of colonisation and Crown breaches of Te Tiriti, where conservation laws, policies and practices have caused immense harm to tangata whenua, including loss of and disconnection from their lands, waters, resources and taonga and the consequent loss of culture, identity and wellbeing. Appropriate affirmative action is required, in accordance with Te Tiriti principles and obligations, to recognise the need for a system change that restores and realises tangata whenua rangatiratanga and kaitiakitanga in respect of their environmental taonga.

Specific inconsistencies between the Crown's Te Tiriti obligations and conservation legislation (and wider conservation policy and practice) are referred to throughout the themes in this report and are addressed in the ODG's recommendations. The following are examples only that illustrate the nature and breadth of such inconsistencies:

- Statutory decision making, unless provided for under Te Tiriti settlement legislation, cannot be delegated or devolved to tangata whenua and ongoing co-management is often limited to "advisory" committees or conservation board sub-committees which can only "advise" on management and governance decisions.
- The statutory processes for notifying, reviewing and approving statutory management planning documents do not clearly identify the involvement of tangata whenua as equal Te Tiriti partners with DOC.

- The Crown's ownership of conservation lands and waterways, indigenous species and marine mammals is pervasive, including the retention of ownership of indigenous species and marine mammals when they are not on conservation lands or in conservation waters, and after they have died or have been harvested.
- Conservation land and water classifications do not reflect the interests and values of tangata whenua (for example, the national park classification – discussed in the following section of this report – which is becoming increasingly modified through Te Tiriti settlements).
- Customary or cultural access, use and take is paternalistically and strictly limited by the statutory purpose for which the land or water is held.
- Tangata whenua have little input into developing and approving marine reserves and marine mammal sanctuaries, and there is a disjunct between marine protection mechanisms and customary fishing rights and interests.

Throughout the engagement hui, the ODG was told that there is a desire from DOC at a regional level and tangata whenua to collaborate, partner and make decisions together, and also for tangata whenua to be fully informed to make their own assessments and decisions, but these desires are hampered by legislation and systems and supposed national imperatives.

In terms of the General Policies, one of the major issues is the wide discretion seemingly given to Crown decision-makers regarding the recognition and realisation of tangata whenua rights and interests. This is caused by discretionary language such as "may" instead of compulsory terms such as "must" that would better reflect the fundamental importance of the section 4 obligations according to Te Tiriti jurisprudence. In this respect, the ODG agrees entirely with the Waitangi Tribunal's criticisms of the General Policies as expressed in *Ko Aotearoa Tēnei*:[67]

> *The dominant policy instruments relevant to DOC's interpretation of Treaty principles... [**do not**] **correctly express those principles** in the broad and unquibbling way the courts require. Rather they declare a suite of Treaty principles and statements or restatements of those principles that is **skewed to the interests of the Executive**. That is predictable and perhaps even understandable. It begins with the statement of five principles issued by the Labour Government more than 20 years ago. … These principles (one assumes deliberately) **do not include the core principle of Treaty partnership** expressed by the Court of Appeal in the Lands case and confirmed time and again by the Waitangi Tribunal. They **reduce the tino rangatiratanga guarantee to a principle of 'self-management'**. Much water has passed under the bridge since that first, modest attempt by the executive to draw a line in the sand on Treaty principles, and **events have long since overtaken the 1989 list**.*
>
> [Emphasis added]

67 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011) Volume 1 at 322–323.

In simple terms, the conservation system is governed by legislation that has not been comprehensively reviewed for over 30 years (and, in the case of national parks, for over 40 years). Not only is the legislative framework for conservation convoluted and disjointed (comprising 24 Acts which are repetitive, overlap and, in some cases, inconsistent), it does not reflect contemporary jurisprudence, politics and attitudes regarding Te Tiriti. That legislative shortcoming then inevitably manifests itself in policy settings and direction, which struggle to maintain currency and effectiveness and certainly do not give best effect to the principles of Te Tiriti. The outdated articulation of the principles of Te Tiriti and their application as described in Chapter 2 of the General Policies are characteristic of this and, like the legislation itself, require substantive review and update.

National parks

National parks are regarded as the jewels of the conservation estate and in particular illustrate the application of the preservationist ethic of conservation.[68] Aotearoa New Zealand's first national park was established in 1887, and in the following three decades several other locations followed suit.

The National Parks Act 1952 defined national parks as "areas of New Zealand that contain scenery of such distinctive quality or natural features so beautiful or unique that their preservation is in the national interest".[69] The 1952 Act went on to state that national parks should be "preserved as far as possible in their natural state".[70] It was an offence under the Act to remove any part of any plant or interfere with any animal without authorisation.[71]

The National Parks Act 1980 largely re-enacted the purposes and principles of the 1952 Act. Accordingly, save for the addition of the Te Tiriti obligation in 1987,[72] the basic foundations of the National Parks Act have altered little in almost 70 years.

68 Waitangi Tribunal, *Te Urewera Report* (Wai 894, 2014), Volume 5 at 2060.

69 National Parks Act 1952, section 3(1).

70 National Parks Act 1952, sections 3(2)(a) and (b).

71 National Parks Act 1952, section 54.

72 Through section 4 and Schedule 1 of the Conservation Act 1987.

The Waitangi Tribunal summarised the impact of national parks in the following way:[73]

> *The cause of maintaining such 'primeval' landscapes inevitably meant the exclusion of Indigenous peoples from them, even where those people had lived on the land for generations [such as] Urewera, which was established in 1954 in the midst of Māori communities. The 1976 management plan for Urewera National Park espoused the preservationist ethos and the exclusion of Māori culture with its emphasis that '[p]reservation of the wilderness character and the protection of the ecology' was the Crown's 'primary objective of management'.*
>
> *The irony of this approach, from a claimant viewpoint, is that the kaitiaki interest is likely to be most significant in relation to national parks. As we have already noted, the conservation estate contains many of the remaining taonga species of flora and fauna, and many of the landscapes and places in which kaitiaki have interests. Those interests are of a greater order of magnitude in relation to national parks, where the relative abundance of taonga species is likely to be higher and where the most iconic features such as mountains, lakes, and rivers are likely to be located. This means that the conflict between kaitiakitanga and the preservationist approach is likely to be at its sharpest in relation to national parks.*

Tangata whenua leaders have for some time aptly summarised the conservation protection objective as "hostile to the customary principles of sustainable use" and have observed that "the spiritual linkage of iwi with indigenous resources is subjected to paternalistic control," and see national parks more broadly as "gated areas where we are obstructed from our customary practices, locked out from decision making and held back from continuing our relationship with sites of deep spiritual or cultural significance".[74]

Over several inquiries and reports, the Waitangi Tribunal has found that the Crown breached Te Tiriti in establishing and managing national parks and has recommended that the national parks be transferred out of Crown ownership and DOC control and instead be jointly held and co-managed by Crown and iwi representatives.[75]

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73 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011), Volume 1 at 363. For an in-depth discussion on the development of the preservationist approach to conservation in Aotearoa New Zealand and the context, establishment and effect of the Urewera National Park, see Waitangi Tribunal *Te Urewera Report* (Wai 894, 2014) Volume 5, Chapter 16: Te Kapua Pouri – Te Urewera National Park at 2025–2365.

74 Jacinta Ruru and others "Reversing the Decline in New Zealand's Biodiversity: Empowering Māori within reformed conservation law" (2017) *Policy Quarterly 13(2)* at 67, citing Edward Ellison "Deficiencies in conservation subsidiary legislation" (unpublished report to the New Zealand Conservation Authority, 25 July 2001) and Mark Solomon "Locked out of National Parks: a call to action from Kaiwhakahaere Ta Mark Solomon" (Te Karaka, 2014).

75 See Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report* (Wai 1130, 2013); Waitangi Tribunal, *Te Urewera Report* (Wai 894, 2014); and Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report* (Wai 903, 2015).

Recently, Te Tiriti settlements have resulted in the removal or amendment of national park status to recognise the relationship that tangata whenua have with certain areas or environmental features, including the re-designation of national park lands as legal entities or persons in their own right. To date, this has included Te Urewera and, insofar as parts of the Whanganui River and its tributaries are within national parks, Te Awa Tupua, with similar arrangements currently under negotiation in respect of Egmont/Taranaki National Park.[76] These innovative approaches reveal the appropriate direction of travel in the ODG's view, but they should be the norm, not matters dependent on the timing or nature of Te Tiriti settlements. These examples highlight the need for a review of the National Parks Act 1980 as a core part of a wider process of fundamental conservation review and reform.

76 The Te Urewera Act 2014 removed Te Urewera from the National Parks Act 1980 and established Te Urewera as a legal entity in its own right, managed by a board comprised of Tūhoe and Crown-appointed persons. See also the Te Awa Tupua (Whanganui River Settlement Claims) Act 2017, which recognises Te Awa Tupua (comprising the Whanganui River and its tributaries and resources from the mountains to the sea) as a legal person, Te Awa Tupua, and *Te Anga Pūtakerongo*, Record of Understanding between the Crown and Ngā Iwi o Taranaki dated 20 December 2017, which proposes to recognise Taranaki Maunga as a legal person with the re-named national park being subject to a new co-governance regime between the Crown and Ngā Iwi o Taranaki.

Te Tiriti o Waitangi / Treaty of Waitangi

Section 4 of the Conservation Act

Section 4 of the Conservation Act requires that the Act and all 23 Acts in its Schedule 1 shall be so interpreted and administered as to give effect to the principles of Te Tiriti o Waitangi. This is a "powerful" Te Tiriti clause that should not be narrowly construed.[77]

In *Ngāi Tai ki Tāmaki*, the Supreme Court stated that:[78]

> *[53] … in applying s 4 to a decision relating to a concession application, DOC must, so far as is possible, apply the relevant statutory and other legal considerations in a manner that gives effect to the relevant principles of the Treaty.*
>
> *[54] We acknowledge that s 4 does not exist in a vacuum and a number of other factors must be taken into account in making a decision on a concession application. For example, in the present case, the direction given in s 4 must be reconciled with the values of public access and enjoyment in the Reserves Act designations relating to the Motu. Those values are also reflected in s 6(e) of the Conservation Act, which lists as one of the functions of DOC the fostering of the use of natural and historic resources for recreation and allowing their use for tourism to the extent that this is not inconsistent with the conservation of such resources. … But s 4 should not be seen as being trumped by other considerations like those just mentioned [for example public access and enjoyment, recreation and tourism]. Nor should s 4 merely be part of an exercise balancing it against the other relevant considerations. What is required is a process under which the meeting of other statutory or non-statutory objectives is achieved, to the extent that this can be done consistently with s 4, in a way that best gives effect to the relevant Treaty principles.*
>
> *[55] How these observations are applied to a particular decision will depend on which Treaty principles are relevant and what other statutory and non-statutory objectives are affected.*

The Supreme Court made these statements regarding section 4 obligations in the context of proceedings challenging regulatory (concession) decision making under conservation legislation. However, the ODG emphasises that the Court's clear direction in the context of the broad and powerful words of section 4 should not be read down or narrowly construed to only apply to regulatory or concession decision making. In this regard, the ODG observes:

77 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [52]; and *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533 at 558.

78 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [53]–[55].

- first, that there is no bright line between regulatory and non-regulatory decision making and processes; and
- second, that the section 4 obligation applies to the interpretation and administration of the entire Conservation Act and the 23 Acts in its Schedule 1 – not just regulatory of concession decisions.

So, with this context squarely in frame, what is Te Tiriti, what are its principles and how should these be given effect?

Te Tiriti o Waitangi

Te Tiriti o Waitangi is the founding constitutional document of Aotearoa New Zealand.[79] It was first signed on 6 February 1840 by the British Crown and tangata whenua and provides the constitutional framework for the relationship between the New Zealand Government and tangata whenua. Te Tiriti has been variously described as:

- "simply the most important document in New Zealand's history";[80]
- "essential to the foundation of New Zealand";[81]
- "part of the fabric of New Zealand society";[82] and
- "of the greatest constitutional importance to New Zealand".[83]

However, for much of the 181 years since it was signed, the effect and meaning of Te Tiriti has been subject to extensive dispute and contest. This is, in part, because there is both a te reo Māori and English language version of Te Tiriti. Key points of comparison between the different language versions are that:

- Article 1: the Māori version granted the Crown "kāwanatanga" (or governorship) whereas the English version granted the Crown rights and powers of "sovereignty";

79 See Matthew Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 85–152; Geoffrey Palmer and Kim Hill, *Constitutional Conversations: Geoffrey Palmer Talks to Kim Hill on National Radio, 1994–2001* (Victoria University Press, Wellington, 2002) at 22; *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 516; Sir Robin Cooke, "Introduction" (1990) 14 NZULR 1 at 1; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 206 and 210; and *Attorney-General v New Zealand Māori Council* (No 2) [1991] 2 NZLR 147 (CA) at 149.

80 Sir Robin Cooke, *Introduction* (1990) 14 NZULR 1 at 1.

81 Sir Robin Cooke, *Introduction* (1990) 14 NZULR 1 at 1.

82 See *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 206 and 210; and also the obiter reservations of Casey and Hardie Boys JJ in *Attorney-General v New Zealand Māori Council* (No 2) [1991] 2 NZLR 147 (CA) at 149.

83 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 516.

- Article 2: the Māori version guaranteed Māori "tino rangatiratanga" (or the unqualified exercise of their chieftainship) over their lands, villages, and all their property and treasures. The English version guaranteed Māori "exclusive and undisturbed possession" of "lands and estates, forests, fisheries and other properties"; and
- Article 3: in the Māori version, the Crown gave an assurance that Māori would have the Queen's protection and all rights (tikanga) accorded to British subjects. This is considered a fair translation of the English.

The Waitangi Tribunal in its 2014 *Te Paparahi o Te Raki Inquiry Report* concluded that the rangatira who signed Te Tiriti in February 1840:[84]

- did not cede their sovereignty (or authority to make and enforce law over their people or their territories) to Britain;
- agreed to share power and authority with Britain, with the Governor having authority to control British subjects in New Zealand, and keep the peace and protect Māori interests;
- consented to the Treaty on the basis that they would be equals with the Governor, though they were to have different roles and different spheres of influence (the detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis);
- agreed to enter land transactions with the Crown, and the Crown promised to investigate pre-Treaty land transactions and to return any land that had not been properly acquired from Māori; and
- appear to have agreed that the Crown would protect them from foreign threats and represent them in international affairs, where that was necessary.

Recent research has also advanced the proposition that the British framers of Te Tiriti may have had a similar understanding to the rangatira signatories in 1840.[85]

However, Te Tiriti as it was likely understood by both tangata whenua and the British framers in 1840 is difficult to reconcile with the contemporary sovereign power exercised unilaterally by the Crown and legislature and the currently very small space in which tangata whenua exercise rangatiratanga.

84 Waitangi Tribunal, *He Whakaputanga me te Tiriti, The Declaration and the Treaty: Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 529.

85 Ned Fletcher, *A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant by the English Text of the Treaty of Waitangi* (PhD thesis, University of Auckland, 2014) at iii and iv.

Approach to the "principles of the Treaty"

The phrase the "principles of the Treaty of Waitangi" is a Crown construct that was first incorporated into legislation in 1975 in the Treaty of Waitangi Act. It was designed to bridge any gap between the te reo Māori and English language versions of Te Tiriti. The principles of Te Tiriti are derived from its text, spirit, intent and circumstances of the Treaty. Importantly, the principles of Te Tiriti cannot be divorced from, and necessarily include, the Articles and language of Te Tiriti itself.[86]

While not ignoring the contemporary reality of existing Crown sovereignty, the ODG places particular weight on the te reo Māori text of Te Tiriti, as almost all rangatira signatories signed the Māori version. The contra proferentum rule directs that in the event of ambiguity, provisions should be construed against the party that drafted the provision (in this case the British Crown) and this is consistent with the approach that the Waitangi Tribunal has taken to interpreting the principles of Te Tiriti.[87]

The principles of Te Tiriti have developed over time and they continue to evolve today. As the Court of Appeal observed, "[t]he Treaty obligations are ongoing" and there can never be a final list of Te Tiriti principles because "[t]hey will evolve from generation to generation as conditions change".[88] Thus, no definitive or exhaustive list or explanation of the principles of Te Tiriti does or should exist.

That said, the Courts and Waitangi Tribunal have identified and developed a number of principles that are now well established, and many of these are of particular relevance to the area of conservation and the responsibilities of DOC. These include the overarching principle of partnership (which itself has a number of principles within and/or interlinked to it[89]), as well as the principles of active protection, the right to development and redress.[90]

The principles of Te Tiriti have been interpreted and articulated by many institutions, including the Executive, Parliament, the Courts and the Waitangi Tribunal. The ODG has given particular emphasis to the jurisprudence of the Waitangi Tribunal because it is a specialist body with statutory responsibility for inquiring into alleged Crown breaches of the principles of Te Tiriti and making recommendations on how to give expression to these principles in a contemporary context.

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86 As recognised by the Privy Council in *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517.

87 Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 11.

88 *Te Rūnanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 656 (CA). Also see *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 642 and 656.

89 Including, for example, the duty to act reasonably, honourably and in good faith and the principle of equity.

90 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 was the first Court of Appeal decision that addressed the implications of the legislative incorporation of the principles of Te Tiriti and defined those principles in some detail. In this case, the New Zealand Māori Council argued that the Government's plan to transfer land to state-owned enterprises breached the principles of Te Tiriti (and were therefore contrary to the obligation in section 9 of the State-Owned Enterprises Act 1986). The Court of Appeal's judgment – commonly referred to as the *Lands* decision – became an important precedent and oft-cited reference for both later Courts and the Waitangi Tribunal.

While the ODG has particularly drawn upon the principles of partnership, active protection, the right to development and redress in this report, it is acknowledged that they are not the only principles of Te Tiriti relevant to conservation.[91]

Partnership: reconciling kāwangatanga and tino rangatiratanga

Both the Courts and the Waitangi Tribunal have expressed that partnership is one of the central principles of Te Tiriti. The specific duties that flow from this principle have varied in articulation. One of the consistent themes is that Te Tiriti gives rise to mutual responsibilities and that Te Tiriti partners should act towards each other reasonably, honourably and in good faith.[92] The Tribunal in its *Te Whānau o Waipareira Report* referred to Te Tiriti as like a "marriage contract":[93]

> *… in which broad and general vows express the desire and the intention of the parties to live together in mutual love and respect. The success of a marriage depends not on the ability of the parties to formulate or interpret vows advantageously to themselves, nor on their ability to enforce them in the case of dispute. Rather, it depends on their commitment to work through problems in a spirit of goodwill, trust, and generosity, actively seeking creative solutions, and taking opportunities to bolster each other.*

This element of partnership captures broad values and informing principles regarding how tangata whenua and the Crown navigate their relationship with each other.

