

Chair
Cabinet

WALKING ACCESS IN THE NEW ZEALAND OUTDOORS

Executive Summary

1. To advance the series of deliberations by Cabinet over the last two years on walking access, Cabinet recently agreed in principle to provide for walking access to selected water margins over a period of time [CAB Min (04) 36/3 refers].
2. It is proposed that Cabinet agree to a policy of walking access along: identified parts of the coast; and along specified dry margins of those watercourses (rivers and streams) and water bodies (such as lakes)¹ and their beds which have been identified as having access value. The policy would be implemented progressively as assessments are undertaken. Decisions would be reviewable.
3. Access would, in general, be along the closest practical route within 5 metres of the coast and water margins and apply to land of all tenures. The policy does not change ownership of land or the ability of landholders² to occupy or use the land, nor does the proposed walking access derogate from existing legal arrangements providing and controlling access. Access may be restricted through the use of exclusions (standard, discretionary and temporary).
4. A Code of Responsible Conduct would be developed in consultation with stakeholders and include standards which promote respect for property and the environment. There are issues about the lack of information available to the public about walking access.
5. Fostering community and landholder involvement in access solutions can assist in strengthening and unifying leadership and achieving national standards and policies that promote access. It is proposed, therefore, that further work be undertaken on the roles and functions and establishment of an access agency.
6. It is proposed that officials report further to the Cabinet Policy Committee by 31 March 2005 on a range of policy and operational matters.

¹ The term "water margins" is also used in this paper as a shorthand reference for the edge of "watercourses and water bodies".

² The term "landholder" includes landowners, lessees and persons entitled to occupy or use land.

Background

7. In May 2004 Cabinet considered a Land Access Strategy and agreed in principle, subject to further work that the following five core objectives, as proposed in the *Walking Access in the New Zealand Outdoors* report (the report of the Acland Committee), guide the development of the New Zealand Land Access Strategy. The objectives are:
 - a. strengthening leadership;
 - b. certainty of information;
 - c. embrace the ethos of the Queen's Chain;
 - d. negotiated solutions; and
 - e. clarifying existing legislation.
8. The problems with the status quo and possible remedies have been considered in a suite of associated papers: CAB Min (02) 9/5A, CBC Min (02) 9/10, CAB Min (04) 15/9.1, CAB Min (04) 23/2 and CAB Min (04) 36/3.
9. The government has been considering the best means of giving effect to those objectives and more recently agreed in principle to walking access to selected water margins over a period of time [CAB Min (04) 36/3 refers].

Walking Access

10. Approximately 70% of land abutting New Zealand's coast and a substantial proportion along rivers, streams and lakes are in some form of public ownership or subject to statutory access provisions (often referred to as the Queen's Chain, comprising 8 different types of land status³). The reservations covering some of that land have been lost by erosion leaving an estimated 50% of water margins with an effective Queen's Chain that is available to the public for access.
11. The remaining land bounded by water which is privately-owned does not bear a strip along the water margin for walking access.
12. The government's objective is to achieve high quality access for walking and similar passive recreational activities (e.g. swimming and picnics) alongside the coastline and specified water margins in New Zealand. A walking access policy would seek to:
 - achieve high quality access for walking and similar passive recreation activities;
 - provide for walking access along footways⁴ beside identified parts of the coastline and specified watercourses and water bodies in New Zealand for public enjoyment of the outdoors;
 - protect existing access;

³ Examples of such "reservations" are legal roads, esplanade reserves, and marginal strips.

⁴ Footway is the strip of land 5 metres wide (extendable up to 20m in certain circumstances) along the dry margin of any watercourse or water body over which a right of passage on foot only is created.

- establish a statutory Code of Responsible Conduct to ensure that persons exercising the walking right respect and protect the interests of landholders⁵;
 - enable the establishment and maintenance of other walking access over land by negotiated agreement with landholders; and
 - provide leadership on walking access policy.
13. In order to achieve the policy and taking into account the varying degrees of access currently existing across New Zealand, the following issues need to be considered:
- a. to which parts of the coast, rivers, streams and lakes should walkers have access, and how should the criteria for determining this be decided?
 - b. how wide should the footway be?
 - c. what standards of behaviour should be required of the those using footways, and how should these standards be enforced? and
 - d. what should the relationship be with other legislation?
14. For each of these issues preliminary decisions are required so that further work can proceed. Legislation governing walking access will also incorporate key features of the government's policy.

