

Summary of submissions on the discussion document: Review of the Plant Variety Rights Act – Outstanding Policy Issues

Outstanding issues relating to the Crown’s compliance with the Treaty of Waitangi

1. 17 submitters (out of a total of 20) responded to the questions in chapter 3 of the discussion document. Some submitters identified as Māori (five) and submitters included breeders (six), academics (two), lawyers (six) and growers (two).

Definitions

2. Several submitters noted the importance of getting the definitions right – some felt that the proposed definition for indigenous plant species was vague and lacked sufficient clarity.
3. The definition of kaitiaki was raised a number of times at the workshops and in submissions – breeders expressed a lot of discomfort at the lack of definition of kaitiaki as it affects their ability to identify those with kaitiaki interest. A few submitters and workshop participants supported the use of a register to identify species and kaitiaki interests.

Definition of indigenous plant species

4. Our preferred option was to adapt the definition of indigenous forest species used in the Climate Change Response Act 2002: species that occurs naturally in New Zealand or have arrived in New Zealand without human assistance.
5. Submitters were split on the preferred option:
 - a. Four submitters (all non-Māori organisations) agreed with our proposed definition noting that it is fit for purpose and provides a workable framework.
 - b. Four submitters (Māori and non-Māori) agreed with the proposed definition in part as they felt it still left some ambiguity as to what would be captured under the definition now and in the future. One submitter queried what ‘occurs naturally’ would capture while another questioned whether indigenous varieties not endemic to New Zealand would be captured under the definition. A Māori academic supported the definition but did not support the use of the term ‘indigenous plant species’ as it perpetuates colonial constructs and devalues Māori culture.
 - c. Four submitters disagreed with the proposed definition on the basis that it does not provide sufficient clarity to breeders.
 - d. Two Māori submitters suggested the term used should be ‘taonga species’ as it more accurately reflects the species which impact kaitiaki interests and the proposed definition. Similarly, one plant breeder recommended defining ‘taonga species’ and kaitiaki as opposed to defining indigenous plant species and non-indigenous species of significance.
 - e. One submitter proposed a slight alteration to the proposed definition to clarify the scope of the trigger: plant species that occurred and/or occurs naturally in New Zealand prior to human occupation or has arrived in New Zealand without human assistance.

Definition of non-indigenous species of significance

6. Our preferred option was to define this term by way of including a list of species that came to New Zealand on the migrating waka in regulations.
7. Overall submitters were in favour of the preferred option:
 - a. Nine submitters (including Māori and non-Māori) strongly supported the inclusion of a list of species that fall into this category in regulations. Submitters noted that doing so provides certainty to all participants and consistent with both mātauranga Māori and western sciences.
 - b. On the issue of expanding the list in the future, submitters recognised, and expected, that the list would be expanded over time however it was noted by two submitters that there should be a clear process for amending the list.
 - c. Three submitters (Māori and non-Māori) disagreed with using the proposed list because they consider any assessment of species of significance to be subjective. It was suggested that further research and consultation should be undertaken prior to adopting the list in legislation.

Disclosure obligations and confidentiality

8. We sought feedback on whether there are any confidentiality considerations in relation to the information to be disclosed in PVR applications.
9. The submissions largely focussed on the confidentiality of commercially sensitive information during engagement with kaitiaki or the Committee. There was a general consensus amongst the submitters that the information should be confidential, at least until it has been considered by the Committee.
 - a. Seven submitters suggested that information should be available to the Committee on a confidential basis only and any disclosure made by breeders during the engagement process should be treated as confidential.
 - b. One submitter believed kaitiaki information and their relationship to a species cannot be held in confidence.
 - c. One submitter said all information should remain public and any issue of information that is commercially sensitive be discussed on a case by case basis.
 - d. One submitter noted that breeders should consult kaitiaki or the Committee before disclosing confidential information about Māori interests.
10. Māori did not identify any information that may need to be held in confidence in perpetuity.

Name of the Committee

11. As the proposed Māori Advisory Committee now has a determinative role, MBIE considers that the committee should be renamed to Māori PVR Committee.
12. Four submitters agreed with the suggested name whilst a majority of the submitters who commented on this topic (six) disagreed and/or proposed alternatives.
13. It was recognised by two Māori submitters that the Committee should have a meaningful Māori name that reflects the mana of the committee and its membership.