Another central element to partnership is how to practically reconcile or balance the concepts of kāwanatanga (the right of the Crown to govern) and tino rangatiratanga (the right of tangata whenua to exercise unqualified chieftainship over their lands, resources and people). The Waitangi Tribunal has pointed out that the Crown does not have an unfettered right of kāwanatanga.[94] The guarantee of tino rangatiratanga requires the Crown to acknowledge tangata whenua control over their tikanga, resources and people and to allow tangata whenua to manage their own affairs in a way that aligns with their customs and values.[95]

91 Other principles identified by the Waitangi Tribunal that may reasonably have application in particular contexts relevant to conservation include the principles of equity, reciprocity, mutual benefit, and options.

92 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 664.

93 Waitangi Tribunal, *Te Whānau o Waipareira Report* (Wai 414, 1998) at 222.

94 Waitangi Tribunal, *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 27.

95 Waitangi Tribunal, *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 28.

Neither kāwanatanga nor tino rangatiratanga is absolute, but because of the power imbalance that currently exists, the Crown has a responsibility to ensure that tangata whenua are not disadvantaged in the relationship.[96] This responsibility links into the principle of active protection. The Waitangi Tribunal has also expressed that in negotiating how to give effect to kāwanatanga and tino rangatiratanga, neither party can impose its will or act in a manner that affects their respective spheres of influence without consent, unless there are exceptional circumstances.[97]

In the conservation context, the Waitangi Tribunal has expressed that, given the importance of the environment under DOC control to the survival of tangata whenua culture, partnership should be the "default setting" for decision making relating to conservation management and that the starting point for partnership should be shared decision making between DOC and tangata whenua.[98] Further, the Tribunal has said that the reconciliation of kāwanatanga and tino rangatiratanga should not preclude tangata whenua "authority, control, responsibility, or stewardship in respect of natural resources which are taonga".[99] In its 2015 *He Whiritaunoka Report*, the Tribunal distilled Te Tiriti jurisprudence (from the Courts and the Tribunal) in terms of the Crown / tangata whenua relationship regarding the environment as:[100]

- the Crown has the power and the duty to make laws and set overall policy for the conservation of natural resources in order to protect the environment;
- tangata whenua have a right to exercise tino rangatiratanga, and while this is not an absolute right, it is one not lightly set aside;
- simultaneously, the Crown has a duty to do all it can to enable tangata whenua to be kaitiaki of their environmental taonga;
- the concept of partnership captures the relationship between the various environmental authorities of the Crown and tangata whenua;
- partnership in this context means communicating effectively and working together to make decisions; and
- there is no hard and fast set of rules about how and in what proportions that shared decision making should occur, it is to be determined contextually and case by case.

96 Waitangi Tribunal, *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 28. See also Waitangi Tribunal, *Te Whānau o Waipareira Report* (Wai 414, 1998) at xxvi, 16 and 30.

97 Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2018) at 158, 169 and 183, cited in Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 17.

98 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011), Volume 1 at 341 and 372.

99 Waitangi Tribunal, *Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358, 2019) at 16, citing Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, (Wai 1200, 2008), Volume 4 at 1240.

100 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report* (Wai 903, 2015) at 1234–1235.

The exact form of partnership, including how decisions are made and at what level and who is responsible for the day-to-day management of taonga, should be considered on a case-by-case basis.[101] Considerations in determining the role for tangata whenua in the governance and management of any part of the conservation estate and protected species include what is required to protect the environment and its ecosystems; the nature and strength of the tangata whenua relationship with the place; and the public interest.[102] The Tribunal said balancing these considerations will indicate what kind and level of tangata whenua interest should be recognised, observing that it could be a partial, preferential, equal or controlling interest.[103]

As the Supreme Court noted in *Ngāi Tai ki Tāmaki* in the context of section 4, that assessment and balancing must be achieved in a way that best gives effect to the principles of Te Tiriti.[104] This is, therefore, not reasonably a matter of minimum compliance, but rather the objective should be to achieve the optimal outcome in terms of giving effect to the principles of Te Tiriti.

The ODG has centred partnership in its approach to giving effect to Te Tiriti and its principles. This principle has moved on from reflecting a hierarchical power structure where the Crown has the unilateral right to govern and tangata whenua are relegated to a mere stakeholder to be consulted. Partnership means an ongoing relationship where power and decision making sit more horizontally. It requires the tino rangatiratanga of tangata whenua to be given expression. Importantly, the ODG emphasises that tangata whenua are not homogenous. The legislative scheme needs to provide for tangata whenua, and their kawa, tikanga and mātauranga, at both national and local levels in nuanced and varied ways which enable Te Tiriti partnership to be appropriately given effect at place.

Active protection of tino rangatiratanga

The Courts and the Tribunal have found that the Crown's Te Tiriti obligations are not merely passive but extend to an obligation to actively protect the rights and interests of tangata whenua, as guaranteed under Articles 2 (tino rangatiratanga) and 3 (equity) of Te Tiriti, to the fullest extent reasonably practicable.[105] The duty of active protection arises from Te Tiriti partnership itself, through the exchange of kāwanatanga and tino rangatiratanga. It is therefore closely linked with the principle of partnership and provides the dynamic and proactive dimension to the Crown's obligations.

101 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011) at 341.

102 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report* (Wai 905, 2015), Volume 3 at 1234–1235.

103 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report* (Wai 905, 2015), Volume 3 at 1235.

104 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [54].

105 Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wai 212, 1993) at 134; Waitangi Tribunal, *Manukau Report* (Wai 8, 1985); Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 2018) at 189; Waitangi Tribunal, *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 30; Waitangi Tribunal *The Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018) at 23; Waitangi Tribunal, *Tū Mai te Rangi: Report on Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 21; and *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664.

In the recent *Hauora Report*, the Tribunal said:[106]

> *Thus, in the modern context, the Tribunal has considered that the Treaty guarantee of tino rangatiratanga affords Māori, through their iwi, hapū, or other organisations of their choice, the right to decision-making power over their affairs. As the Tribunal noted in the Ngāpuhi Mandate Inquiry Report, 'the capacity of Māori to exercise authority over their own affairs as far as practicable within the confines of the modern State' is key to the active protection of tino rangatiratanga.*

The Privy Council applied the active protection principle in the 1994 *New Zealand Māori Council v Attorney-General* (***Broadcasting Assets***) case, describing it in the following terms:[107]

- Crown protection and preservation of tangata whenua property is one of the "foremost" obligations stemming from Te Tiriti principles.
- The obligation is not absolute or unqualified: "While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time".
- If a taonga is "in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection".[108]
- Any "previous default" of the Crown "could … increase the Crown's responsibility".[109]

106 Waitangi Tribunal, *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 30, cited in Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 19.

107 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517. The active protection principle was also applied by the Environment Court in *Grace v Minister of Land Information* [2014] NZRMA 454, 2014] NZEnvC 82.

108 Also see Waitangi Tribunal *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 32. The *Hauora Report* also confirmed that active protection requires the Crown to focus specific attention on inequities experienced by Māori and, if need be, provide additional resources to address the causes of those inequities. The Tribunal noted that this becomes a matter of particular urgency when Māori interests and rights derived from Te Tiriti are under great threat, and that, in such circumstances, active protection may compel the Crown to target more resources according to need in order to reduce structural or historical disadvantage.

109 Also see Waitangi Tribunal, *Tū Mai te Rangi: Report on Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 22, where the Tribunal stated that "[w]e 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".

The *Ngāi Tai ki Tāmaki* decision, the earlier decision of the Court of Appeal in *Ngāi Tahu Māori Trust Board v Director-General of Conservation* (***Whales***)[110] and the Waitangi Tribunal's *Ko Aotearoa Tēnei* report each highlight the importance of the active protection principle in conservation, particularly when DOC is granting concessions, and the need to take the interests (including economic interests) of tangata whenua into account. In this context, the principle requires that where the circumstances affect the interests of tangata whenua:

- tangata whenua must be consulted before a decision is made and weight must be given to the views and interests of tangata whenua;[111]
- the obligations are not limited to consultation, and mere procedural steps, such as consultation without any intention to give weight to the views of tangata whenua, will not be enough;[112]
- the relevant weight depends on the circumstances and can require the interests of tangata whenua to be given a reasonable "preference" or "priority" alongside other interests;[113]
- substantive outcomes for tangata whenua may be necessary, including, in some instances, requiring that concession applications by others be declined;[114]
- any preferred status given to tangata whenua interests does not amount to a veto right;[115] and
- enabling tangata whenua to reconnect to their ancestral lands by taking up opportunities on the conservation estate (whether through concessions or otherwise) is one way that the Crown can give practical effect to Te Tiriti principles.[116]

110 *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, which is commonly referred to as the *Whales* case.

111 See *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533 at 560.

112 See *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533 at 560–561; and *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [52].

113 See *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [73]; *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533 at 561–562; and *Waitangi Tribunal, Ko Aotearoa Tēnei* (Wai 262, 2011), Volume 1 at 323.

114 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [52].

115 *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533 at 559; and *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [95].

116 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [52].

The *Whales* case concerned the granting of a concession for a whale-watching business off the coast of Kaikōura. The Court of Appeal held that the interests of Ngāi Tahu should be given "a reasonable degree of preference". The Court reasoned that although a commercial whale-watching business was not a taonga or the enjoyment of a fishery within the contemplation of Te Tiriti, it was sufficiently "linked to taonga and fisheries that a reasonable Treaty partner would recognise that Treaty principles were relevant".[117] The matter was referred back to the Director-General to reconsider with the proviso that they should take into account the protection of the interests of Ngāi Tahu.

In *Ngāi Tai ki Tāmaki*, the Supreme Court also found that DOC failed give effect to the principles of Te Tiriti in certain concession decisions because it failed to properly consider the economic interests of Ngāi Tai ki Tāmaki as mana whenua and failed to consider the possibility of affording them preference.[118]

The ODG considers the principle of active protection to be of significant importance to the realisation of the exercise of tino rangatiratanga by tangata whenua within an effective conservation system. The positive obligation on the Crown is critical to ensuring the capacity of tangata whenua to exercise authority over their own affairs within the reality of the current system where the Crown exercises overwhelming authority. The fact that the two principal Court decisions concerning section 4 (*Whales and Ngāi Tai ki Tāmaki*) both focus on this principle is illustrative of its importance in the conservation system. The previous default of the Crown in respect of biodiversity decline and excluding tangata whenua from their environmental taonga increases the Crown's responsibly to actively protect the interests of tangata whenua in conservation.

Development

The right to development principle has been strongly endorsed by the Tribunal but has not been recognised to the same extent by the Courts. The principle encompasses the general right of tangata whenua to develop as a people, to retain their properties, and to develop them along customary and/or modern lines.[119]

117 *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533 at 560 and 562.

118 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [73].

119 See Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988).

This principle was first attributed to the right to develop resources that tangata whenua traditionally used, and later expanded to the right to develop taonga through technology that became available after 1840.[120] The Tribunal also considered that taonga could include things not yet known, illustrating the broad ambit of the right to development.[121]

In the *Whales* case, the Court of Appeal effectively recognised Ngāi Tahu's right to development in finding that although a modern commercial whale-watching business was not a taonga or the enjoyment of a fishery within the contemplation of Te Tiriti at 1840, it was sufficiently "linked to taonga and fisheries that a reasonable treaty partner would recognise that treaty principles were relevant".[122]

That an indirect interest can give rise to a development right has since been further considered by DOC in granting a more recent concession to Ngāi Tahu to collect nutrient-rich algae. In this instance, the ODG understands that there was no evidence of Ngāi Tahu having traditional knowledge of the unique properties of the algae (which were discovered with the application of modern science), but there was a connection between Ngāi Tahu and the wetland where the algae grew, and fish and other resources were traditionally gathered there. There is a clear analogy here to the Whales case, where a commercial whale-watching business was not an historical activity but a degree of preference to develop the activity/industry was found to be reasonable considering the principles of active protection and the right to development under Te Tiriti.

The Tribunal, in its *He Maunga Rongo* report, set out the relevant factors for considering whether a right to development applies:[123]

- the enterprise is located in traditionally important areas or resources of the rohe;
- a tribal initiative is involved or contemplated;
- whether iwi and hapū have been significantly involved in this kind of enterprise, perhaps as pioneers;
- the development or activity may contribute to the redress of past Te Tiriti breaches;
- the development or activity may assist a group's cultural, social, or economic development; and
- the development or activity may assist in the preservation or development of a taonga in a vulnerable state.

120 See Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1988); and Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report* (Wai 776, 1999) at 41.

121 Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims concerning the Allocation of Radio Frequencies* (Wai 26, Wai 150, 1990) at 40.

122 *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533 at 560 and 562.

123 Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One* (Wai 1200, 2008), Volume 3 at 911.

The Waitangi Tribunal has also linked the development principle under Te Tiriti to the United Nations Declaration on the Rights of Indigenous Peoples, which states that Indigenous peoples have the right to "freely pursue their economic, social and cultural development" and "determine and develop strategies for exercising their right to development".[124]

Redress

The Court of Appeal confirmed in its 1987 *Lands* case that redress for a breach of Te Tiriti "may fairly be described as a principle" and that "if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress" unless there are "very special circumstances" that would justify a reasonable Te Tiriti partner to withhold redress.[125]

The Waitangi Tribunal has said that "[i]t is well established that redress is required where the Crown fails actively to protect Māori interests, including the rangatiratanga of Māori over their taonga" and that "[t]his duty exists to ensure that any failure to discharge Tiriti / Treaty obligations in the past can be rectified by addressing the current and future needs of Māori".[126]

There is no prescribed form of redress. Rather, the quantum or amount of redress given must be a "fair and reasonable recognition of, and recompense for, the wrong that has occurred".[127] It "involves both the means for economic and social development looking forward and the means to ensure the survival and wellbeing of tribal taonga, including language, culture, customs, lands, and other resources".[128] The Tribunal, in its *He Maunga Rongo* report, said:[129]

> *… redress should be based upon a restorative approach, with its purpose being, in article 2 claims, to restore iwi or hapū rangatiratanga over their property or taonga where the parties agree. In some circumstances, restoration of tribal mana may require some other remedy.*

124 Waitangi Tribunal, *Whaia te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015); and *United Nations Declaration on the Rights of Indigenous Peoples* A/Res/61/295 (2007), Articles 3 and 23.

125 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664–665 and 693, per Somers J.

126 Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wai 953, 2002) at 71. Also see Waitangi Tribunal, *Ngāi Tahu Sea Fisheries* (Wai 27, 1992) at 272; and Waitangi Tribunal, *The Ngawha Geothermal Resource Report* (Wai 304, 1993) at 101.

127 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA), per Somers J.

128 Waitangi Tribunal, *Report on the Management of the Petroleum Resource* (Wai 796, 2011) at 168.

129 Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, (Wai 1200, 2008), Volume 4 at 1248.

In others, the passing of legislation to recognise rangatiratanga, the return of land, and some other form of redress may be sufficient to achieve this result. Where there has been significant environmental damage, these measures may not be adequate. Sometimes there will be a need for a programme of restoration work. This may require the joint efforts of a number of agencies working with Māori if that is what the parties agree to. If that is an option, new regimes may need to be developed for the joint management of significant tribal or hapū taonga.

The ODG is aware that, in practice, redress has been provided mostly through Te Tiriti settlements, through a variety of means. These have ranged from statutory acknowledgements, conservation relationship agreements between DOC and iwi, and conservation management strategies and plans through to the establishment of co-governance and co-management regimes over natural resources and the attribution of legal personality to environmental features of particular significance to tangata whenua.

The most significant of these to date relate to Te Urewera, Te Awa Tupua and the Waikato River[130] and variously involve the recognition of legal personality and increased degrees of devolution and/or co-governance to tangata whenua in areas where their connections and claims are particularly strong.

The ODG emphasises, however, that there is no prescribed form of redress breaches of Te Tiriti and that tangata whenua should not have to rely on redress under Te Tiriti settlements to enable the exercise of rangatiratanga and kaitiakitanga over their lands, waters and other taonga. While existing and future Te Tiriti settlement commitments and arrangements must be honoured, these do not limit the full expression of Te Tiriti principles. The principles of Te Tiriti and section 4 create obligations irrespective of Te Tiriti settlements.

Linked to this need for more fundamental change, the Waitangi Tribunal has also recorded that:

- "it will probably be necessary to amend the Conservation Act" to achieve the level of devolution that is required in certain circumstances;[131]

130 The Te Urewera Act 2014 established Te Urewera as a legal entity in its own right and removed the lands comprising Te Urewera National Park from the National Parks Act 1980 and vested them in the new legal entity to be managed by a board comprised of Tūhoe and Crown-appointed persons. The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 established a legal framework for the co-governance and co-management of the Waikato River, Aotearoa New Zealand's longest river. The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 recognised Te Awa Tupua – comprising the Whanganui River from the mountains to the sea, including all its physical and metaphysical elements – as a living and indivisible whole with its own legal personality, and vested the Crown-owned bed of the Whanganui River in Te Awa Tupua.

131 Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report* (Wai 903, 2015), Volume 3 at 1235.

- "[t]he Crown's structures and policies for conservation management fall short of what is required by the Treaty principles" and "both structures and policies need to be revised, with the principle of partnership at the forefront of that revision;[132] and
- "… the partners should review the conservation legislation as a whole … based on genuine partnership between Crown and Māori involving the new models of decision-making and management" and "[t]o the extent that there are statutory constraints on the full exercise of kaitiakitanga, such a review could identify them and negotiate ways to remove them, so that DOC is left in no doubt that it can pursue creative approaches to fulfilling its section 4 obligations".[133]

Kawa, tikanga and mātauranga

The recognition and application of tikanga in Aotearoa New Zealand is a fundamental element of the obligations which arise from Te Tiriti and its principles.

The Waitangi Tribunal has consistently found that Article 2 of Te Tiriti includes the protection of tangata whenua custom and cultural values.[134] Te Tiriti therefore guaranteed the ongoing authority of tangata whenua and the continued recognition and application of kawa, tikanga and mātauranga.