Extent of walking access

15. The appeal of the New Zealand outdoors differs for users depending on location, their expectations and how they might use the outdoors. This policy focuses on walking access and similar passive recreational uses. Other types of access on motor vehicles, motor bikes, bicycles and horses, with guns or dogs, and camping are specifically excluded from this policy.

Footways

16. To achieve a high quality access objective, it is proposed that provision be made for footways of up to 5 metres from the dry margin of the coastline and lakes and both sides of rivers and streams. If walking access is not possible within 5 metres, alternative access may be sought in the bed of the river, stream or lake or along a route marked out by the landholder.
17. In situations where walking access is blocked by vegetation or other features a person may walk up to, but no more than, 20 metres from the dry margin in order to use the footway. If the obstruction extends more than 20 metres the user would need either to use the riverbed or retrace their steps. Appendix 1 illustrates the options facing the user.
18. Where vegetation in the bed of a watercourse is overgrown and obscures the physical dry margin from being determined visibly, then the dry margin will be deemed to be on the landward edge of the overgrown vegetation. This is solely

⁵ The term "landholder" includes owners and other occupiers such as lessees.

for determining the dry margin (and, therefore, the footway) where vegetation is overgrown. Appendix 2 illustrates this point.

Access criteria

19. It will be important to prioritise areas where providing access along the water margin is desirable. Prioritisation will be based on “access value criteria” which will be included in access legislation because they are a fundamental part of the assessment process. Officials will involve stakeholders in designing the criteria. The proposed access agency (see below) would apply the criteria once the legislation is enacted.
20. It is envisaged that priority will be given first to the establishment of the footway in areas where water margin access has been lost because of erosion, then to filling in gaps where walking is not continuous. Consideration would then be given to water margins outside these areas.
21. The criteria for assessing the access value could include such factors as:
 - the physical significance of the water course or waterbody;
 - the ecological characteristics of the surrounding land;
 - outstanding natural heritage value;
 - the value for fishing and other recreation; and
 - the usefulness for access to public recreational land.
22. It is proposed that officials report on the detail of the access criteria in March 2005.

Process

23. The location of the footway would be established by a mapping process undertaken by the access agency. This would be done initially as a technical mapping exercise using existing topographical and cadastral information. A draft map would then be produced as a basis for consultation with the public. After consideration of public submissions a final map would be approved by the access agency taking account of the statutory criteria, and published. The footways would not come into effect until a period of a year after publication so that affected landholders would have the opportunity to seek exclusions from the footways in respect of all or part of their land.
24. It is expected that the process of mapping would be undertaken progressively with the total process taking at least three years to complete.
25. It is proposed that officials report on the detail of the process in March 2005.

Effect on land ownership and use

26. The walking access policy is not intended to interfere with the essential elements of a landholder’s title to land. Landholders will continue to retain their

rights to the occupation and use of the land. The policy is intended to be permissive and not prevent the use of land where the activity, such as farming, is an everyday use of the land. There would be a prohibition against interfering with or damaging any crop on the footway.

Restrictions

27. There will be land where walking access will not apply. There are three categories of exclusions as follows (these only apply where access does not currently legally exist):

- **standard exclusions** – these would be specified in statute, apply automatically and cover situations where for security, privacy, cultural or for operational (including safety) reasons it is not appropriate to have public access. Examples include prisons, schools during school hours, reservoirs, airports, port facilities, specified public utilities where the title for the land extends into the footway, sites of specific historical significance, waahi tapu and other sites of spiritual or cultural significance. Other classes of land may be added by Order in Council. When there is doubt about whether the area is in this category, the presumption favours the application of a standard exclusion.
- **discretionary exclusions** – these arise from a statutorily defined set of criteria and processes. In cases of doubt, there is a presumption in favour of walking access. Discretionary exclusions would be granted by the access agency, would be for up to a period of up to 20 years and may be subject to conditions. Decisions on discretionary exclusions would be reviewable.
- **temporary exclusions** – landholders would have a right to make temporary exclusions for circumstances described in statute (such as lambing or tree felling) for a maximum of 90 days in any one year. Landholders would notify the exclusion through signposting and may be required to notify the agency or its delegate and provide appropriate public notification through signage.