14. Two submitters (breeders) suggested retaining the word ‘advisory’ in the name as it would better reflect the role of the committee and that there should only be one authoritative body for PVRs in New Zealand (ie the Commissioner).

Appointing the Committee

Appointment process

15. The appointment process for Māori Advisory Committees in other IP regimes is set out in the Terms of Reference. As with the appointment process of the other Māori Advisory Committees, it was envisaged that the Commissioner would appoint the committee following a process seeking nominations and interviews. Given the decision making role the Committee will have, we proposed adapting the appointment process to include a statutory requirement that requires (i) the Terms of Reference to be reviewed regularly, and (ii) the Commissioner to consult with the Committee on this review. In doing so, the Committee will be able to shape the appointments process.
16. A majority of the submitters agreed with the proposed appointments process – specifically supporting a public nomination/appointment process.
17. It was recommended by three submitters that Māori should play a more active role in the appointments process – Māori organisations should have the ability to nominate or appoint representatives to the Committee. Te Hunga Rōia Māori o Aotearoa suggested that the regime should adopt a process similar to the appointment process for Te Taura Whiri in Te Ture Mō Te Reo Māori Act 2016.

Criteria for appointment

18. In addition to requiring committee members to have knowledge of mātauranga Māori, te ao Māori, tikanga Māori and taonga species, we proposed to include in legislation that the appointer consider “whether the proposed member has the mana, standing in the community, skills, knowledge, or experience to participate effectively in the committee and contribute to achieving the purposes of the committee” (adapted from the *Te Urewera Act 2014*).
19. Every submitter agreed, at least in part, with our proposed list of criteria for appointment. However, it was noted by three submitters that the list should also include knowledge of plant breeding/commercial breeding.
20. One submitter disagreed with requiring the legal expertise on the Committee because they felt that such a requirement would mean that the appointee may not have appropriate cultural skills. It was also noted in the hui that requiring a member to have legal expertise could significantly reduce the pool of eligible candidates as there are very few people with both legal and relevant cultural expertise.

The Committee’s decision making process

Including a list of relevant considerations for determinations

21. The discussion document proposed to include a list of relevant considerations the committee should take into account when making determinations on kaitiaki relationships. The purpose of this is to guide the Committee’s decision making and provide clarity to applicants and kaitiaki of the nature of issues the Committee will consider. The discussion document included the following list of considerations:
 - a. Have the parties acted in good faith?
 - b. Have kaitiaki demonstrated their relationship to the taonga species and associated mātauranga Māori?

- c. What is the kaitiaki assessment of the affect that the grant of a PVR might have?
 - d. How significant is that affect?
 - e. Is this affect consistent with (i) the nature of the kaitiaki relationship, (ii) the affect from PVRs already granted in relation to that species?
 - f. Have mitigations been considered?
22. Most of the submitters (seven) supported the inclusion of a list of factors in the legislation. Of the 11 submitters that commented on this issue:
- a. Three submitters agreed with the proposed list of considerations in part but proposed minor changes to provide further clarity.
 - b. The New Zealand Law Society did not support the inclusion of the proposed list of considerations in the Act out of concern that it would enable kaitiaki interests to trump all other interests. They believe the list does not adequately balance the interests of all parties.
 - c. A breeder noted that the types of mitigations that should be considered should be defined. It is unclear whether they intend this to be included in the list of relevant considerations or in a separate part of legislation (or rather a non-legislative instrument).
23. Several submitters noted that the list should not be too prescriptive or exhaustive to allow the Committee to exercise a reasonable amount of discretion.

Approach to decision making

24. In considering the approach the Committee should take to decision making, we proposed that the Committee should take an investigative approach and be empowered to convene a hui or request further information from the breeder or kaitiaki before reaching a determination.
25. There was unanimous support for this approach (11 Māori and non-Māori submitters). Māori felt that an investigative approach would be consistent with tikanga Māori.
26. The issue of adequately resourcing the Committee to adopt an investigative approach was raised by one submitter. An investigative approach will require the Committee to be more hands on and may require additional resources. As such an approach is likely to draw out the decision making process, the submitter noted this approach will be more expensive.
27. One breeder expressed some concern that an investigative approach could adversely impact breeders if third parties did not provide information or unreasonably extended the engagement process thereby delaying commercialisation.