It is a well-established principle of common law that the customary law and practices of the Indigenous peoples remain and are legally cognisable unless explicitly extinguished. The "received" common law must adapt to accommodate the tikanga (customary law) and, in the event of an inconsistency at common law, tikanga should properly prevail. Consistent with this, tikanga is also increasingly recognised by the Courts as forming part of, or at the very least informing, the New Zealand common law, describing it is a "value, an "integral strand" and an "ingredient" of the common law that has legal effect independent of any statutory incorporation of Te Tiriti and its principles.[135]

132 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011), Volume 1 at 345.

133 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011), Volume 1 at 367.

134 Waitangi Tribunal *Motunui-Waitara Report* (Wai 6, 1983) at 51. See also Waitangi Tribunal *Report on the Orakei Claim* (Wai 9, 1987) at 134–135; Waitangi Tribunal *Ngāi Tahu Land Report* (Wai 27, 1991) at 824; and Waitangi Tribunal *Mohaka River Report* (Wai 119, 1992) at 63.

135 See, variously, *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [169]; *Proprietors of Wakatū v Attorney-General* [2017] 1 NZLR 423 at [670] per Glazebrook J; *Tukaki v Commonwealth of Australia* [2018] NZCA 324 at [27]; *Te Ara Rangatu o te Iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2019] NZAR 12; and *Ngāti Whātua Ōrakei Trust v Attorney-General* [2019] 1 NZLR 116 at [77] per Elias CJ.

Justice Joe Williams (writing extra-judicially) has said that tikanga as the "first law of Aotearoa" is being "drawn into mainstream decision-making" under the "integrate-to-perpetuate" model.[136] The Court of Appeal in *Takamore v Clarke*, with reference to the relationship of Te Tiriti to the recognition of tikanga at common law, stated:[137]

> *It requires no leap of faith … to suggest that in general the common law of New Zealand should as far as is reasonably possible be applied and developed consistently with the Treaty of Waitangi.*

More recently, in *Ngāti Whatua Orakei Trust v Attorney-General*, the Supreme Court accepted that "rights and interests according to tikanga may be legal rights recognised by the common law".[138]

Kawa, tikanga and mātauranga are intrinsically interconnected with recognition, protection and exercise of rangatiratanga and kaitiakitanga in accordance with Te Tiriti and its principles. This is particularly so in matters affecting conservation and the environment, as the Waitangi Tribunal has repeatedly recognised across many of its reports.

Therefore, when considering the application and effect of section 4 of the Conservation Act, the recognition and application of kawa, tikanga and mātauranga in the context of conservation and in the exercise of rangatiratanga and kaitiakitanga must be at the heart of the partnership between DOC and tangata whenua and the discharge of DOC's legal obligations.

International obligations

In carrying out our review, the ODG also took into consideration a range of international standards, agreements and processes that are specifically relevant to best practice in conservation policy and in which the New Zealand Government has actively participated. These included the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**); the Intergovernmental Platform on Biodiversity and Ecosystem Services (**IPBES**); resolutions and standards of the International Union for the Conservation of Nature (**IUCN**) and the United Nations Convention on Biological Diversity (**CBD**) and CBD Nagoya Protocol (**Nagoya Protocol**).

136 Justice Joseph Williams, "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) *Waikato Law Review 21* at 32. Refer also, Ani Mikaere, "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds), *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) at 330.

137 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [249].

138 *Ngāti Whatua Orakei Trust v Attorney-General* [2018] NZSC 84 at [77].

As noted earlier, the Waitangi Tribunal has recorded the link between the principle of development under Te Tiriti and certain of the rights recognised in UNDRIP.[139] While acknowledging that the Courts have not seen the need to substantively engage with UNDRIP when there is express statutory reference to the principles of Te Tiriti as they have viewed Te Tiriti as the primary and more important source of such obligations in Aotearoa New Zealand,[140] UNDRIP and other international instruments nevertheless reinforce not only the national but also the international importance of giving full effect and expression to Te Tiriti and its principles, particularly in the area of conservation.

For that reason, the ODG traverses below the key aspects of UNDRIP and other international instruments that are relevant to conservation. In the ODG's view, these international instruments reinforce the obligations arising under Te Tiriti and its principles and provide additional justification and support for our recommendations in this report.

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The New Zealand Government endorsed UNDRIP in 2010, the rights articulated in UNDRIP are fundamental rights. The relevant UNDRIP rights to the place and role of tangata whenua in relation to the conservation estate and the taonga within it can be grouped as follows:

- Right to self-determination as the key and pivotal right from which the other rights hinge.[141]
- Rights to self-determination and participation in decision making concerning matters that affect them (including the development of priorities and strategies for their lands, territories and resources).[142] Related to this, the threshold and requirement to obtain the free, prior and informed consent of Indigenous peoples applies to the forcible removal from lands or territories; the adoption of legislative or administrative measures that affect them; and projects that affect their lands, territories and other resources.[143] Of interest is the corresponding obligation on the State to provide effective mechanisms for redress and appropriate measures to mitigate adverse environmental, cultural or spiritual impact.[144]

139 Waitangi Tribunal, *Whaia te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015); and *United Nations Declaration on the Rights of Indigenous Peoples* A/Res/61/295 (2007) (**UNDRIP**), Articles 3 and 23.

140 For example, in *New Zealand Māori Council v Attorney-General* 2013] NZSC 6 at [92], the Supreme Court expressed "doubt if the Declaration adds significantly to the principles of the Treaty statutorily recognised under the State-Owned Enterprises Act 1986". In *Klink v Environmental Protection Authority* [2019] NZHC 3161 at [85], the High Court said that the "obligation to take into account international conventions such as UNDRIP has been subsumed within the express provisions of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012".

141 UNDRIP, Article 3.

142 UNDRIP, Article 32(1).

143 UNDRIP, Articles 10, 19 and 32(2).

144 UNDRIP, Article 32(3).

- Customary access and use, including rights to practice and revitalise cultural traditions and customs; maintain, protect and access cultural sites; maintain and strengthen the distinctive spiritual relationship with traditional lands, territories, waters and coastal seas and resources; and be secure in the enjoyment of their own means of subsistence and development.[145] The stipulated obligation of state redress through effective mechanisms is also relevant.[146]
- Rights to the conservation and protection of the environment and the productive capacity of their lands or territories and resources, including conservation of vital medicinal plants, animals and minerals, and the State's obligation to progress to a full realisation of that right and to take effective measures that relevant programmes are implemented.[147]
- Rights to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, and the obligation on the State to give legal recognition and protection to these lands, territories and resources with respect to customs and traditions of the Indigenous peoples concerned.[148]
- Rights to redress and fair compensation, as well as having access to financial and technical assistance for the enjoyment of the rights contained in this Declaration.[149]

Although the orthodox view is that UNDRIP is aspirational and not legally binding, in 2019 the New Zealand Government established an independent body to develop a plan and engagement process strategy to realise UNDRIP. The outcome was the *He Puapua* report,[150] which envisaged New Zealand reaching a state of UNDRIP consistency by 2040 and made recommendations on how to develop a national Declaration Plan. *He Puapua* also provided options and examples about what a staggered realisation of UNDRIP might look like, including with respect to conservation.

The ODG considers that UNDRIP is valuable in more generally informing how tangata whenua relationships with the conservation estate should be recognised and serves to reinforce many of the principles that flow from Te Tiriti itself.

145 UNDRIP, Articles 11, 12, 20 and 25.

146 UNDRIP, Articles 11(2) and 12(2).

147 UNDRIP, Articles 24(2) and 29(3).

148 UNDRIP, Articles 26(1) and 26(3).

149 UNDRIP, Articles 28, 10 and 39.

150 *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* (1 November 2019).

Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES)

In 2019, the 7th IPBES Plenary released a Global Assessment Report on Biodiversity and Ecosystem Services.[151] Based on the systematic review of about 15,000 scientific and government sources, the Assessment Report also drew (for the first time ever at this scale) on indigenous and local knowledge, particularly addressing issues relevant to Indigenous peoples and local communities.[152]

The Assessment Report concluded that nature is declining globally at rates unprecedented in human history and that the rate of species extinctions is accelerating. While noting that biodiversity decline is occurring in every country of the world, the assessment also reported that there is less rapid decline occurring on lands and territories owned and managed by Indigenous peoples relative to other lands.[153]

This finding was consistent with the ODG's observation that better biodiversity outcomes could be achieved in Aotearoa New Zealand if tangata whenua had greater involvement in the governance and management of biodiversity-rich and culturally significant areas.

151 *Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, ES Brondizio, J Settele, S Díaz and HT Ngo (eds) (Intergovernmental Platform on Biodiversity and Ecosystem Services, 2019). The Assessment Report is the most comprehensive ever completed and is the first intergovernmental report of its kind, building on the landmark Millennium Ecosystem Assessment of 2005 and introducing innovative ways of evaluating evidence.

152 Also see "Media Release: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating'", Intergovernmental Platform on Biodiversity and Ecosystem Services: **www.ipbes.net/**.

153 Press release: "Islands of nature in a sea of decline – indigenous and local knowledge, action and contributions key to saving the world's nature" (6 May 2019), Forest Peoples Programme: **www.forestpeoples.org**.

International Union for the Conservation of Nature (IUCN)

IUCN is a membership union composed of both government and civil society organisations. It is considered the global authority on the status of the natural world and the measures needed to safeguard it.[154] Aotearoa New Zealand is a state member of IUCN through DOC and the NZCA, and many of IUCN's standards are applied to assess biodiversity and species decline and to manage protected areas.[155] Similarly, the system DOC has adopted for the classification of Aotearoa New Zealand's protected areas[156] is also strongly influenced by IUCN's global protected areas category system.[157]

However, the ODG noted the obvious exclusion in Aotearoa New Zealand's system of protected areas classified under category VI of IUCN's system. Category VI protected areas conserve ecosystems and habitats together with associated cultural values and traditional natural resource management systems. They are generally large, with most of the area in a natural condition, where a proportion is under sustainable natural resource management and where low-level non-industrial use of natural resources compatible with nature conservation is seen as one of the main aims of the area.

Also relevant to the ODG's work was analysis of territories and areas conserved by Indigenous peoples and local communities (**ICCAs**), which have been in international discourse formally since the IUCN World Conservation Congress 2008 in Barcelona, gaining formal recognition by the IUCN and CBD as key governance mechanisms in nature conservation.[158]

154 "About", International Union for Conservation of Nature: **www.iucn.org/about**.

155 For example, the New Zealand Threat Classification System (NZTCS) is modelled on IUCN's Red List Category system – see "Conservation status of plants and animals": **www.doc.govt.nz/nature/conservation-status/**. The major difference between the IUCN Red List and the NZTCS is the use of national species assessors rather than international experts.

156 "Categories of conservation land", Department of Conservation: **www.doc.govt.nz/about-us/our-role/managing-conservation/categories-of-conservation-land/**.

157 "Protected Area Categories", International Union for Conservation of Nature: **www.iucn.org/theme/protected-areas/about/protected-area-categories**.

158 "ICCAs for biological and cultural diversity", International Union for Conservation of Nature: **www.iucn.org/news/protected-areas/201905/iccas-biological-and-cultural-diversity**. ICCAs are a governance option that sit alongside any and all of the protected area classifications. They are natural and/or modified ecosystems containing biodiversity values, ecological services and cultural values, voluntarily conserved by Indigenous and other communities through local or customary laws and are found in both terrestrial and marine areas. See also: Fikret Berkes "*Community conserved areas: Policy issues in historic and contemporary contexts*" (2008) 2(1) Conservation Letters 20.

Introduction of a classification in Aotearoa New Zealand's protected area system that is similar to IUCN's Category VI together with the application of ICCAs could potentially provide much better biodiversity and Te Tiriti outcomes than is the present case. The ODG also reviewed the full list of IUCN resolutions relating to Indigenous peoples and conservation and was disappointed to see the number of pro-indigenous resolutions to which the New Zealand Government, through DOC, had lodged objections. Many of these resolutions referred to UNDRIP and now that Aotearoa New Zealand has endorsed UNDRIP, the ODG considers that these objections should be reversed.

United Nations Convention on Biological Diversity (CBD) and the Nagoya Protocol

Aotearoa New Zealand ratified the CBD and has been an active participant in all CBD meetings.[159] The CBD has three main goals: conservation of biological diversity (or biodiversity), sustainable use of its components, and fair and equitable sharing of benefits arising from genetic resources. A delegation from the National Māori Congress, led by Te Arikinui Dame Te Atairangikaahu, participated in Aotearoa New Zealand's signing of the CBD at the 1992 UN Conference on Environment and Development, and tangata whenua have continued to be active participants in CBD processes, particularly relating to the work of the Article 8(j) working group.

The CBD recognises the dependency of Indigenous peoples and local communities on biological diversity and the unique role of Indigenous peoples and local communities in conserving life on Earth. This recognition is enshrined in the preamble of the CBD and in its provisions. It is for this reason that in Article 8(j) of the CBD, Parties have undertaken to respect, preserve and maintain the knowledge, innovations and practices of Indigenous peoples and local communities relevant for the conservation of biological diversity and to promote their wider application with the approval of knowledge holders; and to encourage equitable sharing of benefits arising out of the use of biological diversity. Furthermore, because of its relevance to the work of the CBD, considerations relating to the traditional knowledge of Indigenous peoples and local communities are also being incorporated in all the programmes of work under the CBD.

There are numerous decisions and agreements of the CBD that could be usefully applied within the context of the ODG's review, but of particular relevance is the Nagoya Protocol.[160] The Nagoya Protocol is an international agreement which aims to share the benefits arising from the utilisation of genetic resources in a fair and equitable way.

159 "Convention on Biological Diversity", Department of Conservation: **www.doc.govt.nz/about-us/international-agreements/convention-on-biological-diversity/**.

160 *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (2014): **www.cbd.int/abs/**.

The New Zealand Government has yet to adopt the Nagoya Protocol, citing unresolved issues arising from the Wai 262 claim, but the Nagoya Protocol nevertheless provides a strong signal by the international community of what is now deemed good practice. In the ODG's view, the fact that the New Zealand Government has yet to sign up to the Nagoya Protocol is indicative of the many gaps that exist between international developments in good practice and the current state of conservation policy with respect to tangata whenua in Aotearoa New Zealand.

Ngā tūtohunga / Recommendations

Themes

The ODG's recommendations are grouped under seven themes. Each of these themes is supported by a whakataukī (proverb) and each theme has one overarching recommendation (seven primary recommendations) and between one to five sub-recommendations (17 sub-recommendations in total). Where appropriate, the ODG recommends detailed ways of achieving a sub-recommendation.

The seven overarching themes and the ODG's primary recommendations are:

1. **Fundamental reform**: Transform conservation through fundamental reform of the conservation system.
2. **Purpose of conservation**: Reframe the purpose of conservation to ensure it is fit for purpose for Aotearoa New Zealand.
3. **Kawa, tikanga and mātauranga**: Centre kawa, tikanga and mātauranga within the conservation system.
4. **Lands, waters, resources, indigenous species and other taonga**: Recast the legal status of conservation lands, waters, resources, indigenous species and other taonga.
5. **Te Tiriti partnership**: Reform conservation governance and management to reflect Te Tiriti partnership at all levels.
6. **Tino rangatiratanga**: Enable devolution of powers and functions including decision making to meaningfully recognise the role and exercise of rangatiratanga.
7. **Resourcing**: Build capability and capacity within DOC and tangata whenua to give effect to Te Tiriti.

The seven themes and their respective primary and sub-recommendations are addressed in more detail in this section of the report.

Timeframes

The ODG's recommendations (and sub-recommendations) as set out in this section of the report are also identified with reference to two timeframes:

(a) Interim recommendations that can be implemented immediately (i.e. by 2022).

(b) Fundamental reform recommendations that can be implemented over the next 5 years (i.e. by 2026).

The interim recommendations focus on the redrafting of the General Policies, changes to the delivery of conservation (as any changes to the General Policies should have flow on changes to the way conservation is delivered), and building the capability and capacity of DOC and tangata whenua to give effect to Te Tiriti in the conservation system. The fundamental reform recommendations focus on the transformation of the conservation system through legislative change, and the resourcing to achieve and maintain that change.

The timeframe split is a result of legislative restrictions that hinder the redrafting of the General Policies to align with DOC's Te Tiriti obligations. The General Policies are the highest level of DOC policy that provide statutory guidance to the implementation of the legislative framework. However, the current legislation determines the metes and bounds of the General Policies and the mechanisms through which they can be implemented. In the ODG's view, this in turn restricts the ability of the General Policies to effectively direct, and of DOC to implement, a conservation system that fully reflects and realises Te Tiriti obligations imposed through section 4.

Therefore, while the primary focus of the ODG's task was the partial review of the General Policies, we are firm in our view that the Conservation Act (and the suite of related legislation including the National Parks Act) must be amended to enable the full implementation of the recommendations in this report. The General Policies will then require further review when that reform of the conservation system and its supporting legislation is complete. We note that the need for both meaningful interim changes and fundamental reform was supported by iwi, hapū and whānau throughout the ODG's engagement hui.

General Policies

While we have included certain recommendations relevant to the redrafting of the General Policies throughout Themes 2–7, we have not included redrafting the General Policies as a separate or explicit overarching recommendation. However, we have, as expressly required by our terms of reference, proposed a redrafted Chapter 2, entitled "Te Tiriti o Waitangi / Treaty of Waitangi responsibilities", which is set out in **Appendix 2** of this report.

In this regard, the ODG considers that Chapter 2 of the General Policies should be amended as an immediate priority to reflect, in a direct and unquibbling way, the full range of Te Tiriti obligations that apply as a consequence of section 4 and acknowledge that the Crown's conservation policies and their implementation cannot reasonably displace or override that statutory directive. The proposed redrafting of Chapter 2 includes amendments which:

- recognise, protect and prioritise the interests of, and exercise of tino rangatiratanga and kaitiakitanga by, tangata whenua in relation to lands, waters and other taonga which are subject to management and administration by DOC;
- recognise that the principles of Te Tiriti must apply and adapt to local circumstances and evolve over time as new circumstances arise;

- reflect the confirmation by the Supreme Court in *Ngāi Tai ki Tāmaki* that:
  - the obligation to give effect to the principles of Te Tiriti is not overridden by other considerations set out in conservation legislation (for example, public access and enjoyment, recreation and tourism);
  - giving effect to the principles of Te Tiriti is not merely a balancing exercise against other relevant considerations; and
  - what is required is a process where the meeting of other statutory objectives is achieved, to the extent this can be done consistently with section 4, in a way that best gives effect to the relevant principles of Te Tiriti;
- reflect an elevation of language from a discretionary "may" or "should" to an obligatory "will" (or "must") across all aspects of conservation (including provision for partnership, tino rangatiratanga, access and use, and mātauranga) to reflect the fundamental importance of DOC's Te Tiriti obligations; and
- the amendment of the definition of "Principles of the Treaty of Waitangi" in the glossary of the General Policies refers to those principles that are recognised by the Courts and the Waitangi Tribunal (i.e. not merely those principles "identified from time to time by the Government" as the General Policies currently state).