28. It is also intended that the policy restrict walking access to no closer than 50 metres to a residence or marae, or 20 metres from any other lawfully-erected building on private land.

Land covered by the policy

29. Decisions on footways on Māori land and general land would be subject to the same statutory criteria and with appeal rights. An indicative process would see “Access Commissioners” making decisions on footways along general land while the Maori Land Court would be responsible for decisions affecting Maori land. The initial processes may differ because of legislation governing various land tenures.

30. The criteria for standard, discretionary and temporary exclusions would be the same for both Maori and general land. The standard and temporary exclusions would also apply to both. Some consequential amendments to Te Ture Whenua Māori Act may be required to give effect to the decision-making processes.

31. A provision may be required such that walking access does not affect the validity of agreements between the Crown and Māori for the settlement of historical Treaty claims, or the ability of the Crown to enter into such agreements in the future. Further work is required on the implications of the policy on specific Treaty of Waitangi settlement legislation and historical claims including beds of rivers and lakes for access.
32. It is proposed that officials further assess the impact of the policy on the Māori Land Court and the Te Ture Whenua Māori Act.

Relationship to foreshore and seabed

33. The Foreshore and Seabed Act 2004 is about the public foreshore and seabed only. The Act provides rights of access over, across, in and on the public foreshore and seabed and does not grant walking access over areas of foreshore in private title.
34. The foreshore is the “wet” part of the beach covered daily by the ebb and flow of the tides. Much of the area commonly regarded as the “beach” is not foreshore and therefore is not affected by access provisions in the Foreshore and Seabed Act. The policy outlined in this paper relates to walking access along the strip of dry land which adjoins the foreshore (i.e. the dry “beach” where one walks or has picnics). On the coastline, should that area have access value, it is proposed that this policy apply to the dry margins adjoining the foreshore but not over private foreshore.

Compensation

35. As noted above, the footway is not intended to interfere with the essential elements of a landholder’s title to the land. The landholder retains the rights to the occupation and use of the land. It is proposed that officials examine this issue further.

Access to footways

36. Provision is also needed for access **to** footways along the coasts and water margins. The New Zealand Land Access Strategy includes an objective of negotiated solutions. The main feature to give effect to this objective is a contestable fund which would provide for negotiated walking access over private land to footways. At this stage, the fund would be used to:
 - create new, and enhance existing walking access opportunities across private land to footways, the existing Queen’s Chain, public land and private land with recreational or iconic value;
 - support walking access initiatives which accord with the principles of high quality access;
 - provide these opportunities in a cost-effective manner; and
 - promote partnerships between Government and local communities.
37. Further details about the fund and the role of an access agency are subject of a further report in March 2005. Funding will be sought in the 2006 Budget.

Code of Responsible Conduct

38. Walking access to New Zealand's outdoors needs to be governed by standards which promote care for property and the environment. The Acland report highlighted the need for an access code that would:
- provide minimum standards of behaviour of walkers and landholders;
 - describe rights and responsibilities and obligations;
 - educate by giving guidance on good practice beyond strict compliance with the law; and
 - provide clarity to inform decision-making.
39. A Code of Responsible Conduct ('the Code') would act as the interface between the legislation and the public, by providing a comprehensive source of information and guidance aimed at landholders and recreational users. Shorter less formal publications and guidelines may also be issued.
40. The Code would address three dimensions:
- *A plain language description of the legal framework* governing walking along the footway, including prohibitions under the access statute and other legislation;
 - *Evidential minimum standards* which would provide guidance on certain prohibitions, for example, activities that might be considered a disturbance to a landholder). Compliance with the minimum standards can be used as a defence against a prosecution under the access statute; and
 - *Recommended 'best practice'*, which goes beyond compliance with the law. This is likely to include guidance on appropriate ways of getting over fences and gates and good conduct on farms (how to behave near stock or where paddocks are sown in crops).
41. The process for developing the Code would be prescribed in access legislation and be the responsibility of the access agency. The process will need to be based firmly on consultation, to ensure that the Code reflects the needs and expectations of landholders and users. It is proposed that officials commence consultation while recognising that subsequent formal processes will need to be statutory.
42. The proposed process for developing the Code is:
- i) officials begin informal consultation on the process and content with stakeholders;
 - ii) access agency prepares an initial statutory draft;
 - iii) consultation with interested persons;
 - iv) draft Code undergoes a public consultation and submission process; and
 - v) final Code approved by Minister.
43. The walking access proposed in this policy would be an exception to the Trespass Act 1980. Failure to comply with the standards outlined in the Code may lead to prosecution under either the Trespass Act or the access legislation. Further details on an enforcement regime are subject for the next report- back.