How a decision is reached

28. In considering how the Committee will reach a decision, MBIE proposed the Committee should be required to try to reach a unanimous decision and only in the event that this is not possible, may the Chair of the Committee allow a decision to be made by consensus or a simple majority vote. Prescribing how the Committee will reach a decision in legislation will provide greater clarity and transparency around the Committee's decision making process.

29. A majority of the submitters (seven out of 10 submitters) supported our preferred approach. Those that did not support our preferred approach were split between requiring a unanimous decision and a simple majority:
- a. Those that preferred the simple majority approach (a breeder and New Zealand Law Society) believed reaching a unanimous decision could cause unnecessary delays. It was also noted that the Committee is akin to a panel of judges who operate on a simple majority basis. It was suggested that, where there was disagreement amongst the Committee, it could be noted in the reasoning.
 - b. One breeder believed the decision should be unanimous given the significance of the decision and the lack of appeal.

Role of the Committee in considering mitigations

30. Given the desire for a mana-enhancing regime that allows Māori to determine what is an appropriate mitigation, our preferred option was that the committee can only facilitate discussions between kaitiaki and breeders on the issue of mitigations.
31. A majority of the submitters that commented on this issue (Māori and non-Māori) supported our preferred option:
- a. Nine submitters agreed with our preferred option as it ensures Māori retain mana over the process and the Committee remains neutral.
 - b. Two submitters agreed with our preferred option in part noting that the Committee should reserve the right to determine whether the agreed mitigations are sufficient to address the negative impacts.
 - c. One submitter noted mitigations may vary between kaitiaki and therefore the Committee should be able to determine what is adequate.
 - d. Two submitters disagreed with the preferred option noting that the Committee should be able to make decisions where the parties cannot reach an agreement. The New Zealand Law Society believes the preferred option is inconsistent with the proposed investigative approach to decision making.
 - e. Several submitters (that supported and disagreed with the preferred option) cautioned against legitimising the abandonment of intellectual property protections in the legislation. There was some concern that the legislation would be drafted in such a way that foresees or encourages breeders to forgo obtaining a PVR if an agreement cannot be reached.

Process for reviews post-determination

Initial review of determinations

32. The Committee's decisions relating to kaitiaki relationships will only be subject to judicial review – a full appeal of the decision to the High Court will not be available. Given the limitations of judicial review, we proposed including a first stage review option in which the Committee may be asked to reconsider its decision in light of new information provided by a person objecting to the determination. We suggested that the Chair of the Patent or Trademark Māori Advisory Committees may be asked to sit with the Committee when it reconsiders decisions to ensure there are a new set of eyes in reviewing decisions.
33. All of the submitters (14 submissions) supported the inclusion of a first stage review as well as ensuring that there is a strict timeframe (14 days) for seeking a review.

However submitters disagreed as to what this first stage should look like:

- a. 10 submitters agreed with our preferred approach noting that it would minimise costs and enable both parties to seek a review of the Committee's decision. A lawyer also acknowledged that this approach is similar to first stage review processes used by other quasi-judicial Committees (eg Legal Services Agency). The New Zealand Law Society noted that it is important to ensure legislation will allow a third party (eg kaitiaki from another rohe or a plant breeder) to make an objection before grant about kaitiaki interests.
 - b. Two submitters agreed with our preferred option in part – one submitter noted that, a tiered system which incorporates an initial mediation style engagement following by an IPONZ hearings process would be more appropriate.
 - c. One submitter preferred the decision being reviewed through the IPONZ hearing process
 - d. One breeder recommended establishing a trustee/representative for breeders.
34. Despite the overall support, there was also a lot of support for establishing a mediation process in which disputes around the Committee's decision could be resolved.

Time period for initiating judicial review

35. We proposed to include a timeframe within which a party must indicate if they wish to seek judicial review – we suggested that this timeframe should be four weeks as this is consistent with the appeal periods in other IP regimes.
36. A majority of submitters agreed with the proposed timeframe.
37. Two submitters suggested it should be six weeks to ensure kaitiaki have sufficient time to consult with kaitiaki.
38. The New Zealand Law Society expressed a strong objection to imposing a timeframe that restricts the right of review. In their view such a limitation is inconsistent with the LDAC guidelines and New Zealand Bill of Rights Act.