The ODG's redrafting of Chapter 2 assisted to frame and drive the broader recommendations in this report. The ODG considers that the changes to Chapter 2 and related consequential changes to other chapters of the General Policies should be made immediately.

Recommendations by theme

The following pages of this report set out ODG's primary and sub-recommendations with reference to each theme. They also provide an indication of which matters should be the subject of immediate action (by 2022) and which matters require more fundamental and transformative review and reform (by 2026).

Theme 1. Fundamental reform

Whakataukī

Nā tō rourou, nā taku rourou, ka ora ai.
With your food basket and my food basket, there will be prosperity.

This whakataukī captures the notion that by working together in partnership, the people and our environment can go beyond survival and really thrive.

Recommendation 1

Transform conservation through fundamental reform of the conservation system.

Sub-recommendations

A. Review and replace the Conservation Act 1987 and all associated schedule 1 Acts (and associated structures, policies, strategies, plans and delivery) to honour Te Tiriti and provide for the meaningful exercise of rangatiratanga and kaitiakitanga by tangata whenua to ensure that Papatūānuku thrives.

B. Adopt a Te Tiriti partnership approach when undertaking fundamental reform of the conservation system.

Recommendation 1: Transform conservation through fundamental reform of the conservation system

The need for transformative change through the fundamental reform of the conservation system in Aotearoa New Zealand became apparent to the ODG over the course of the review process as it began to appreciate the significant and system-wide inconsistencies between the Crown's Te Tiriti obligations and the nature and implementation of the current conservation system, as well as the state of Aotearoa New Zealand's rapidly declining biodiversity.

While the Supreme Court determined that section 4 of the Conservation Act obliges DOC to achieve its other statutory objectives and administer the conservation system in a way that best gives effect to the principles of Te Tiriti, the manner in which those other obligations have been interpreted and applied are, in fact, inconsistent with those principles. It the ODG's view, the current statutory and non-statutory mechanisms and processes are both outdated and inadequate to give effect to the principles of Te Tiriti in contemporary Aotearoa New Zealand.

The fact that Te Tiriti settlements have been increasingly used to effect substantive change to the legal frameworks and relationships which operate in the conservation arena also reflects a telling need for substantive reform. It has also created added complexities, as such Te Tiriti settlement-based mechanisms displace the 'status quo' in parts of some regions and not in others or in different ways within the same region. It has been difficult for the ODG to objectively rationalise why, for example, the Crown considers that the arrangements in respect of Te Urewera or Te Awa Tupua appropriately reflect the Crown's Te Tiriti obligations when similar arrangements are seemingly not available or offered in other areas.

It is therefore clear to the ODG that a conservation system that gives effect to the principles of Te Tiriti must reasonably start with the review and reform of the foundational instrument – the legislation – in order to enable the other levels of the system – such as the General Policies and other strategies, policies, plans and processes – to develop from and build upon that base.

An overview of the key concerns with the existing conservation framework is set out earlier in this report in the section entitled "Ngā take whakarae / Key concerns with the existing framework". Responses to those key concerns are set out below in sub-recommendations 1A and 1B. These sub-recommendations are concerned with fundamental reform and should be achieved over the next 5 years. However, in order to achieve that timeframe, the Crown should take initial steps now to establish and begin the substantive review and reform process.

Consistent with the principles of Te Tiriti, the ODG considers that this fundamental review and reform process should itself be progressed in partnership between the Crown and tangata whenua.

1A: Review and replace the Conservation Act 1987 and all associated schedule 1 Acts (and associated structures, policies, strategies, plans and delivery) to honour Te Tiriti and provide for the meaningful exercise of rangatiratanga and kaitiakitanga by tangata whenua to ensure that Papatūānuku thrives

Fundamental reform (by 2026)

Broadly, legislative amendments need to remove statutory barriers to the exercise of rangatiratanga, kaitiakitanga and mātauranga. In the words of the Tribunal, "the overall approach to conservation and the methods used should, to the greatest extent practicable, give life to the kaitiaki relationships and the expression of mātauranga".[161] In order to do this, legislation must transform from its current ethic – which is driven by ownership and management by exclusion – to one that is driven by a holistic and thriving living environment with tangata whenua involved in partnership at its heart.

The ODG makes specific recommendations regarding legislative amendments and wider conservation system reform under the other themes below. These other recommendations include:

161 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011), Volume 1 at 347.

- streamlining conservation legislation by taking a holistic approach;
- inserting express Te Tiriti provisions into all conservation legislation, including both overarching clauses stating that the legislation must be interpreted and administered (or similar wording) to give effect to Te Tiriti and its principles (similar to section 4) and elaborated provisions setting out particular mechanisms to implement and realise that obligation;
- redefining the purpose of conservation to reflect both tangata whenua and tangata tiriti[162] perspectives and support thriving indigenous biodiversity;
- providing for mātauranga and biodiversity outcomes;
- reclassifying public conservation lands and waters to recognise tangata whenua relationships;
- revoking Crown ownership of species, lands and taonga;
- ensuring tangata whenua access to and use of natural resources, species and taonga;
- reforming all conservation governance entities and statutory bodies to reflect a Te Tiriti partnership;
- enabling the delegation and devolution of functions and powers to tangata whenua; and
- resourcing the transition to, and maintenance of, a conservation system that gives effect to Te Tiriti and its principles.

The ODG is also aware of several other review workstreams that DOC is currently progressing (in addition to the partial reviews), including the review and reclassification process for stewardship lands and the management planning systems review.[163] Noting the potential relevance of these initiatives, we support a system-wide approach to conservation reform, jointly progressed between the Crown and tangata whenua, in order to give meaningful effect to Te Tiriti and its principles.

Additionally, and although beyond the strict scope of our terms of reference, we consider that a 'whole of Government' approach towards the recognition of Te Tiriti is required; the current piecemeal and siloed department-by-department approach is not conducive to an Aotearoa New Zealand that honours Te Tiriti.

162 Literally, "the people of Te Tiriti", referring to the non-Māori people of Aotearoa New Zealand.

163 See, for example, Department of Conservation media release, "Government speeds up stewardship land reclassification", 28 May 2021: **www.doc.govt.nz/news/media-releases/2021-media-releases/government-speeds-up-stewardship-land-reclassification/**.

1B: Adopt a Te Tiriti partnership approach when undertaking fundamental reform of the conservation system

Fundamental reform (by 2026)

A conservation system that honours Te Tiriti and provides for the meaningful exercise of rangatiratanga and kaitiakitanga can only be achieved if tangata whenua play an integral role in the reform as equal Te Tiriti partners with the Crown.

Te Tiriti and its principles necessitate that partnership and shared decision making between DOC and tangata whenua should be the standard approach to conservation – and must reasonably extend to any process of review and reform. A partnership approach would allow the Crown and tangata whenua, as Te Tiriti partners, to fairly and respectfully determine and develop the nature and terms of a transformed conservation system, including the practical details of how kāwanatanga and tino rangatiratanga would co-exist in that new system. In this regard, only tangata whenua can identify what their relevant kawa, tikanga and mātauranga in respect of conservation are and how they should be incorporated into the conservation system.

In its engagement hui, the ODG heard from iwi that this review and reform work goes to the heart of the relationship between tangata whenua and nature – a kinship relationship that builds and maintains identity, culture and mātauranga – and will therefore be "life-changing" and "as big as Te Tiriti" itself. Tangata whenua must therefore be involved from the start of the review and reform process, and in fact should be involved in co-designing both the process and the ultimate reforms. That involvement in partnership should continue throughout the process and should be both valued and resourced.

In this latter respect, the meaningful reform of a system that regulates the use of one-third of Aotearoa New Zealand's lands and waters, and the species that live within them, will not be possible without the dedication of time and resource. The ODG heard from iwi that resourcing and time are major issues for them. Accordingly, the process must ensure that it is sensitive to the capacity and commitments of iwi, who are vital to enabling their hapū and whānau to be informed and travel with them through the journey of reform. Iwi must therefore be fully informed and resourced from the outset of the review and reform process and given every opportunity to participate as Te Tiriti partners.

Accordingly, the ODG recommends that:

- the Minister and DOC engage with tangata whenua to co-design the process for a comprehensive review of the conservation system and conservation legislation;
- the Minister engages with tangata whenua to explore the potential for a tangata whenua representative body (to be appointed by tangata whenua) to work in partnership with the Minister and DOC to guide and provide oversight to the review and to any new legislation that is proposed as a result;
- the Minister and DOC engage with tangata whenua both during the course of and following the review process;
- the Minister and DOC work in partnership with tangata whenua to develop the policy direction and legislative drafting instructions to implement the outcomes and recommendations of the review; and
- the Crown resources the involvement of tangata whenua in the review and reform process.

Theme 2. Purpose of conservation

Whakataukī

Ahakoa he iti, he pounamu
Although it is small, it is precious

This whakataukī encompasses the idea that something seemingly minor, such as the wording used to define the purpose and understanding of conservation, can be of great significance to the way conservation is perceived and carried out in Aotearoa New Zealand. It also reflects the idea that all components of the environment, whether big or small, are valued and necessary for thriving biodiversity.

Recommendation 2

Reframe the purpose of conservation to ensure it is fit for purpose for Aotearoa New Zealand.

Sub-recommendation

A. Embed a new understanding of conservation that is specific to Aotearoa New Zealand that reflects both tangata whenua and tangata tiriti[164] perspectives and supports thriving indigenous biodiversity.

164 Literally, "the people of Te Tiriti", referring to the non-Māori people of Aotearoa New Zealand.

Recommendation 2: Reframe the purpose of conservation to ensure it is fit for purpose for Aotearoa New Zealand

There is no purpose section in the Conservation Act 1987. The long title states that it is "[a]n Act to promote the conservation of New Zealand's natural and historic resources, and for that purpose to establish a Department of Conservation". The Act defines "conservation" as:[165]

> *the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.*

To the extent that it is an Act to "promote the conservation of New Zealand's natural and historic resources", the definition of "conservation" conforms closely with Eurocentric values and places an emphasis on preservation and protection set apart from human existence, except for recreational enjoyment. Access to and use of conservation lands, waters, resources and species are tolerated and regulated only when it meets this purpose.

The tangata whenua environmental ethic of kaitiakitanga, reciprocity between humans and the environment, and sustainable use is not provided for at all. One witness in the Wai 262 inquiry described the different approaches as a "major paradigm difference between the 'hands off' outlook of many in the conservation movement, and the continual interaction with the natural environment that is the way of Māori".[166] The principle of active protection requires the Crown to provide for and protect the environmental ethic of tangata whenua.

2A: Embed a new understanding of conservation that is specific to Aotearoa New Zealand that reflects both tangata whenua and tangata tiriti perspectives and supports thriving indigenous biodiversity

The purpose of conservation must be reframed to ensure it is fit for purpose in Aotearoa New Zealand and gives effect to the promises made in Te Tiriti. To achieve this, a new understanding of conservation that is specific to Aotearoa New Zealand that reflects both the tangata whenua and tangata tiriti perspectives must be embedded throughout the conservation system – in legislation, the General Policies, wider policy settings, and culture and practice. This understanding must bring together the differing approaches to conservation management represented by mātauranga Māori and the preservationist philosophy and establish a pluralist approach – a shared vision for conservation.[167]

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165 Conservation Act 1987, section 2.

166 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011), Volume 1 at 367, citing Robert McGowan, updated brief of evidence on behalf of Ngāti Kahungunu, 11 August 2006 at 12.

167 This recommendation was also made by the Waitangi Tribunal in *Ko Aotearoa Tēnei* (Wai 262, 2011), Volume 1 at 366–367.

The two approaches need not be irreconcilable. There is universal concern to support thriving indigenous biodiversity and maintain the intrinsic value of natural resources. Both approaches demand the protection and enhancement of habitats and the restoration of species populations before they can be harvested sustainably.

An understanding of conservation that gives effect to Te Tiriti must recognise the vital role and valuable contribution that tangata whenua, mātauranga, mātauranga holders and indigenous biodiversity have in maintaining, protecting and restoring the environment.

Sustainable use is an essential part of the conservation ethic for the sustenance of tangata whenua as a people; it is critical for cultural survival, identity and knowledge.[168] The rights of tangata whenua to sustainably use natural resources are protected in the CBD,[169] UNDRIP[170] and *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020*.[171]

The ODG considers that sustainable use can also encompass those parts of the existing definition of conservation in the Act regarding appreciation and recreational enjoyment by the public.

Fundamental reform (by 2026)

To achieve recommendation 2A by 2026, the ODG recommends that conservation legislation is reformed to, at a minimum, include all of the following:

- A preamble in te reo Māori and English (similar to Te Ture Whenua Māori Act 1993).

168 Jacinta Ruru and others, "Reversing the Decline in New Zealand's Biodiversity: Empowering Māori within reformed conservation law" (2017) *Policy Quarterly 13*(2) at 68.

169 United Nations Convention on Biological Diversity, Articles 8 and 10.

170 United Nations Declaration on the Rights of Indigenous Peoples, Articles 26 and 32(1).

171 *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* (Department of Conservation, August 2020) at 44 and 72. The provision for sustainable use also aligns with the definition of conservation in the 1980 World Conservation Strategy (1980) at Section 1, Introduction: living resource conservation: "The management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations. Thus conservation is positive, embracing preservation, maintenance, sustainable utilization, restoration, and enhancement of the natural environment."

- A purpose section that embodies a shared vision for thriving indigenous biodiversity and the natural environment, which recognises and protects the mauri and the interconnectedness of all the elements of te taiao and their health and wellbeing; upholds the intrinsic whakapapa relationship between tangata whenua and te taiao; and ensures and enables the sustainable use and enjoyment of the natural environment for the wellbeing of future generations.[172]
- A definition of "conservation" similar to the following: "conservation means the maintenance, enhancement and sustainable use of whenua, moana, wai and the species that rely upon them, across generations, having special regard for indigenous biodiversity, mauri and natural ecosystems".
- Provision for the recognition at law of the relationship between tangata whenua and the environment and related innate values founded on relevant kawa, tikanga and mātauranga (like those presently recognised in respect of Te Awa Tupua and Te Urewera[173]).
- Mechanisms, process and structures which recognise and enable a true partnership between the Crown and tangata whenua in the delivery of conservation in Aotearoa New Zealand.

Interim (by 2022)

The ODG recommends that the General Policies, where possible within the current legislative framework, be amended to reflect an Aotearoa New Zealand understanding of conservation. Ways this can be done include:

- a section to the 'Introduction' outlining a shared vision for thriving indigenous biodiversity and the natural environment, ensuring positive biodiversity outcomes are articulated as one of the objectives and that the shared vision and biodiversity outcomes are reflected in other relevant sections throughout the General Policies;
- further reference to this shared vision in Chapter 2, for example:

  "An approach to conservation centred on the principles of Te Tiriti reflects a shared vision for thriving indigenous biodiversity and the natural environment, which:

172 The ODG notes the relevance of the current work on the review and reform of the Resource Management Act 1991. In June 2021, the New Zealand Government released an exposure draft of the Natural and Built Environments Bill. Clause 5 of that Bill sets out the purpose of the proposed legislation and includes the requirement to uphold "Te Oranga o te Taiao". "Te Oranga o te Taiao" incorporates the health of the natural environment; the intrinsic relationship between iwi and hapū and te taiao; the interconnectedness of all parts of the natural environment; and the essential relationship between the health of the natural environment and its capacity to sustain all life.

173 As reflected in Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (Part 2, sections 10–17) and Te Urewera Act 2014 (Part 1, sections 5 and 11–12).

- *recognises and protects the mauri and the interconnectedness of all the elements of te taiao and their health and wellbeing;*
- *upholds the intrinsic whakapapa relationship between tangata whenua and te taiao; and*
- *ensures and enables the sustainable use and enjoyment of the natural environment for the wellbeing of future generations."*

- defining "intrinsic value" in the glossary of the General Policies by referencing kawa, tikanga and mātauranga concepts such as mauri and tapu.[174]

Changing the system's purpose and the definition of conservation will set a foundation to build a conservation system that gives effect to Te Tiriti. The remaining themes in this report discuss mechanisms that are intended to give practical effect to this foundation.

174 The term "intrinsic value" comes from the current definition of "conservation" in the Conservation Act 1987.

Theme 3. Kawa, tikanga and mātauranga

Whakataukī

E kore e ngaro, te kākano i ruia mai i Rangiātea
The seed sown from Rangiātea shall never be lost

Rangiātea is known as a place in Hawaiki from where tangata whenua departed to migrate to Aotearoa New Zealand. This whakataukī reflects the idea that kawa, tikanga and mātauranga will never be lost in the context of the environment of Aotearoa New Zealand, from which they evolved and developed for many centuries. There are many opportunities for centring kawa, tikanga and mātauranga in Aotearoa New Zealand's unique environment and they should be applied in ways that allow them to continue to evolve and flourish. The whakataukī also endorses the need for biodiversity outcomes to have an intergenerational focus.

Recommendation 3

Centre kawa, tikanga and mātauranga within the conservation system.

Sub-recommendations

A. Ensure the conservation system and decision making within it gives weight to mātauranga and upholds kawa and tikanga.

B. Ensure that the terms and principles under conservation legislation, policies, strategies and plans reflect kawa, tikanga and mātauranga.

C. Ensure the relationship between tangata whenua and conservation lands, waters, wāhi tapu, resources, species and other taonga (including kawa, tikanga and mātauranga relating to that relationship) is determined by tangata whenua, and that relationship is enabled and empowered by the conservation system.

Recommendation 3: Centre kawa, tikanga and mātauranga within the conservation system

Aotearoa New Zealand's indigenous ecosystems and species are in a rapid state of decline due to our use of the land and invasive pests and diseases. There are around 4,000 species that are threatened or at risk of becoming extinct.[175] This means we could lose more than 80 percent of our reptiles, frogs, bats and birds. 59 of our bird species have disappeared since humans first arrived here, and we continue to lose fundamental ecosystems and habitats like tussock grasslands, sand dunes, indigenous scrubland and indigenous forests.