Information

44. The Acland report and subsequent consultation highlighted that there is a dearth of readily-accessible information on existing public access. Cadastral maps and similar data do not identify all current available public access and there is generally limited information available for the public.
45. Users, landholders and government need information about the location and types of current access available to the public. Information needs to be user-friendly, free or low cost, portable and obtainable from a single source, include details about land ownership, clear and accurate mapping, thereby resulting in improved marking of access points.
46. Most of the necessary information about current access is held by Land Information New Zealand and other sources, in particular local government and the Department of Conservation. It all needs to be correlated and made available in a much more publicly-accessible form.
47. In addition, it would be impractical to comprehensively signpost every footway and prohibited activity. Signage would include information such as restrictions or access arrangements. Deviations from a footway will need to be appropriately signposted in order to be enforceable and for users to recognise where exclusions or narrowing of footways exist.
48. Officials will report further on giving effect to the suggestions to improve information and signage about walking access.

Relationship with other legal arrangements affecting water margins

49. The walking right will complement existing legal arrangements. The policy will not detract from existing legal arrangements that already provide access along water margins.
50. Existing esplanade reserves/strips, access strips and marginal strips would continue to apply although there are some exceptions for Maori land, for example as set out in the Ngai Tahu Claims Settlement Act 1998. It will maintain future walking access in the event of future erosion or sudden changes in the course of rivers.
51. Where there is an existing legal provision of access that width will prevail.

Relationship with other legislation

52. Issues surrounding the identification and use of unformed legal roads were identified during consultation on the Acland report. It is proposed that the access legislation would give the access agency or any person the ability to apply to the District Court for an order that obstructions to walking access be removed from unformed legal roads. It is proposed that officials assess the implications of this initiative for local government and the *Local Government Act 1974*.

53. Landholders have expressed concerned about their responsibilities under the *Health and Safety in Employment Act 1992 (HSEA)* of a walking access policy. The HSEA requires landholders to take “all practicable steps” in relation to their duties under the statute. Because persons on a footway would be there without specific knowledge of the landholder the landholders’ duties toward such persons would be qualified by this circumstance. The use of temporary exclusions by landholders could also fit within the “all practicable steps” requirement.
54. Landholders are also concerned about their responsibilities under the *Forest and Rural Fires Act 1977 (FRFA)*. Research shows that the risk of fire on rural land caused by recreational activities is overstated. Farmers are not liable for fire suppression costs (unless the occupier is directly responsible for starting the fire) and the costs are paid out of the Rural Fire Fighting Fund. Commercial forest managers, however, cannot use the Rural Fire Fighting Fund and are directly liable for the cost of suppressing a fire on their property, even if they were not personally responsible. It is proposed that this matter be addressed in the current review of the FRFA and the Fire Service Act 1975.
55. Although there is no need for specific legislative changes to the *Occupiers’ Liability Act 1962 (OLA)*, a residual liability under common law could be further limited by transferring the protections afforded under section 10 of the New Zealand Walkways Act 1990 into access legislation. There may be a need for further clarification of landholders’ responsibilities and liabilities under the OLA and related Acts, as well as educational initiatives. This is a complex area and officials will seek further advice from the Crown Law Office on liability under various statutes.

Exclusive capture

56. The policy does not address the concerns of anglers over the sale of access rights as there are issues outside the scope of the policy. It is proposed that officials report in March 2005 on policy options to address the sale of access rights.