Objections after grant

39. The discussion document proposed that objections on the basis that a grant adversely impacts kaitiaki relationships will only be heard if the application was not considered by the Committee (for any reason). Where the PVR grant adversely impacts kaitiaki relationships, we proposed that the grant should be cancelled (rather than nullified as previously agreed by Cabinet) and be referred to the Committee for consideration. This would provide breeders with an opportunity to have the grant restored if the Committee finds, after the fact, the kaitiaki relationship is not adversely impacted.
40. Most of the submitters who commented on this issue (seven of the 11 written submissions) disagreed with our proposed approach:
- a. Four submitters preferred option 3 which allows objections to be considered even if the Committee has already considered the application. Submitters were of the view that this issue should be treated the same as objections for the standard conditions.
 - b. One Māori submitter suggested that the objections on the basis that kaitiaki relationships are adversely impacted should not be allowed (option 1).

- c. Two submitters (legal) did not support cancelling a grant before the Committee has an opportunity to consider the impact on kaitiaki relationships. They were concerned that the proposed approach may discourage voluntary disclosure where new information comes to light after grant.

Other issues raised

41. Submitters also raised a number of issues not directly in response to the issues raised in the discussion document:
 - **Treatment of hybrid varieties** – breeders sought greater clarity around how hybrid varieties would be treated in the new regime.
 - **Funding of the Committee and the impact on fees** – submitters supported having a tiered fee structure whereby only breeders working with indigenous plant species or non-indigenous species of significance would pay higher fees to fund the Committee.
 - **The number of people that should be appointed to the Committee** – there were differing views as to the number of people that should be on the Committee; some agreed this should be no more than three, whilst others suggested it should be at least five.

Chapter 4: Outstanding issues relating to the operation of the Plant Variety Rights Office

42. A total of 15 (out of 20) submitters commented on Chapter 4 of the discussion document on operational issues. Some submitters identified as Māori (two) and submitters included breeders (six), lawyers (seven) and growers (one).

Information available to the public

43. The discussion document sought feedback on how information submitted with an application should be treated. Origin and breeding information is currently made publicly available once a PVR is granted. Additional information may be disclosed through an OIA request.
44. 14 submitters commented on this issue. Of those who expressed a clear preference:
 - a. Six submitters supported information being available to the public. Submitters noted that there is no right to confidentiality in UPOV therefore publication of breeding information is quid pro quo for a right. Other submitters supported publication in the interest of transparency.
 - b. One submitter supported keeping information confidential.
 - c. Three submitters supported keeping information confidential temporarily as it would mean that, if the PVR is not granted, then the breeder has avoided disclosing commercially sensitive information. It was argued that this could encourage participation in the PVR process. Submitters who favoured this option generally supported publication at time of grant (consistent with Canada and Australia), though one submitter suggested information should be confidential for at least three years post grant.
 - d. Two of those who supported information being available to the public were also comfortable with information being released at the time of grant.

Supply of plant material in relation to a specific application

45. We sought feedback on whether the status quo, in which certain seeds must be provided at the time of the application, and other material supplied within 12 months of a request of the Commissioner, is workable.
46. 12 submitters commented on this issue:

- a. Five submitters believed the status quo works well, with some commenting favourably on the pragmatic approach to providing extensions taken by the PVR Office.
- b. Of those who raised concerns, the main issue was the delays caused by the import/quarantine process, or out of date import health standards.
- c. The point was also made that applications themselves often can't be delayed due to UPOV novelty requirements.