175 See *New Zealand's Environmental Reporting Series: Our land 2018* (Ministry for the Environment and Stats NZ, April 2018); and *New Zealand's Environmental Reporting Series: Environment Aotearoa 2019* (Ministry for the Environment and Stats NZ, April 2019).

The knowledge systems of kawa, tikanga and mātauranga evolved from and sustained the natural environment for hundreds of years prior to the signing of Te Tiriti in 1840. Mātauranga is a complete indigenous scientific knowledge system that is essential to both a thriving environment and the ability of the culture and identity of tangata whenua to flourish.

However, colonisation and settlement in the 19th century and the resulting environmental impacts and biodiversity losses had wide-ranging effects on the relationship that tangata whenua had with biodiversity. One of these impacts has been the loss of mātauranga in relation to those species that have vanished. To further embed this loss, our current conservation legislation, and therefore conservation system, does not adequately protect, foster or give weight to kawa, tikanga and mātauranga. Mātauranga is only mentioned once in the General Policies, and the Crown has discretion to recognise and support it.[176] This is despite most of the surviving examples of the natural environment in which mātauranga evolved being under DOC control.

Although not in legislation, the Crown is beginning to recognise and provide for mātauranga in the conservation system through strategy and policy documents. For example, *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* acknowledges both mātauranga and other scientific disciplines as equally valid, distinct and separate knowledge systems and seeks to ensure mātauranga is elevated to equal standing as other forms of knowledge in Aotearoa New Zealand's biodiversity management.[177] Other examples include the Government's 2017 Conservation and Environment Science Roadmap[178] and the science advisory groups for kauri dieback and myrtle rust.[179]

176 Policies 12(c) of the Conservation General Policy and 11(c) of the General Policy for National Parks each state that mātauranga "should be recognised" and "may be supported by cooperative arrangements".

177 *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* (Department of Conservation, August 2020) at 33–34. Te Mana o te Taiao provides the overall strategic direction for the protection, restoration and sustainable use of biodiversity in Aotearoa New Zealand for the next 30 years. It adopts the He Awa Whiria model – a visualisation of a braided river system, where braids represent different knowledge systems that can stand alone but can also be woven together throughout parts of the river's journey. To achieve *Te Mana o te Taiao* outcomes, mātauranga Māori is recognised as an integral part of biodiversity research and management.

178 The roadmap seeks to increase use of mātauranga Māori in environmental research. The roadmap includes recognising, developing and utilising mātauranga Māori, both alongside and integrated with other science approaches, to improve environmental outcomes and to support Māori to exercise kaitiakitanga and other traditional roles. The roadmap provides a high-level, 20-year view of research priorities to provide strategic direction to organisations which fund, resource and undertake research.

179 DOC is working with iwi science specialists in the science advisory groups for kauri dieback and myrtle rust. The strategic science plans concerning these conservation issues seek to give effect to Te Tiriti principles in defining the science needed, the processes used to undertake that science, and when managing and implementing the knowledge derived from that science.

Many iwi have also developed iwi management plans and other documents that anchor and guide their approaches to kaitiakitanga and conservation. While aimed at giving effect to section 6e of the Resource Management Act 1991, these documents are often relied upon by iwi to inform and support their decisions on conservation matters as well.

Despite this, the ODG is sharply aware of the danger that the bureaucratic system of the Crown can operate in a way that appropriates tikanga, te reo and mātauranga. Any reform must include safeguards to ensure appropriation does not occur. What is required is a decolonised system where its roots are Papatūānuku, te taiao and their mauri.

The three sub-recommendations under Theme 3 centre kawa, tikanga and mātauranga in the conservation system in two ways:

- First, through tangata whenua involvement in governance, management and delivery.
- Second, by giving kawa, tikanga and mātauranga visibility and weight throughout the conservation system.

Theme 3 recommendations are directed to both interim (because even though the legislation does not refer to kawa, tikanga and mātauranga, it also does not restrict the centring of such in policy and delivery) and fundamental reform (to expressly enshrine in conservation legislation the centring of kawa, tikanga and mātauranga).

3A: Ensure the conservation system and decision making within it gives weight to mātauranga and upholds kawa and tikanga

Interim (by 2022) and fundamental reform (by 2026)

The ODG recommends that both:

(a) the General Policies and their implementation and delivery are changed in the immediate term; and

(b) the conservation legislation and the wider system are reviewed and reformed over the next 5 years;

in order to:

- recognise the vital role that mātauranga holders have in a shared vision for thriving indigenous biodiversity and the natural environment;
- recognise the valuable contributions that mātauranga and tangata whenua contribute to conservation governance, management and delivery at place;
- reflect kawa, tikanga and mātauranga in conservation terms and principles;
- require that decisions-makers will recognise kawa, tikanga and mātauranga and will understand the relevant kawa, tikanga and mātauranga and specify how they are given weight;
- recognise that flora and fauna and related kawa, tikanga and mātauranga derived from that flora and fauna are specific to iwi/hapū and their rohe, and enable these specific relationships;
- change conservation boundaries so that they better reflect iwi/hapū rohe and interests; and

- state that kawa, tikanga, mātauranga and tangata whenua interests in research and related permissions and concessions will be recognised and supported by cooperative partnerships, including the sharing of research findings with tangata whenua.

3B: Ensure that the terms and principles under conservation legislation, policies, strategies and plans reflect kawa, tikanga and mātauranga

3C: Ensure the relationship between tangata whenua and conservation lands, waters, wāhi tapu, resources, species and other taonga (including kawa, tikanga and mātauranga relating to that relationship) is determined by tangata whenua, and that relationship is enabled and empowered by the conservation system

Interim (by 2022) and fundamental reform (by 2026)

The ODG recommends that both:

(a) the General Policies and their implementation and delivery are changed in the immediate term; and

(b) the conservation legislation and the wider system are reviewed and reformed over the next 5 years;

in order to:

- recognise that the use of te reo Māori is a gift from tangata whenua to the nation of Aotearoa New Zealand;
- recognise that only tangata whenua (at both national and rohe/local levels) can determine their relationships with conservation lands, waters, wāhi tapu, resources, species and other taonga, and the meaning and application of associated kawa, tikanga and mātauranga;
- require the development of safeguards to ensure that the Crown does not appropriate kawa, tikanga, and mātauranga; and
- recognise that any intellectual property rights based on mātauranga be vested with the respective mātauranga holders.

Theme 4. Lands, waters, resources, indigenous species and other taonga

Whakataukī

Ko tōku ūkaipō te whenua, ko tōku whenua te ūkaipō
In the womb, the placenta sustains us, out of the womb, the land takes the place of the placenta and sustains us.

This whakataukī highlights the strong connection between people and the environment. People and the environment rely on each other for sustenance and wellbeing. The literal meaning of ūkaipō is to be fed by the breast at night. Its more symbolic meaning refers to the spiritual, emotional and physical nourishment that is given through the comfort and intimate relationship between the mother and child. Similarly, land (or Papatūānuku) and people are viewed as carrying the same relationship. Therefore, appropriate access and use of land, resources and taonga are important for the wellbeing of people and the environment.

Recommendation 4

Recast the legal status of conservation lands, waters, resources, indigenous species and other taonga.

Sub-recommendations

A. Reform the ownership model of public conservation lands and waters to reflect the enduring relationships tangata whenua have with these places and the resources and taonga within them.

B. Undertake a review of all classifications applied to public conservation lands and waters to recognise tangata whenua relationships.

C. Revoke Crown ownership of indigenous species.

D. Resolve tangata whenua rights and interests in the freshwater and marine domains.

E. Ensure tangata whenua access to and use of all lands, waters, species and resources managed within the conservation system, including within the context of permissions and concessions.

Recommendation 4: Recast the legal status of conservation lands, waters, resources, indigenous species and other taonga

DOC has conservation responsibilities for (and the Crown owns much of) one-third of lands and waters in Aotearoa New Zealand. Current ownership and classification models[180] that determine how an area and species on it are managed, accessed and used are based on 'western' views that do not reflect the relationship that tangata whenua have with the environment – a relationship that requires interaction with the environment irrespective of legal ownership.

The General Policies give the Crown discretion to consult tangata whenua in the investigation process for new and additions to national parks and boundaries and special areas within national parks, and seek the inclusion of any foreshore adjoining a national park, despite the Marine and Coastal Area (Takutai Moana) Act 2011, and any beds of lakes and rivers vested in the Crown, which should await the resolution of freshwater rights and interests.[181]

The Crown's ownership of conservation lands, indigenous species and marine mammals is pervasive, including the retention of ownership of indigenous species and marine mammals when they are not on conservation lands or in conservation waters, even if they are deceased.

Current conservation legislation strictly limits access to and the use of traditional materials and indigenous species and usually requires authorisation from the Minister or Director-General. For example:

- the take of any indigenous plants or animals in national parks is prohibited without the prior written consent of the Minister;[182]
- only the Minister may grant concessions and only the Director-General may authorise the taking of plants intended to be used for traditional Māori purposes;[183]

180 Present classifications include National Park (classes: Specially Protected Area; Wilderness Area; Amenities Area); Conservation Area (classes: Stewardship Area; Marginal Strip; Specially Protected Area (types: Conservation Park; Ecological Area; Sanctuary Area; Wilderness Area; Watercourse Area; Amenity Area; Wildlife Area)); Wildlife Area (classes: Wildlife Sanctuary; Wildlife Refuge; Wildlife Management Reserve); Reserve (classes: Recreation; Historic; Scenic; Nature; Scientific; Government. Purpose; Local Purpose); and Marine (classes: Marine Reserve; Marine Mammal Sanctuary; Faunistic Reserve).

181 Chapter 6 of the General Policy for National Parks concerns new, and additions to, national parks, and boundaries and special areas within national parks. Despite requiring that the NZCA "will seek the views of tangata whenua" before requesting an investigation and report on any proposal that land should be declared to be a national park, there are only "should" obligations to consult tangata whenua in the investigation process and have regard to their views.

182 National Parks Act 1980, section 5.

183 Conservation Act 1987, sections 17Q and 30(2). Sometimes more than one type of permission is needed because of overlapping requirements in the different pieces of legislation.

- "absolutely protected" wildlife (or any part of the animal, such as feathers) – which includes most taonga species – is owned by the Crown and remains in the Crown's ownership even after it has been lawfully taken or killed;[184]
- the sale of some protected wildlife is prohibited;[185]
- only the Minister can declare and authorise – by way of statutory amendment, which has been used sparingly – that any wildlife that is not absolutely protected can be harvested and where for customary purposes;[186] and
- the General Policies give the Crown discretion to authorise customary use of traditional materials and indigenous species.[187]

Given that the Crown ultimately determines tangata whenua access to and use of conservation resources, the term "customary use" generally refers to restricted forms of activity, which are predominantly non-pecuniary in nature.

184 Wildlife Act 1953, section 57.

185 Wildlife Act 1953, sections 23 and 63A.

186 Wildlife Act 1953, section 6 and Schedule 3.

However, section 6 is not commonly used for authorising customary take and possession of dead protected wildlife because, prior to the judgment in *Shark Experience Limited v PauaMac5 Incorporated* [2019] NZSC 111, [2019] 1 NZLR 791 at least, section 53(1) was thought to provide a more comprehensive mechanism that applied to a wider range of species. However, as a result of the *Shark Experience* decision, DOC considers it can no longer use section 53(1) for customary take and possession. Section 6 is primarily used for hunting live wildlife species listed on Schedule 3, including the possession of any remains. For example, these provisions are used to authorise customary management of tītī/muttonbirds in limited parts of Aotearoa New Zealand (namely, on specified privately-owned islands in Foveaux Strait and adjacent to Stewart Island/Rakiura, and on specified privately-owned land and public conservation land on islands off the eastern coast of the North Island from Northland to the Bay of Plenty).

187 For example, Policy 2(g) only requires that such use "may be authorised" where certain conditions are met (including that there is an established tradition of customary use at the place) and that the views of tangata whenua "should be sought and had regard to". Policy 5(f) states that DOC may hold or manage collections of antiquities and artifacts, including taonga, where it is important to preserve their association with places, or for information purposes, without reference to tangata whenua.

Currently, Crown conservation land is only being returned to tangata whenua through Te Tiriti settlement legislation.[188] There has been little willingness to do this and, where it has occurred, it has been piecemeal and inconsistent. Furthermore, tangata whenua should not have to rely on the settlement process to achieve partnerships, exercise kaitiakitanga, express mātauranga or have lands returned to them; these things are protected by the principles of Te Tiriti and conservation legislation.

The ODG considers that the legal status of conservation lands, waters, resources and indigenous species needs to be recast to give effect to Te Tiriti. The following sub-recommendations aim to remedy the concerns noted above by giving effect to rangatiratanga, kaitiakitanga and mātauranga, in order to enhance the relationships that tangata whenua have with their ancestral taonga and consequently to improve biodiversity outcomes for the benefit of Aotearoa New Zealand.

4A: Reform the ownership model of public conservation lands and waters to reflect the enduring relationships tangata whenua have with these places and the resources and taonga within them

Fundamental reform (by 2026)

The ODG recommends that:

- tangata whenua and the Crown work in partnership to develop a suite of conservation ownership models;
- the suite of new conservation ownership models be embedded in conservation legislation;
- options for the new suite of conservation ownership models include:
  - the creation of new land titles that reflect the interests of tangata whenua and the Crown;
  - the declaration of lands and waters as legal entities or persons that are vested in governance entities (comprised of solely tangata whenua representatives or tangata whenua and Crown representatives); and
  - the return of land to tangata whenua for conservation purposes under agreements (including outside of Te Tiriti settlements), especially where the tangata whenua interest is of overwhelming significance (for example, places or species that are of great significance to iwi or hapū identity);

188 Te Tiriti settlements provide the least cumbersome way to transfer land to tangata whenua, as it is done through bespoke legislation enabling transfer. Other means of transfer are subject to legal requirements that DOC / the Crown have to meet to declare land surplus to requirements and available for disposal; for example, section 26(2) of the Conservation Act 1987, post-Te Tiriti settlement rights of first refusal, and section 40 of the Public Works Act 1981 (offer back to prior owners when no longer required for a public work – conservation land being considered a “public work”).

- the suite of new conservation ownership models is informed by kawa, tikanga and mātauranga; and
- tangata whenua must be the ones who define kawa, tikanga and mātauranga and their relationships with the environment.

Interim (by 2022)

The ODG recommends that the General Policies are amended to require that any new acquisition, classification, disposal or exchange decision will only be made after engagement with tangata whenua.

4B: Undertake a review of all classifications applied to public conservation lands and waters to recognise tangata whenua relationships

Fundamental reform (by 2026)

The ODG recommends that:

- tangata whenua and the Crown work in partnership to develop a suite of new conservation classifications for lands and waters;
- the suite of new conservation classifications be embedded in conservation legislation;
- the suite of new conservation classifications is informed by kawa, tikanga and mātauranga; and
- tangata whenua must be the ones who define kawa, tikanga and mātauranga and their relationships with the environment.

The ODG recommends that the General Policies are amended to require that any new acquisition, classification, disposal or exchange decision will only be made after engagement with tangata whenua.

4C: Revoke Crown ownership of indigenous species

Fundamental reform (by 2026)

The ODG recommends that conservation legislation is amended so that:

- the Crown's ownership of native wildlife and marine mammals is removed;
- native and protected wildlife and marine mammals are not property;
- nobody owns native and protected wildlife and marine mammals; and
- the Crown does not own taonga works derived from protected wildlife and marine mammals, but instead tangata whenua have lawful ownership of such taonga.

4D: Resolve tangata whenua rights and interests in the freshwater and marine domains

Responsibilities under conservation legislation and the General Policies include matters relating to freshwater bodies and marine environments. Like other environmental features, tangata whenua whakapapa to, and have ancestral links with, lakes, rivers and the ocean. These domains are of vital importance to the social, economic, and cultural wellbeing and health of tangata whenua. Resolving tangata whenua rights and interests in these domains is of fundamental importance to a conservation system that gives effect to Te Tiriti.

The ODG recommends that the General Policies and any processes of review and reform in relation to the conservation system more generally:

- expressly recognise the vital relationship that tangata whenua have with water in both freshwater and marine domains, in addition to their relationship with the underlying land; and
- expressly acknowledge that the full nature of tangata whenua rights and interests in water remain to be resolved (particularly as more comprehensive review and reform is ongoing).

The ODG further recommends that the long outstanding resolution of the issue of tangata whenua rights and interests in relation to water is an important matter that must be achieved as part of, or at least in parallel with, the fundamental reform of the conservation system.

4E: Ensure tangata whenua access to and use of all lands, waters, species and resources managed within the conservation system, including within the context of permissions and concessions

Access to and use of conservation lands, waters, resources and species is an essential part of the kaitiakitanga conservation ethic and is essential to the social, economic, and cultural wellbeing of tangata whenua. Article 2 of Te Tiriti guarantees tangata whenua access and use of the environment. These rights are also acknowledged in the UN Convention on Biological Diversity,[189] UNDRIP,[190] and *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020*.[191]

The Supreme Court in *Ngāi Tai ki Tāmaki* recognised that access and use are important for the development and economic interests of tangata whenua and said that the Crown must consider affording preference to tangata whenua in certain circumstances in order to protect these interests.[192]

189 United Nations Convention on Biological Diversity, Articles 8 and 10.

190 UNDRIP, Articles 26 and 32(1).

191 *Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020* (Department of Conservation, August 2020) at 44 and 72.

192 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [90]–[91].

Fundamental reform (by 2026)

In order for the conservation system and legislation to allow for levels of access and use that give effect to Te Tiriti, the ODG recommends that:

- tangata whenua authorise take and harvest for the purpose of social, economic and cultural wellbeing;
- tangata whenua are empowered to develop frameworks based on kawa, tikanga and mātauranga to understand species abundance and identify sustainable methods for harvesting and managing plants and animals (or parts of them);
- tangata whenua authorise permissions for research involving indigenous flora and fauna; and
- any benefits arising from the utilisation of indigenous genetic resources are shared with tangata whenua in a fair and equitable way under mutually agreed terms.[193]

Interim (by 2022)

The ODG recommends that the General Policies are amended to:

- make customary harvest and access a "will" obligation provided appropriate conditions are satisfied, with a presumption in favour of customary practices rather than mere case-by-case discretion;
- remove the requirement that there be "an established tradition of such customary use at the place" before customary use may be permitted;
- require decision-makers to expressly consider giving tangata whenua interests in taonga a reasonable degree of preference in concessions and permissions in the conservation estate;[194] and
- include a section on customary and cultural use within the "People's benefit and enjoyment" chapter.