Access Agency

57. One of the core objectives of the policy is to strengthen leadership for walking access. The Acland report considered that access needs to be managed in a coherent and constructive way rather than the *ad hoc* manner arising from present arrangements that give rise to inconsistent practices and standards.
58. Fostering community and landholder involvement in land access solutions can assist in strengthening and unifying leadership and achieving national standards and policies that promote access. It is therefore proposed that further work be done on the establishment of an access agency. The agency would:
 - a. work progressively over time to assess the coast, rivers, streams and lakes against access value criteria and to identify footways;

- b. develop, in consultation with stakeholders, the Code of Responsible Conduct;
 - c. build a central and regional database of existing and new walking access opportunities and actively disseminate that information to stakeholders; and
 - d. administer a contestable access fund.
59. Again, it is proposed that officials report in March 2005 on the detailed roles and function of the agency.

Implementing the policy

60. Appendix 3 is an indicative programme for implementing the policy.

Financial Implications

61. The Ministry of Agriculture and Forestry (MAF) is submitting a budget bid in the 2005/06 budget round to enable further work to progress including developing software and hardware data management systems. Estimated costs for the first two years are \$ **deleted as Budget sensitive** in 2005/06 and \$ **deleted as Budget sensitive** in 2006/07. Outyear costs cannot be determined with certainty until the policy is finalised and legislation enacted.

Legislative implications

62. Legislation is required to give effect to the walking access policy. The implementation of the policy also has potential consequential amendments to the Trespass Act, the New Zealand Walkways Act, the Local Government Act, the Conservation Act, the Resource Management Act, the Health and Safety in Employment Act, the Forest and Rural Fires Act, the Occupiers' Liability Act and the Overseas Investment Act.
63. The legislation would also create the entity responsible for implementing the proposed policy. Cabinet has agreed to a "walking access" bill with a Priority 4 (proceed to a select committee) ranking. Given the current timing, it is likely that a Bill will not be ready until 2005. It is proposed that MAF reports to POL by 31 March 2005 on the final details required for legislation.

Consultation

64. The Department of the Prime Minister and Cabinet was consulted in the preparation of this paper. The following agencies were informed: Ministry for the Environment, Te Puni Kokiri, Land Information New Zealand, State Services Commission, Ministry of Justice, Department of Labour, Department of Internal Affairs, Ministry of Tourism, Department of Conservation, New Zealand Police and the Treasury. Crown Law has also provided advice on elements of this policy proposal.

Human Rights and New Zealand Bill of Rights

65. The Ministry of Justice's initial view is that the proposals appear to be consistent with the New Zealand Bill of Rights Act 1990. Further consideration will be required as the policy is developed into legislation.

Communications

66. It is proposed that the Minister for Rural Affairs release the details of government's policy decisions. The Office of the Minister of Rural Affairs will co-ordinate a communications strategy.

Recommendations

67. I recommend that the Cabinet Policy Committee:
1. **note** that Cabinet agreed in principle in July 2004 to:
 - 1.1. adopt the concept and further development of a New Zealand Land Access Strategy encompassing an objective of high quality access;
 - 1.2. the following five core objectives, as proposed in the report *Walking Access in the New Zealand Outdoors* guide the development of the New Zealand Land Access Strategy:
 - 1.2.1. strengthening leadership
 - 1.2.2. certainty of information
 - 1.2.3. embracing the ethos of the Queen's Chain
 - 1.2.4. negotiated solutions
 - 1.2.5. clarifying existing legislation
 2. **confirm** the decision in recommendation 1;
 3. **agree** that the government's objective is to achieve high quality access for walking and similar passive recreational activities alongside identified parts of the coastline and specified water courses and waterbodies;
 4. **agree** that the purpose of the walking access policy is to:
 - achieve high quality access for walking and similar passive recreation activities;
 - provide for walking access along footways beside identified parts of the coastline and specified watercourses and water bodies in New Zealand for public enjoyment of the outdoors;
 - protect existing access;
 - establish a statutory code of responsible conduct to ensure that persons exercising the walking right respect and protect the interests of landholders;
 - enable the establishment and maintenance of other walking access over land by negotiated agreement with landholders; and
 - provide leadership on walking access policy.