Provision of propagating material for comparison and reference purposes

47. In some cases, testing of a new variety requires growing of comparator varieties to test for distinctness. However, the legislation is not clear as to whether or not the Commissioner can request protected material for use either as a comparator in a growing trial, or for use in a reference collection. There is sometimes a reluctance from rights holders to provide material for either of these purposes.
48. In the discussion document, we recommended requiring applicants and grantees to provide propagating material for comparison and reference purposes.
49. Submitters were largely supportive of the preferred option (12 submissions). However, submitters raised the following concerns:
 - a. Provision of material to third parties - submitters sought much stronger guarantees that the material will be secure and assurance as to how the material would be used. Many suggested a right to enter into agreements with the third parties to secure the material would be necessary.
 - b. The role of the PVR Office - some considered the current policy in place for dealing with this situation was inadequate and that PVR Office fails to fully acknowledge accountability for material that remains formally under its control.
 - c. It was also noted that it is unreasonable to expect rights holders to keep material for the life of the PVR just in case they are required to provide material to the PVR Office. It was suggested that material could be stored as a tissue culture (though this would mean costs and delays preparing propagating material if requested).
 - d. Two submitters raised the issue of who should be responsible for the costs associated with preparing and supplying material for comparative purposes.
50. Submitters were critical of the PVR Office's reliance of 'side by side' growing trials. Some submitters noted that overseas trials often only include the closest variety as a comparator. Submitters suggested:
 - a. More use could be made of written descriptions of comparator varieties, and this could be supplemented by a power for the Commissioner to request additional information to support a 'paper assessment'.
 - b. Owners of comparator varieties could also be given the option to distinguish their varieties, ie demonstrate that it is not a relevant comparator.
 - c. Provision of samples of variety constituents could be uses in some cases.
51. Submitters were less supportive of providing material for establishing a formal reference collection. Breeders were concerned about the maintenance of such a collection (likely to be people involved in breeding too in such a small market, potentially giving them an unfair advantage); who would pay for it; and how you could possibly choose which varieties to have a collection of.

Sanctions for failing to provide comparator material on request

52. Given the factors discussed above, submitters considered that prescribing timeframes

to respond to a request for material is problematic. There would have to be a great deal of flexibility here. We note, however, that this does not appear to be too distinct from the discussion around supplying material that is the subject of the application and the general feeling there was that the PVR Office took a pragmatic and sensible approach to that matter.

53. Also related to the discussion above, there were mixed views on whether there should be sanctions for a failure to provide material on request. One submitter acknowledged that it would be appropriate when it is clear that the rights holder is not making their best efforts to comply. Any sanction would have to be discretionary to account for all the factors that can influence provision of material. Failure to provide material when the owner is not satisfied of the security arrangements with that material should not be sanctioned.

Growing trials

54. The discussion document recommends the legislation should state that growing trials are compulsory. Under the current regulations, if the Commissioner has insufficient information, they can undertake or commission growing trials, and can disregard the results of previous growing trials unless they were approved or overseen by the Commissioner.
55. Our preference was for the Commissioner to direct the types of growing trials for all applications. The other options canvassed in the discussion document include:
 - a. Option 1: Applicants organise their own growing trials
 - b. Option 2: Applicants have the option to conduct their own growing trials
 - c. Option 3: The Commissioner directs the types of trial for certain species.
56. 14 submitters commented on the two issues relating to the conduct of growing trials.
 - a. Those in support of compulsory growing trials generally caveated their position with the need to accept foreign test reports.
 - b. Others considered that flexibility was paramount, and if an application could provide sufficient information that satisfies the Commissioner that the variety is distinct, uniform and stable (the key criteria for a PVR grant), then that should suffice.
 - c. On the issue of who conducts growing trials, submitters were supportive of the Commissioner directing the types of trials. However submitters raised similar concerns as those above (in relation to the provision of plant material for comparators).
 - d. Some were also concerned that this was a considerable amount of discretionary power in the PVR Office's hands, and that it could result in higher costs if breeders were not permitted to conduct their own trials.

Trial and examination fees

57. We proposed requiring trial and examination fees paid within a prescribed period after the Commissioner's request, otherwise applications could lapse (option 3). Currently, applicants must provide the trial/examination fee within a prescribed period after the application is made, but no period is prescribed in regulations.
58. There was unanimous support for our preferred option however most submitters then suggested a two-month timeframe to pay following the request (consistent with the Patents regulations).

Hearings and appeals relating to decisions of the Commissioner of PVRs

59. This section raised two issues for consideration:

- a. Whether the legislation should provide for a general right to be heard when the Commissioner exercises discretion.
 - b. Where appeals to a decision of the Commissioner should be held, ie District Court or High Court.
60. All submitters that commented on the first issue supported it. Two submitters suggested this approach should extend to matters relating to kaitiaki interests as well.
61. On the second issue, the majority of submitters thought that appeals should be heard at the High Court, consistent with other IP regimes. Two submitters suggested an alternative approach:
 - a. One submitter considered that this should depend on the nature of the proceedings.
 - b. One submitter considered that appeals should start at the District Court.