193 This would be consistent with the Nagoya Protocol to the United Nations Convention on Biological Diversity regarding the sharing of benefits arising from the utilisation of genetic resources in a fair and equitable way, which the Crown should ratify.

194 This is consistent with the decision in *Ngāi Tai ki Tāmaki*, where the Supreme Court found that DOC did not properly give effect to Te Tiriti principles in its decision to grant the concession because DOC failed to properly consider the economic interests of Ngāi Tai ki Tāmaki and failed to consider the possibility of affording them preference. See also the findings of the Court of Appeal in *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 561–562.

Outside of the General Policies, the ODG also recommends as an immediate priority that DOC works closely with tangata whenua to:

- clarify the status of Ngā Aitanga a Nuku agreements and the ability to take and possess dead protected wildlife for customary purposes in view of the Supreme Court's 2019 decision in *Shark Experience Limited v PauaMac5 Incorporated* (which addressed a number of issues connected with the statutory protections for wildlife under the Wildlife Act);[195] and
- determine how DOC should best meet its Te Tiriti and regulatory obligations with respect to access to cultural materials, including taonga species.[196]

195 *Shark Experience Limited v PauaMac5 Incorporated* [2019] NZSC 111, [2019] 1 NZLR 791.

196 Ngā Aitanga a Nuku agreements were introduced in 2016 and provide for tangata whenua management of the collection and holding of cultural materials by way of issuing permissions on a day-to-day basis, in line with a cultural materials plan. Cultural materials plans are jointly created with DOC – and sometimes enabled within Te Tiriti settlements – and then approved by the relevant decision-maker (either the Minister or Director-General depending on the place and species or material). While an authorisation under the Wildlife Act is still required under this process, it effectively shifts the permitting function for cultural materials to tangata whenua to administer permits for their own people. Currently, there is one arrangement in place with Waikato-Tainui and work with 25 other iwi/hapū is underway to set up other arrangements. Uptake on the new process has been slow over the last 4 years due to competing priorities; however, as a consequence of the *Shark Experience* decision, DOC considers that it can no longer use section 53(1) of the Wildlife Act to authorise customary take and possession of deceased protected wildlife.

Theme 5. Te Tiriti partnership

Whakataukī

Ko te Tōtara i weherua he kai mā te ahi.
A people divided, like tōtara split apart, is as food for the fire.

This whakataukī is about encouraging unity and partnership in conservation. It expresses that progress will come from combining the skills and knowledge of both tangata whenua and tangata tiriti.

Recommendation 5

Reform conservation governance and management to reflect Te Tiriti partnership at all levels.

Sub-recommendations

A. Review and reform conservation governance entities including the New Zealand Conservation Authority, conservation boards and other statutory bodies to reflect Te Tiriti partnership.

B. Adopt appropriate models for mana-to-mana relationships, planning and decision making at the appropriate geographic scale.

C. Honour and implement existing Te Tiriti settlement commitments and arrangements, noting that these do not limit the full expression of Te Tiriti partnership.

D. Make immediate changes to ensure tangata whenua are engaged in decision making that affects their interests, including in the context of permissions and concessions.

Recommendation 5: Reform conservation governance and management to reflect Te Tiriti partnership at all levels

The Crown's structures and processes for conservation governance and management fall short of what is required by the principles of Te Tiriti. Reasons for this shortfall include:

- conservation legislation specifies that the statutory decision-maker will usually be the Minister of Conservation or the Director-General (depending on the specific decision), and that delegation of decision-making powers generally is only possible to a DOC official;
- tangata whenua input is often limited to advisory committees or conservation board sub-committees, unless otherwise provided for in Te Tiriti settlement legislation. Te Tiriti settlements and related legislation have created many different forms of partnership with or participation by Te Tiriti partners in conservation, including forms of co-governance and co-management that give Te Tiriti partners decision-making powers, or ways of strengthening iwi input and influence over decisions and operations.[197] However, forms of co-governance and co-management are ad-hoc and few and far between;
- the primary conservation governance bodies – the NZCA (national) and conservation boards (regional) – do not have adequate tangata whenua representation.[198] Despite having the power to approve statutory management documents (conservation management strategies and plans, and national park management plans)[199], these bodies have very little power in practice;
- the statutory processes for developing, notifying, reviewing and approving statutory management documents do not clearly identify tangata whenua involvement as Te Tiriti partners;
- DOC has a nationwide network of Pou Tairangahau – regionally-based staff whose role is to facilitate relationships and act as a conduit for information and ideas between DOC and tangata whenua – who are highly effective cross-cultural mediators. However, they comprise an operational arm that cannot be viewed as a proxy for a Te Tiriti partnership with tangata whenua; and

197 In these cases, tangata whenua are usually not the decision-maker. Models include the formation of an advisory committee with claimant group membership; the development of a conservation management plan or chapter in a conservation management strategy with a conservation board; overlay classifications; statutory acknowledgments; deeds of recognition; and relationship agreements with DOC.

198 The members are appointed by the Minister of Conservation. The NZCA has a Ngāi Tahu representative, and Te Tiriti settlements have put in place specific arrangements for tangata whenua representation on 10 out of 15 conservation boards (but only seven have current tangata whenua representation).

199 These sit beneath the General Policies and guide DOC's decisions about the activities, including commercial activities and customary use and access, which can occur in a given place.

- the General Policies give the Crown discretion to choose whether to partner with tangata whenua.[200] Partnership and shared decision making are not expressed as the default approach for every aspect of DOC's work. Tangata whenua are often placed alongside "other interested persons and organisations"[201] and consultation is expressed as a mere procedural step without the requirement to give weight to tangata whenua views and interests.[202]

In contrast to the current system, the ODG adopts the following directions as expressed by the Tribunal *Ko Aotearoa Tēnei*:[203]

> *Partnership must be seen in every aspect of DOC's work; DOC must be looking for partnership opportunities in everything that it does; and opportunities to share power with tangata whenua should be a core performance indicator for DOC, rather than the exceptional outcome driven by the wider pressures of Treaty settlements it now is.*

Accordingly, the sub-recommendations under Theme 5 aim to ensure that conservation governance and management reflects Te Tiriti partnership at all levels and in every aspect of DOC's work.

These sub-recommendations give effect to the principles of Te Tiriti because they place tangata whenua above the status of a mere stakeholder among many and allow the tangata whenua voice to be heard. A greater investment in, and input from, tangata whenua and kawa, tikanga and mātauranga in DOC's work will only produce better conservation outcomes.

5A: Review and reform all conservation governance entities including the New Zealand Conservation Authority, conservation boards and other statutory bodies to reflect Te Tiriti partnership

What is needed are new structures that allow the Crown and tangata whenua to engage effectively, at both national and local levels. These structures should determine, case by case, the appropriate level of tangata whenua control or influence over specific taonga (places, species, features etc.), and develop new models for the management of those taonga.

The ODG recommends the following statutory and system changes:

200 For example, Policy 2(b) only requires that partnerships "should be encouraged" and "may be sought and maintained".

201 See, for example, Policy 4.4(b) regarding the planning, establishment and management of marine reserves.

202 For example, Policies 2(d) and 2(e) only require that tangata whenua "will be consulted" when statutory planning documents are being developed and "will be consulted" on specific proposals that involve places or resources of spiritual or historical and cultural significance to them. The General Policies do not require that a reasonable degree of preference is given to the interests and views of tangata whenua, and there is no direction regarding concessions and the interests of tangata whenua, despite the Supreme Court's clear direction in the *Ngāi Tai ki Tamaki* and *Whales* cases.

203 Waitangi Tribunal, *Ko Aotearoa Tēnei* (Wai 262, 2011), Volume 1 at 324.

- The replacement of the NZCA and conservation boards with new statutory bodies that have reformed powers, functions and memberships to reflect Te Tiriti partnership and effective decision making at national and regional/local levels.
- That new statutory bodies do not interrupt or obstruct existing or future direct relationships between DOC and iwi/hapū at national and conservancy levels.
- The establishment of an independent Parliamentary Commissioner for Te Tiriti relationships, the role of which will include monitoring, evaluating, auditing of and reporting on DOC's implementation of its section 4 obligations.
- The establishment of place-based governance and management bodies on a case-by-case basis.

As set out under sub-recommendation 1B above, the Minister should engage with tangata whenua to determine the potential for a tangata whenua representative body (to be appointed by tangata whenua) to work in partnership with the Minister and DOC to guide and provide oversight to the review of the conservation system and the implementation of fundamental legislative reform, including the establishment of the statutory bodies recommended under this section.

5B: Adopt appropriate models for mana-to-mana relationships, planning and decision making at the appropriate geographic scale

Fundamental reform (by 2026)

The ODG recommends the following further statutory and system changes:

- Embed a Te Tiriti partnership approach to conservation management, strategy and planning, including business planning and the allocation of funds and resources, and monitoring and evaluation processes.
- Ensure iwi/hapū planning documents are provided for when decisions are being made regarding conservation management, strategy and planning.
- Embed a Te Tiriti partnership approach to conservation concessions and other permissions decision making.
- Embed a Te Tiriti partnership approach to conservation operational delivery.
- Amend regional/local boundaries and corresponding statutory management documents so they better reflect the rohe and interests of iwi/hapū.
- Provide for the participation in conservation management of tangata whenua who own Māori land adjacent to or surrounded by conservation lands and waters.

5C: Honour and implement existing Te Tiriti settlement commitments and arrangements, noting these do not limit the full expression of Te Tiriti partnership

Interim (by 2022)

The ODG recommends that the General Policies and the delivery of conservation recognise that:

- existing and future Te Tiriti settlement commitments and arrangements will be honoured and implemented;
- Te Tiriti settlement commitments and arrangements do not limit the full expression of Te Tiriti partnership and other principles; and
- the principles of Te Tiriti and section 4 create obligations irrespective of Te Tiriti settlements, and tangata whenua should not have to rely on Te Tiriti settlements for the recognition and exercise of their rights and interests under Te Tiriti in the context of conservation.

5D: Make immediate changes to make sure that tangata whenua are engaged in decision making that affects their interests, including in the context of permissions and concessions

Interim (by 2022)

The ODG recommends that the General Policies (and consequential changes to implementation and delivery) should be amended to:

- make partnership with tangata whenua a mandatory "will" obligation throughout the General Policies, including when:
  - developing statutory management strategies and plans;
  - deciding whether to hold, manage or dispose of antiquities and artefacts, including taonga;
  - deciding whether to site monuments, pou whenua, plaques or other memorials;
  - where practical, managing natural hazards;
  - specific proposals or projects are of interest or relevance to them;
  - implementing international agreements at place;
  - developing and disseminating place-specific education and information;
  - monitoring, reporting and evaluating processes;
  - finding opportunities for and supporting tangata whenua to reconnect and strengthen their relationships with ancestral lands, waters and taonga through conservation;
- distinguish relationships with others by using the word collaborate or collaborative relationship instead of partner or partnership;

- add an obligation that decision-makers must consider providing tangata whenua interests a reasonable degree of preference when considering any concessions and permissions;
- require formal policies to partner with tangata whenua regarding concessions, permissions and other authorisations within their rohe;
- require that iwi/hapū planning documents and other documents that iwi/hapū identify as relevant will be appropriately recognised:
    - in conservation management strategies, conservation management plans and national park management plans;
    - in DOC's regional offices' business and planning cycles;
    - when DOC, the NZCA and conservation boards make decisions; and
- adopt a policy to encourage the appointment of tangata whenua representatives to all conservation boards.

Theme 6. Tino rangatiratanga

Whakataukī

He rei ngā niho, he parāoa ngā kauae
To have a whale's tooth, you must also have a whale's jaw

This whakataukī means that one must have the right attributes or qualifications for a particular task or enterprise. Tangata whenua have the knowledge and desire to look after and sustainably use the environment from which they descend and have evolved with for hundreds of years. The appropriate devolution of functions and powers to tangata whenua, to enable autonomy in decision making and kaitiakitanga, is essential for the wellbeing of the environment.

Recommendation 6

Enable devolution of powers and functions including decision making to meaningfully recognise the role and exercise of rangatiratanga.

Sub-recommendation

A. Provide for the delegation, transfer, and devolution of functions and powers within the conservation system to tangata whenua.

Recommendation 6: Enable devolution of powers and functions including decision making to meaningfully recognise the role and exercise of rangatiratanga

Conservation legislation, in most cases, only enables the Minister and the Director-General to delegate decision making and other powers within DOC and its bodies (for the most part, to the Director-General or a DOC employee). Any delegations under an Act can only be within the framework of that Act if it has specific delegation powers (compared with other agencies that have a general authorisation available under the Public Service Act 2020).[204]

The Conservation Act and National Parks Act limit the ability of the Minister to delegate beyond the Director-General, the NZCA, conservation boards and DOC employees; and limit the ability of the Director-General to delegate beyond DOC employees. There is no power within the Conservation Act to delegate decision making regarding concessions.

204 The following statutes have specific delegation powers: Conservation Act 1987 (sections 57 and 58); National Parks Act 1980 (sections 41 and 42); Reserves Act 1977 (section 10); Wildlife Act 1953 (sections 44 and 44A); Wild Animal Control Act 1977 (sections 6 and 7); and Marine Mammals Protection Act 1978 (section 21).

The Reserves Act and the Wildlife Act are the most enabling for delegation of the Minister's powers; for example, the Reserves Act allows the Minster to delegate powers to manage a reserve to any individual, committee, body, local authority or organisation; and the Wildlife Act allows the Minister to delegate powers to control and manage a protected area under the Act to any body or person. Under the Wildlife Act, there is no ability to delegate the management of protected species. The Marine Reserves Act 1971 is silent on the delegation of powers.

In the General Policies, there is no mention of rangatiratanga, despite active protection being one of the foremost obligations stemming from the principles of Te Tiriti.[205]

As discussed earlier under Theme 4, DOC has made positive steps through Ngā Aitanga a Nuku agreements, which provide for tangata whenua management of the collection and holding of cultural materials by way of issuing permissions on a day-to-day basis. However, the Supreme Court case *Shark Experience Limited v PauaMac5 Incorporated* has created uncertainty about the status of these agreements, with DOC considering that it can no longer use provisions in the Wildlife Act to authorise the customary take and possession of dead protected wildlife.[206]

The exercise of rangatiratanga, as guaranteed to tangata whenua under Te Tiriti, requires tangata whenua to exercise autonomy and control. The conservation system is not giving effect to the principles of Te Tiriti as it does not adequately provide for the exercise of autonomy and control by tangata whenua over their environmental taonga.

The conservation system and legislation should enable rangatiratanga where tangata whenua have the desire to exercise autonomy and control, and tangata whenua should be resourced and supported to do so. In other words, the devolution of functions and powers must be driven by tangata whenua, and tangata whenua should not be overburdened.

The recommendations under this theme are brief because they are overarching in nature – they enable many of the recommendations under Themes 1–5 (for example, the ability of tangata whenua to authorise harvest or research, or make decisions in partnership with the Crown). Therefore, the recommendations under Theme 6 must be read in conjunction with the recommendations under the other themes.

205 As recognised by the Privy Council in *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 at 517.

206 *Shark Experience Limited v PauaMac5 Incorporated* [2019] NZSC 111, [2019] 1 NZLR 791.

6A: Provide for the delegation, transfer and devolution of functions and powers within the conservation system to tangata whenua

Fundamental reform (by 2026)

The ODG recommends that the conservation system and legislation is amended to:

- uphold rangatiratanga as guaranteed by Te Tiriti as a priority objective, acknowledging that rangatiratanga requires sharing of power and resources;
- devolve certain decision-making functions and powers to tangata whenua who are outside of DOC and its bodies (such as those that will need to be exercised to give effect to the recommendations under Themes 1–5); and
- allow for the devolution of further decision-making functions and powers to tangata whenua who are outside of DOC and its bodies, including allocation decisions and permissions functions.

Interim (by 2022)

The ODG recommends that changes to the General Policies and the delivery of conservation should:

- recognise that the active protection of rangatiratanga is one of the foremost obligations stemming from the principles of Te Tiriti;
- require that the delivery of conservation outcomes will, wherever practicable, be achieved in a manner that is consistent with the rangatiratanga of tangata whenua;
- develop guidance for what rangatiratanga might look like in practice and test this at the iwi, hapū and whānau level for implementation; and
- assess with tangata whenua and adapt to, on an ongoing basis, their interests as they evolve over time alongside the principles of Te Tiriti to inform decision-making processes.

Theme 7. Resourcing

Whakataukī

Kua tawhiti kē to haerenga mai, kia kore e haere tonu. He nui rawa o mahi, kia kore e mahi tonu
We have come too far not to go further. We have done too much not to do more

Tā Himi Henare

This whakataukī captures the notion that all of the steps taken towards giving effect to Te Tiriti in the conservation system will only be successful if the extra step is taken to ensure they are resourced in appropriate ways.

Recommendation 7

Build capability and capacity within DOC and tangata whenua to give effect to Te Tiriti.

Sub-recommendation

A. Provide resourcing for both DOC and tangata whenua to build capability and capacity to give effect to the principles of Te Tiriti, including but not limited to:

i. partnering in fundamental reform;

ii. exercising autonomy and participating in decision making;

iii. developing policy, strategy and planning documents;

iv. delivering conservation at place; and

v. reconnecting and strengthening the relationship of tangata whenua with conservation lands and waters, resources, and species.

Recommendation 7: Build capability and capacity within DOC and tangata whenua to give effect to Te Tiriti

The current system is built on a culture that does not place appropriate value on tangata whenua perspectives and involvement in conservation. Structures, processes and practices that give effect to Te Tiriti are not adequately resourced or prioritised relative to other DOC work. On the one hand, DOC staff lack the capability to meet their Te Tiriti obligations in conservation; and on the other, tangata whenua lack capacity to engage with DOC, make decisions and deliver conservation.

At its engagement hui, the ODG heard that a lot of conservation work undertaken by tangata whenua is voluntary and carried out during the weekends on top of fulltime jobs. Tangata whenua are being put under pressure across the entire environmental management system and are not being resourced to participate. This is not a fair or sustainable approach to building a conservation system that gives effect to Te Tiriti and its principles.

DOC has already established initiatives with tangata whenua to fund their participation in conservation. In the 1990s, the Ngā Whenua Rāhui Komiti (independent of DOC, but serviced by DOC) was established to administer the Ngā Whenua Rāhui and Mātauranga Kura Taiao funds.[207] The Komiti advises the Minister of Conservation on how to spend the funds, with the final decisions made by the Minister. The Ngā Whenua Rāhui Fund is designed to protect indigenous ecosystems on Māori-owned land in order to support tangata whenua retaining tino rangatiratanga (ownership and control) over their lands.[208] The Mātauranga Kura Taiao Fund supports projects that focus on the preservation, promotion and transmission of mātauranga in biodiversity management.[209]

These funds are a limited example of section 4 of the Conservation Act in action and should continue to function. These examples show that resourcing tangata whenua to carry out conservation is entirely possible.

Iwi saw this work that will affect the relationship between tangata whenua and nature as "lifechanging" and "as big as Te Tiriti" itself, necessitating as much input from tangata whenua as possible.[210]

207 The Ngā Whenua Rāhui Komiti has also partnered with DOC and Te Puni Kōkiri in the development of Tauira Kaitiaki Taiao – a conservation cadetship scheme for Māori.

208 The principal mechanisms used are kawenata (covenants) and a supporting management agreement (using section 29 of the Conservation Act).

209 It funds projects that may include the documentation of traditional knowledge and practices; wānanga; developing frameworks for customary use; developing education opportunities to transmit traditional knowledge and practices; ecosystem restoration and protection using traditional knowledge and practices; rongoā practices; environmental monitoring; and revival of traditional practices for biodiversity management.

210 These statements were made at the ODG's engagement hui in Motueka.

7A: Provide resourcing for both DOC and tangata whenua to build capability and capacity to give effect to Te Tiriti, including but not limited to:

i. partnering in fundamental reform;

ii. exercising autonomy and participating in decision making;

iii. developing policy, strategy and planning documents;

iv. delivering conservation at place; and

v. reconnecting and strengthening the relationship of tangata whenua with conservation lands and waters, resources, and species.

Because the General Policies do not include resourcing obligations, these recommendations concern changes to how conservation is delivered and the resourcing of fundamental reform.

The ODG recommends, in relation to tangata whenua capacity and capability, that the Crown resources and supports tangata whenua to:

- establish tangata whenua governance and management structures;
- represent their interests and exercise autonomy and decision-making powers within existing and future governance and management structures;
- partner and engage effectively with DOC;
- deliver conservation at place;
- either develop iwi/hapū planning documents or identify the relevant documents to be considered for planning and decision-making purposes;
- identify the types of permissions, concessions and other applications they have interests in, with the proviso that systems can be adopted by tangata whenua and DOC that allow for smoother processing of these; and
- develop and undertake activities for the purpose of social, economic and cultural wellbeing within/alongside the concession/permission regime.

In order to build the capability and capacity for DOC and tangata whenua to achieve a conservation system that gives effect to Te Tiriti, the ODG recommends in relation to DOC's capability:

- mandatory Te Pukenga Atawhai training for all DOC staff members, NZCA members, and conservation board members, that is completed in their first year in role and revisited where necessary or appropriate within the period of their service;

- development and delivery of Te Pukenga Atawhai training in partnership with tangata whenua on a rohe-by-rohe basis to ensure that course participants gain understanding of the whakapapa, tikanga, values and interests of tangata whenua with whom they engage;
- review and enhancement of DOC's existing Te Pukenga Atawhai training to ensure all DOC staff are appraised of their understanding of Te Tiriti, trained in giving effect to its principles in the work of DOC and equipped with methods to give effect to the principles of Te Tiriti in their role;
- inclusion of Te Tiriti literacy and partnership outcomes when setting performance expectations for all conservation roles (i.e. in all role descriptions, individual development plans, letter of expectation and annual performance reviews);
- development and implementation of a DOC diversity and inclusion policy that includes concrete targets and actions towards increasing tangata whenua representation in the conservation workforce; and
- reform of DOC's business planning system to ensure the General Policies and lower-order statutory management plans (e.g. conservation management strategies and national park management plans), iwi/hapū planning documents and other documents that iwi/hapū identify as relevant and directly influence resourcing decisions.

Te ara whakamua / The path ahead

Section 4 of the Conservation Act 1987 represents the strongest statutory reference to the principles of Te Tiriti in the laws of Aotearoa New Zealand. The Conservation Act, and the 23 operative statutes currently listed in Schedule 1 of that Act (including the National Parks Act 1980),[211] must "so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi".

The legal consequence of the Supreme Court's *Ngāi Tai ki Tāmaki* decision in relation to the interpretation and application of section 4 is that conservation in Aotearoa New Zealand must be administered under and delivered through those 24 conservation statutes in a manner which gives effect to the principles of Te Tiriti.

Contrary to the misdirection previously contained in the General Policies, other objectives and considerations within conservation legislation to do not prevail over section 4 where there is an apparent inconsistency between the provisions of any of these Acts and the principles of Te Tiriti.[212] Instead, the Supreme Court confirmed that any other statutory (or non-statutory) objectives must be achieved, consistently with section 4, in a way that best gives effect to the relevant principles of Te Tiriti.[213]

While the *Ngāi Tai ki Tāmaki* decision was in the context of the determination of concession application and the express misdirection was contained in the General Policies, the ODG considers that the implications of the Supreme Court's decision go beyond statutory decision making and the General Policies. Rather, having carefully considered the relevant findings of the Waitangi Tribunal across a number of Tribunal inquiries and reports, as well as the direct experiences of the members of the ODG and the views provided by iwi and others at the ODG's engagement hui, we believe the misdirection within the General Policies is merely indicative of a more fundamental and systemic failing in giving effect to the principles of Te Tiriti in conservation.

It is for that reason, as outlined in this Report and our recommendations, that the ODG considers that, beyond any amendment of the General Policies and other short-term initiatives that we have identified, a comprehensive review and reset of the conservation system and its supporting legislation is required. In the ODG's view, fundamental reform and transformational change is needed to ensure that conservation in Aotearoa New Zealand is centred around a genuine and active partnership between the Crown and tangata whenua which gives best effect to the principles of Te Tiriti and enables the environmental, climatic and biodiversity issues of the 21st century to be addressed for the benefit of us all.

This is the wero (challenge) that we place before the Director-General, the NZCA, the Minister and the Crown as a whole with this report.

Tungia te ururua kia tupu, whakaritorito te tupu o te harakeke

211 While there are still 24 statutes listed in Schedule 1, the West Coast Wind-blown Timber (Conservation Lands) Act 2014 was repealed on 1 July 2019.

212 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [76]–[77].

213 *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [54].

Te āpitihanga tuatahi / Appendix 1

Ngā ture whakahaere mō ngā arotake whāiti

Ko ngā arotake whāiti:

- ka herea ki te aromatawai i te whakaaturanga o ngā whai whakaarotanga o wāhanga 4 – arā, tā mātou here ki te whakamana i ngā mātāpono o Te Tiriti o Waitangi – puta noa I ngā wāhanga katoa (tae atu ki ngā Kaupapa here e whakapuakina ana me te ārahitanga anō hoki) o ngā kaupapa here whānui;
- ka whakahou i te whakaaturanga o ngā "Principles of Crown action on the Treaty of Waitangi" nō te tau 1989 kua whakaurua hei kupu whakataki ki Wāhanga 2;
- ka whai whakaaro mēnā rānei me whakahou ētahi āhuatanga o ngā kaupapa here whānui i runga i ngā whakahau o Te Rōpū Whakamana i te Tiriti o Waitangi ki tana pūrongo, "Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity", me ngā take i hāpaitia ki te kerēme Wai 262;
- ki te horopaki o ngā whai whakaarotanga o wāhanga 4 anake, aroturuki i te hāngaitanga tētahi ki tētahi o ngā rerenga kōrero e whakamahia ana i tēnei wā ki te Conservation General Policy me te General Policy for National Parks, me te tautuhi i ngā wāhi ka taea te whakatutuki i te hāngaitanga pai ake;
- ka tautuhi i ngā here o nāianei (mēnā rānei he here) ki roto i ngā whakaritenga Kaupapa here whānui ake, tae atu ki ngā ture, me ngā rongoā ka taea pea.

Kāore ngā arotake whāiti e:

- whakarerekē i ngā ture matua;
- pā tōtika ki te whai whakaarotanga o te hunga hanga whakatau ki ngā whakatau tukunga tohitū (ōrite rānei) i te wā e haere ana te hātepe arotake whāiti;
- whakarerekē i te tukunga o te mahi whakamahere whakahaerenga ā-ture a Te Papa Atawhai, tae atu ki te whakawhanaketanga, te arotakenga hoki/rānei o ngā rautaki whakahaere whāomoomo, ngā mahere whakahaere papa rēhia ā-motu, ngā mahere whakahaere whāomoomo hoki, i te wā e haere ana te hātepe arotake whāiti;
- te pā atu ki te ihirangi o te DOC Strategy, ngā Stretch Goals, ngā Intermediate Outcomes rānei, te hoahoa o ngā pūnaha a Te Papa Atawhai (ngā ngātahitanga, te kaupapa here, ngā manuhiri, ngā whakaaetanga), te kiko rānei o ngā aratohu ā-roto a Te Papa Atawhai (hei tauira, ngā Standard Operating Procedures), i te wā e haere ana te arotake whāiti.

I te wā e haere ana ngā arotake whāiti, ka mahi tonu a Te Papa Atawhai i āna mahi e ai ki te aronga kua whakatakotoria e te Kōti Matua ki *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122.

Terms of reference for the partial reviews

The partial reviews will:

- be constrained to assessing the reflection of section 4 considerations – namely, our obligation to give effect to the principles of Te Tiriti o Waitangi / the Treaty of Waitangi – throughout all chapters (including explicit policies as well as guidance) of the General Policies;
- update the description of the 1989 "Principles of Crown action on the Treaty of Waitangi" included as a preamble to Chapter 2;
- consider whether any revisions to the General Policies should be made in light of the Waitangi Tribunal's recommendations in its report *Ko Aotearoa Tēnei*: *A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* and issues raised in the Wai 262 claim;
- in the context of section 4 considerations only, assess the relative alignment of phrasing currently applied in the Conservation General Policy and the General Policy for National Parks, identifying areas where better alignment could be achieved; and
- identify current limitations (if any) within wider policy settings, including legislation, and possible remedies to these.

The partial reviews will not:

- amend primary legislation;
- have any direct effect on decision-makers' consideration of specific concession (or similar) decisions whilst the partial review process is underway;
- alter the delivery of DOC's statutory management planning function, including the development and/or review of conservation management strategies, national park management plans and conservation management plans, whilst the partial review process is underway; or
- have any effect on the content of DOC's Strategy, Stretch Goals or Intermediate Outcomes, the design of DOC's systems (partnerships, policy, visitors, permissions), or the substance of any of DOC's internal guidelines (e.g. Standard Operating Procedures) whilst the partial review process is underway.

Whilst the partial reviews are underway, DOC will continue to undertake its work in line with the direction provided by the Supreme Court in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122.

Te āpitihanga tuarua / Appendix 2

Proposed revised draft of Chapter 2 of the General Policies (Treaty of Waitangi responsibilities)

2. Tiriti o Waitangi / Treaty of Waitangi

The Conservation Act 1987 and all the Acts listed in its Schedule 1 (cumulatively, **conservation legislation**) must be interpreted and administered so as to "give effect to the principles of the Treaty of Waitangi" (section 4, Conservation Act 1987). This obligation applies to all persons exercising powers and performing functions and duties under conservation legislation.

Tangata whenua involvement in conservation management can achieve enhanced conservation of natural resources and historical and cultural heritage. Tangata whenua have a deep and enduring relationship and understanding of the natural world and the environs. For tangata whenua, all elements of nature including animals, plants, rivers, mountains, lakes are their whanaunga (ancestral kin); they are connected by whakapapa (genealogy) and they have a mauri (life essence). This entails obligations to care for, nurture and protect the natural world, best reflected in the concept of kaitiakitanga. The ethic and obligation of kaitaikitanga is related to the interconnected whakapapa relationship that tangata whenua have to the environment. This relationship is a reciprocal one with the overall aim of balance.

The Treaty of Waitangi / Te Tiriti o Waitangi (**Te Tiriti**) is the founding constitutional document of New Zealand. It provides the constitutional framework for the relationship between tangata whenua and the Crown. Weight should be placed on the te reo Māori text of Te Tiriti.[214] Te Tiriti guarantees:

- the right of the Crown to exercise kāwanantanga or governorship (Article 1);
- the right of tangata whenua to exercise tino rangatiratanga or unqualified chieftainship over their lands, villages and treasures (Article 2); and
- the right of tangata whenua to the Crown's protection and all the rights accorded to British subjects /New Zealand citizens (Article 3).

The phrase "principles of the Treaty of Waitangi", as found in section 4 of the Conservation Act, is a Crown construct that was first incorporated into legislation in the Treaty of Waitangi Act 1975. The principles of Te Tiriti have been derived by the Courts and Waitangi Tribunal from the text, spirit, intent and circumstances of Te Tiriti.

214 While not ignoring the contemporary reality of existing Crown sovereignty, the Waitangi Tribunal places considerable weight on the te reo Māori text of Te Tiriti because it was the version signed and understood by rangatira. See Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 10–11. Additionally, the contra proferentum rule directs that in the event of ambiguity, provisions should be construed against the party that drafted the provision (in this case the British Crown).

The principles of Te Tiriti have developed over time. There can never be a final list of Te Tiriti principles as Te Tiriti obligations are ongoing; they will evolve from generation to generation as conditions change.[215] Nevertheless, the Courts and Waitangi Tribunal have adopted, and continue to interpret and apply, a number of now well-established principles that are of particular relevance to conservation.

These principles include:

- partnership;
- active protection;
- development; and
- redress.

The Court of Appeal in the landmark 1987 *Lands* decision unanimously found that Te Tiriti "signified a partnership between races" which required "the Crown as a partner acting towards the Māori partner in utmost good faith which is the characteristic obligation of partnership".[216]

The principle of partnership is recognised as the overarching tenet from which other key principles of Te Tiriti have been derived. Closely interlinked with the principle of partnership, the active protection of rangatiratanga is one of the foremost obligations that is relevant to conservation which stems from the principles of Te Tiriti.

The policies in this chapter are based on the interpretation by the Courts and Waitangi Tribunal of these principles, the text of Te Tiriti, and section 4 of the Conservation Act. Importantly, when applying these policies in decision making, and when developing, exercising and implementing other policies, plans and processes under conservation legislation, section 4 (as informed by the decision of the Supreme Court in *Ngāi Tai ki Tāmaki*) requires best effect to be given to the principles of Te Tiriti.

The way that these principles are applied will depend on the particular circumstances of each case and, consistent with the principle of partnership, should be informed and guided by the views, kawa, tikanga and mātauranga of the tangata whenua (iwi, hapū and whanau) at place with interests in the relevant lands, waters, species and other taonga. In all cases, the relationship of partnership between the Department and tangata whenua must be based on mutual good faith, honour, cooperation, respect and informed decision making.

215 *Te Rūnanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 656 (CA). Also see *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 642 and 656.

216 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA), per Cooke P at 664; see also per Richardson J at 682; per Somers J at 692–693; and per Casey J at 702.

An approach to conservation centred on the principles of Te Tiriti reflects a shared vision for thriving indigenous biodiversity and the natural environment, which:

- recognises and protects the mauri and the interconnectedness of all the elements of te taiao and their health and wellbeing;
- upholds the intrinsic whakapapa relationship between tangata whenua and te taiao; and
- ensures and enables the sustainable use and enjoyment of the natural environment for the wellbeing of future generations.

Policies

2 Te Tiriti o Waitangi responsibilities

Section 4

(a) The principles of Te Tiriti are not to be treated as merely part of a balancing exercise against other relevant considerations and they are not trumped by other objectives under conservation legislation (for example, public access and enjoyment or recreation and tourism). Rather, those other objectives must be achieved, consistently with section 4, in a way that best gives effect to the principles of Te Tiriti.

(b) All provisions in conservation legislation must be interpreted and applied, and all obligations, processes and decisions arising from conservation legislation (including the application and implementation of this General Policy) must be carried out, consistently with section 4, in a way that best gives effect to the principles of Te Tiriti.

Partnership and rangatiratanga

(c) Tangata whenua will be treated reasonably, honourably and in good faith.

(d) Wherever practicable, conservation outcomes will be achieved in a manner that is consistent with the exercise of rangatiratanga and kaitiakitanga by tangata whenua.

(e) Partnerships with tangata whenua in relation to conservation will be actively sought, agreed, maintained and supported.

(f) Where sought and agreed by tangata whenua, protocols or similar agreements between tangata whenua and the Department will be developed and implemented to support their partnership.

(g) The nature of the partnership with tangata whenua will be appropriate to local circumstances, and may include but is not limited to:

(i) governance of conservation lands, waters, species and other taonga that is led by tangata whenua or jointly led by the Department and tangata whenua; and

(ii) management of conservation lands, waters, species and other taonga that is led by tangata whenua or jointly led by the Department and tangata whenua.

(h) Partnerships with tangata whenua and the obligation to actively protect and enable the exercise of rangatiranga and kaitiakitanga should inform:

(i) the development and content of statutory management strategies and plans;

(ii) decisions on concessions, permissions and other authorisations;

(iii) decisions on any new acquisition, classification, disposal or exchange;

(iv) decisions on whether to hold, manage or dispose of antiquities and artefacts, including taonga tūturu;

(v) decisions on monuments, pou whenua, plaques or other memorials;

(vi) managing natural hazards;

(i) considering specific proposals or projects that are of interest or relevance to tangata whenua;

(ii) undertaking research;

(iii) implementing international agreements at place;

(iv) developing and disseminating place-specific education and information; and

(v) monitoring, reporting and evaluating processes.

(i) Tangata whenua interests in lands, waters, species and other taonga may be given a reasonable degree of preference when considering concessions and permissions in the conservation estate.

(j) Partnership arrangements with tangata whenua should be regularly reviewed and updated.

(k) There should be the provision of adequate resourcing to tangata whenua to support the exercise of kaitiakitanga and rangatiratanga in conservation.

(l) Iwi and hapū planning documents, and other documents that iwi and hapū identify as relevant, must be appropriately recognised in:

(i) statutory planning documents;

(ii) the Department's regional offices' business and planning cycles; and

(iii) when the Department, the New Zealand Conservation Authority and conservation boards make decisions.

(m) Tangata whenua representatives must be appointed to all conservation boards.

Kawa, tikanga and mātauranga

(n) It is for tangata whenua with relevant interests at place to determine and define their kawa, tikanga and mātauranga in relation to, and their relationships with, conservation lands, waters, wāhi tapu, species and other taonga.

(o) The kawa, tikanga and mātauranga of tangata whenua will be valued and will inform conservation principles, practice, governance, management and delivery.

(p) The centrality of the holders of kawa, tikanga and mātauranga within tangata whenua to any advice on the interpretation and application of kawa, tikanga and mātauranga in conservation will be recognised.

(q) The relationship that iwi and hapū have to flora and fauna and related kawa, tikanga and mātauranga will be supported.

(r) There will be a presumption in favour of the authorisation of customary harvest, take, use of and access to plants, animals and materials, provided:

(i) it is supported by tangata whenua;

(ii) it is not inconsistent with any relevant Acts and regulations (including fisheries legislation) or any relevant conservation management strategies and plans (noting that such strategies and plans should themselves be consistent with section 4 and give effect to the principles of Te Tiriti); and

(iii) the preservation and sustainability of the indigenous species at the place is not adversely affected.

(s) Agreements that provide for tangata whenua management of the collection and holding of cultural materials by way of issuing permissions on a day-to-day basis will be promoted and facilitated.

(t) Kawa, tikanga, mātauranga and tangata whenua interests in research and related permissions and concessions will be recognised and supported by cooperative partnerships, including the sharing of research findings with tangata whenua.

(u) Opportunities through conservation to reconnect and strengthen the relationships of tangata whenua with relevant lands, waters, species and other taonga in which they have customary interests will be actively identified, promoted and supported.

(v) Te reo Māori is a taonga and should be used where possible.

(w) Where reference is made in public information to places or resources of significance to tangata whenua, there should be appropriate use of te reo Māori and, where agreed by tangata whenua, reference should be made and attention drawn to relevant tangata whenua associations, tikanga and values.

(x) Safeguards will be developed with tangata whenua to ensure that the Crown does not misappropriate or misuse kawa, tikanga and mātauranga.

(y) Where possible, conservation boundaries should be adapted so that they better reflect tangata whenua (iwi and hapū) rohe and interests.

Redress

(z) Te Tiriti settlements will be honoured and implemented.

(aa) Fair and reasonable conservation redress will be negotiated in Te Tiriti settlements, which better enable the exercise of rangatiratanga and kaitiakitanga.

(bb) Te Tiriti settlement commitments and arrangements do not replace nor limit the full expression of the partnership between the Crown and tangata whenua under Te Tiriti or the ongoing application of the obligations under section 4 of the Conservation Act.

(cc) Tangata whenua rights and interests in conservation lands, waters, species and other taonga will be actively recognised and provided for beyond the terms of any Te Tiriti settlements.

(dd) Contemporary grievances which tangata whenua raise will be addressed, and fair and reasonable solutions provided.

Te āpitihanga tuatoru / Appendix 3

Summary table of recommendations

Theme	Recommendation	Sub-recommendation
Fundamental reform	**1.** Undertake a fundamental reform of the conservation system as a whole.	**A.** Review and replace the Conservation Act 1987 and all associated schedule 1 Acts (and associated policies, strategies and delivery) to honour Te Tiriti and provide for the meaningful exercise of rangatiratanga and kaitiakitanga by tangata whenua to ensure that Papatūānuku thrives. **B.** Adopt a Te Tiriti partnership approach when undertaking fundamental reform of the conservation system.
Purpose of conservation	**2.** Reframe the purpose of conservation to ensure it is fit-for-purpose for Aotearoa.	**A.** Embed a new understanding of conservation that is specific to Aotearoa New Zealand and reflects both tangata whenua and tangata tiriti perspectives and supports thriving indigenous biodiversity.
Tikanga	**3.** Centre kawa, tikanga and mātauranga within the conservation system.	**A.** Ensure the conservation system and decision making within it give weight to mātauranga and uphold kawa and tikanga. **B.** Ensure that the terms and key principles under conservation legislation, policies and strategies reflect kawa, tikanga and mātauranga. **C.** Ensure the relationship between tangata whenua and conservation lands, waters, wāhi tapu, resources, species and other taonga (including kawa, tikanga and mātauranga relating to that relationship) is determined by tangata whenua, and that relationship is enabled and empowered by the conservation system.
Lands, waters, resources, species and other taonga	**4.** Recast the legal status of conservation land and waters, resources, indigenous species and other taonga.	**A.** Reform the ownership model of public conservation lands and waters to reflect the enduring relationships tangata whenua have with these places and the resources and taonga within them. **B.** Undertake a review of all classifications applied to public conservation lands and waters to recognise tangata whenua relationships. **C.** Revoke Crown ownership of indigenous species. **D.** Resolve tangata whenua rights and interests in the freshwater and marine domains. **E.** Ensure tangata whenua access to and use of all land, waters, species and resources managed within the conservation system, including within the context of permissions and concessions.

Theme	Recommendation	Sub-recommendation
Te Tiriti partnership	**5.** Reform conservation governance and management to reflect Te Tiriti partnership at all levels.	**A.** Review and reform conservation governance entities including the New Zealand Conservation Authority, conservation boards and other statutory bodies to reflect Te Tiriti partnership. **B.** Adopt appropriate models for mana-to-mana relationships, planning and decision making at the appropriate geographic scale. **C.** Honour and implement existing Te Tiriti settlement commitments and arrangements, noting these do not limit the full expression of Te Tiriti partnership. **D.** Make immediate changes to ensure that tangata whenua are engaged in decision making which affects their interests, including in the context of permissions and concessions.
Tino rangatiratanga	**6.** Enable the devolution of powers including decision making to meaningfully recognise the role and exercise of tino rangatiratanga.	**A.** Provide for the delegation, transfer and devolution of functions and powers within the conservation system to tangata whenua.
Resourcing	**7.** Build capability and capacity within Te Papa Atawhai and with tangata whenua.	**A.** Provide resourcing for both Te Papa Atawhai and tangata whenua to build capability and capacity to give effect to the principles of Te Tiriti, including but not limited to: i. partnering in fundamental reform; ii. exercising autonomy and participating in decision making; iii. developing policy, strategy and planning documents; iv. delivering conservation at place; and v. reconnecting and strengthening the relationship of tangata whenua with conservation lands and waters, resources, and species.

Te āpitihanga tua wha / Appendix 4

Key messages from the engagement hui

The ODG undertook targeted engagement to test the draft recommendations between April and July 2021. The engagement included 20 hui with whānau, hapū and iwi, 13 hui with conservation boards, and a workshop with key conservation stakeholder groups. The ODG also received 14 written responses from these targeted groups. The ODG also met with the NZCA to inform them of the progress of the partial reviews and to share the draft recommendations.

Summary of feedback from whānau, hapū and iwi

Process:

- Overall, whānau, hapū and iwi were keen to provide support to help push this mahi across the line as a whole package.
- Tauranga, Murihiku and Gisborne attendees were interested in providing feedback and/or inputting into the technical drafting stage.
- Tūwharetoa wished to work directly with the Crown. The protocol between Ngāti Tūrangitukua and the Crown sets out clear expectations of how Ngāti Tūrangitukua want to be engaged with, and the ODG recommendations do not take that into account.
- Rotorua attendees wanted DOC to come back after the public submission process to make sure their views are heard and to see if the recommendations are appropriately reflected. Tangata whenua want to be the last voice in the process.
- Whakatane attendees noted a hope that this process will give more weight to Te Tiriti settlement accords.
- Chatham Islands attendees found that the recommendations presented were encouraging but there was frustration with the process and ensuring the different values and tikane/tikanga on the Chathams are provided for.
- Thames attendees suggested an independent audit of DOC to understand the current state of affairs and budgeting.

Recommendations:

- Overall whānau, hapū and iwi were generally supportive of the recommendations, with a desire to uphold/strengthen section 4.
- Taranaki attendees eagerly await the way in which these recommendations will be received as they echo the sentiments that iwi have long communicated with DOC.
- An Ōtākou attendee noted that some of the current governance structures serve a purpose – for example, conservation boards are great for keeping connections with the community.

- Manawatu attendees described a need to show strong links between these recommendations and opportunities for the wider public to be involved in caring for and enjoying conservation lands and waters.
- Kerikeri attendees encouraged the ODG to pay attention to the language used and to refer only to “Te Tiriti” rather than switching between “Te Tiriti” and “the Treaty”. Legislation should be changed to say “the Crown must accede to “Te Tiriti” rather than “give effect to Treaty principles”.

Summary of feedback from conservation boards

Process:

- Overall, conservation boards were disappointed with the timeframes for engagement and felt that there was not enough time for meaningful engagement and input from them. There should be caution in adding extra work to already overloaded boards.
- Auckland Conservation Board and Bay of Plenty Conservation Board suggested testing and/or providing examples of these recommendations in practice.
- Auckland Conservation Board and the West Coast Conservation Board both acknowledged that people (including the conservation community) may have different views on this kaupapa and will need to be brought along on this journey.

Recommendations:

- Overall, conservation boards were generally supportive of the recommendations, with a desire to have a clear statement about what conservation is to support their role. There was interest in how these recommendations might change the structure of conservation boards.
- Wellington Conservation Board suggested including a climate change lens in this work, which might help with resourcing in the future.
- East Coast Hawke’s Bay Conservation Board noted that this was an opportunity to ensure there is a Māori voice in the conservation space. Te Tiriti partners can grow together and improve with contributions.
- Auckland Conservation Board noted that volunteers are not always equipped to engage with Māori.
- Taranaki-Whanganui Conservation Board suggested that the technical drafting of the General Policies should look to encourage delegation and devolution of power where possible within the current legislative system.

Summary of feedback from conservation stakeholder groups

- Overall, most conservation stakeholders welcomed the recommendations, were frustrated with the timeframes, and were interested in how this mahi would connect/align with other DOC workstreams, in particular the conservation system reform (and the Environmental Defence Society (**EDS**) scoping report).
- There were concerns about how these recommendations would impact concessionaires/ operators and visitors / recreational users. In regard to reforming the ownership model, operators worry about losing their livelihoods and desire to protect the interests of concessions moving forward. Fish and Game emphasised the importance of public access, with time spent in nature leading to valuing nature.
- There was interest in a conservation system reform, noting other drivers for this reform, including the Parliamentary Commissioner for the Environment (**PCE**) tourism report and the biodiversity strategy.
- Tourism Industry Aotearoa (**TIA**) suggested that the definition of conservation should focus on outcomes, as well as the commonalities and shared values of Te Tiriti partners.
- Federated Mountain Clubs (**FMC**) disagreed with the process and approach, desiring for the process to be public and noting the impossible nature of the ODG task. It also expressed a wish for conservation organisations and their roles to be acknowledged.

Overall key messages

- The overall response to the draft recommendations was positive from both tangata whenua and conservation boards. Many thanked the ODG for their work and commended them for the boldness of their vision. Some noted the political atmosphere is receptive to the work and this is the moment to drive it (including the Ōtākou hui).
- The recommendations should be progressed as a complete package, as they collectively create a system for Te Tiriti partnership to be enabled, fixing one part may not be enough to give effect to Te Tiriti (Hawke's Bay hui).
- There is a need to reflect the issues of today, including climate change and biodiversity outcomes, in these recommendations as we can create solutions for these together (Tauranga hui).
- There was frustration with how DOC is delivering on its Te Tiriti responsibilities. There was interest in pursuing some of the recommendations now (including Wairoa hui and Te Hiku Conservation Board), with immediate changes available both in terms of delivery and policy.
- There was concern about how the recommendations will be received by the wider public. It was noted there is a need to bring them along, giving them comfort and knowledge, on this journey.
- Implementation will be key; there was a desire to be involved in the implementation process and ensure that an implementation pathway (Auckland Conservation Board idea) is responsive to different circumstances and places around the motu.

Process for the partial reviews:

- Attendees were pleased with the opportunity to engage in this process.
- This process will involve a culture change for DOC. There was concern about how the recommendations will be received by DOC and decision-makers. DOC has a role to play in communicating what a Te Tiriti relationship in the future should look like.
- There was concern about the short timeframes. There needs to be reasonable time for the engagement, and the timeframes need to work for both Māori and the Crown.
- There was interest in ensuring this process is connected and aligned to other DOC workstreams (including Te Tiriti settlements, both past and present negotiations) and wider government reform programmes (e.g. Resource Management Reform, Climate Change, Freshwater and Three Waters Reform).
- Some hapū and iwi did not see the ODG process as reflecting a Te Tiriti partnership and would prefer to work directly with DOC on the partial reviews of the General Policies.[217] There was reflection that whānau, hapū and iwi would like to be involved at all levels of the process of the partial reviews and it is important to ensure a Te Tiriti partnership throughout the engagement process.
- There were suggestions of implementing a review and monitoring process for both the General Policies – i.e. putting in a process to ensure the General Policies can evolve in the future (Auckland Conservation Board idea).

Fundamental reform

- The current Te Tiriti clause, section 4 of the Conservation Act, needs to be maintained or enhanced in any legislative reform process. Additional clauses in conservation legislation could support its effectiveness.
- Legislation needs to be fit for purpose; a reform of conservation legislation could involve retrofitting the current Acts or combining them. An option raised by Ngāti Kuia was that there could be one Act based on lands and oceans, and one based on animal management and species.

217 Ngāpuhi objected to the ODG draft recommendations and provided the unequivocal response that "There is no such thing as Treaty partnership". The ODG was told that Ngāpuhi are not "Treaty partners" with the Crown in any respect and they do not aspire to be such.

Purpose of conservation

- This will require a te taiao approach that reflects mana whenua perspectives (Whanganui hui), mauri and aroha, recognises Māori jurisdictional autonomy over indigenous biodiversity, and enables sustainable use of resources. This will properly support the interconnectedness of environmental wellbeing and human wellbeing (including cultural, spiritual, economic and social wellbeing).
- Some attendees wanted a clear statement about what conservation is to guide work (conservation boards), and others questioned whether conservation is even the right term to be using (Rāpaki hui).
- A comment received by conservation stakeholders was about the place of recreation, as it was not included explicitly in the recommendations. There was also discussion on the role of communities, concessionaires/operators and visitors.
- A view was expressed by some attendees that intrinsic value in the current definition is important to them.

Tikanga:

- The recommendations must encourage and recognise the idea that each marae, hapū and iwi has its own tikanga. To achieve this, tikanga and particular terms need to be broad and flexible, as only tangata whenua can determine their tikanga and what terms mean in their rohe. One suggestion was to create working groups to develop these terms.
- There was caution raised about clashes of tikanga and the potential to abuse tikanga. There is a fear that knowledge systems will be hijacked and attempts made to squeeze mātauranga into the Pākehā paradigm of science-based decisions (including Gisborne hui). Attendees also talked of intellectual property rights and data sovereignty (Kerikeri hui).
- It was noted that there is lost knowledge around the country. An education scheme will be needed, developing capacity through targeted study, Tohunga development and re-education of practitioners.

Lands, waters, resources, species and other taonga:

- A cultural permitting and harvest system is vital and important; keep this future process simple (Te Tau Ihu hui). Cultural harvest is a sustainable practice and there are benefits which can include gathering information and data on species.
- The recommendations need to articulate the benefits and impacts of commercial interests (Whakatane hui).

- They should also include geothermal interests – for example, add this to the list of waters for rights and interests (Rotorua hui idea).
- Consider public/private partnership impacts, including ownership of indigenous species on private land.
- There are a number of innovative and exciting ideas for mechanisms to achieve change – for example, how to provide for species in significant areas in a similar way to the legal personality of landscapes; and the potential for conservation land, particularly land with little or no biodiversity, to be used for other purposes places e.g. for climate refugees or for iwi as papakāinga lands (Rotorua hui).
- The concessions and permissions system needs to be reviewed. In particular:
  - money should go back to the rohe (Wellington Conservation Board hui);
  - applications should include how a proposal will add value to wellbeing and how one will work with iwi (Whakatane hui), and
  - the authority for issuing permits needs to be reconsidered – for example, Fish and Game issuing hunting licences.
- Include a specific recommendation on national parks.

Te Tiriti partnership:

- There was interest in how the draft recommendations would affect the role and structure of conservation boards, and Fish and Game.
- Future structures and governance models were discussed with ideas on neutrality, keeping connections with the community, who would have the deciding vote, the make-up or representation (e.g. 50/50 or based on iwi boundaries), and bottom-up decision making.
- A theme was strategies and plans being co-designed, co-developed and co-delivered with tangata whenua from the beginning of a process (Ngāti Rangiwewehi feedback). There was also discussion about the integration of iwi management plans and frustration expressed about the Crown not acknowledging these outside the resource management system.
- The importance of relationships in a rohe (Te Tau Ihu hui) and ensuring that a national Māori authority is not used as a proxy voice for all Māori. Mana-to-mana relationships are fundamental to the success of partnership (Chatham Islands hui).

Tino rangatiratanga:

- This delegation needs to have real power, without checklists or an ability to revoke it at will (Ngāti Kuia). It should not just be a devolution of resources or limited decision making. Consider the balance between regional and national delegation and the transfer of decision making.
- A desire for Māori to be their own conservation system (e.g. running their own pest control). There are existing tools and models that can be utilised, such as statutory acknowledgements in Deeds of Settlements and Kaitiaki models (Hawke's Bay hui).
- There is a need for the prioritisation and recognition of Māori issues and that decisions that relate to Māori are made by Māori for Māori.

Resourcing:

- Overall, there was a desire for the resourcing recommendations to be more advanced. Consider other types of resourcing (e.g. time, equipment, systems and people) and other ways of increasing resourcing (e.g. collaborating with local government about potential conservation funding schemes (like targeted rates), GDP allocation, concessions revenue, and a funding programme).
- There was a comment from Auckland Conservation Board on how these recommendations will change or influence transformative investment (e.g. Jobs for Nature projects).
- Tangata whenua capacity support needs to be determined by iwi, including KPIs and timeframes. These processes and funds need to sit outside DOC. DOC should look to resource tangata whenua early/now. There were questions as to how resourcing would be devolved equally across hapū and iwi; as well as divided between Te Tiriti partners.
- DOC must be accountable to ensure training is making a difference. Ideas (from Thames hui) included targeted apprenticeships, support for volunteers (as they are not always equipped to engage effectively with Māori), joint projects and partnering with mana whenua to inform annual business planning in the regions.

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