5. **note** that this policy does not allow for persons to take motor vehicles, motor bikes, bicycles and horses, with guns or dogs, or camp, on footways on private land without the express permission of the landholder;
6. **note** that approximately 70% of land abutting New Zealand's coast and a substantial proportion along rivers, streams and lakes are in some form of public ownership or subject to statutory access provisions and some of that land has been lost by erosion leaving an estimated 50% of water margins having an effective Queen's Chain that is available to the public for access;
7. **note** that the remaining land bounded by water which is privately-owned does not bear a strip along the water margin for walking access;

Access Value

8. **note** that the appeal of the New Zealand outdoors differs for users depending on location, their expectations and how they might use the outdoors;
9. **note** that because not all land is bounded by water and is of particular recreational interest, it will be important to prioritise areas where providing access is desirable;
10. **note** that officials will be reporting further on the detail of the access criteria and processes for public consultation;
11. **note** that the walking access policy is not intended to interfere with the essential elements of a landholder's title to land and that landholder's continue to retain their rights to occupation and use of the land;

Restrictions

12. **agree** that there be three categories where walking access would be restricted (where access is currently not legally available):
 - 12.1. **standard exclusions** – these would be specified in statute(e.g, prisons, schools during school hours, reservoirs, airports, port facilities, specified public utilities where the title for the land extends into the footway, sites of specific historical significance, waahi tapu and other sites of spiritual or cultural significance. Other classes of land may be added by Order in Council. These would apply automatically and cover situations where for security, privacy, cultural or for operational (including safety) reasons it is not appropriate to have public access;
 - 12.2. **discretionary exclusions** – these arise from a statutorily defined set of criteria and processes; and
 - 12.3. **temporary exclusions** – these would be available in situations described in statute for a maximum of 90 days in any one year.

13. **agree** that walking access not be closer than 50 metres to a residence or marae, or 20 metres from any other lawfully-erected building on private land.

Footways

14. **agree** that provision be made for footways of up to 5 metres from the dry margin of identified parts of the coast, along specified dry margins of those watercourses (rivers and streams) and water bodies (such as lakes) and their beds which have been identified as having access value;
15. **agree** that if walking access is not possible within 5 metres, alternative walking access may be sought in the bed of a river, stream or lake, or along a route marked out by the landholder;
16. **agree** that where walking access is blocked by vegetation or other features a person may walk up to, but no more than, 20 metres from the dry margin in order to use the footway;
17. **agree** that where vegetation in the bed of a watercourse is overgrown and prevents the physical dry margin being determined visibly, then the dry margin be on the landward edge of the overgrown vegetation;
18. **note** that provision needs to be made for walking access over private land to footways along the coasts and water;
19. **note** that officials will examine issues associated with compensation for walking access;
20. **note** that, in preparation for a Budget bid in 2006, officials will be reporting further in March 2005 on the contestable fund which would provide for negotiated walking access over private land;

Standards of Walking Access

21. **note** that providing for walking access to New Zealand's outdoors needs to be governed by standards which promote care for property and the environment;
22. **agree** that a Code of Responsible Conduct be developed in consultation with interested organisations and persons and promulgated to inform those who access New Zealand's outdoors;

Information

23. **note** that government, land owners and users need accurate and readily accessible information about the location and types of walking access;
24. **note** that officials will report further in March 2005 on information needs;

Access Agency

25. **note** that fostering community and land owner involvement in land access solutions can assist in strengthening and unifying leadership and achieving national standards and policies that promote walking access;
26. **note** that officials will be reporting in March 2005 on roles, functions and the establishment of an access agency;

Next Steps

27. **direct** officials from the Ministry of Agriculture and Forestry, in consultation with other department officials, to report back by 31 March 2005 on further policy and operational matters including:
 - 27.1. further detail on the access value criteria and consultation processes;
 - 27.2. the contestable fund for negotiated walking access over private land;
 - 27.3. a Code of Responsible Conduct and an enforcement regime;
 - 27.4. the information needs for the walking access policy;
 - 27.5. the role, function and establishment of an Access Agency; and
 - 27.6. implications for other access-related legislation.

Financial

28. **note** that the Ministry of Agriculture and Forestry is submitting a new initiatives budget bid in the 2005/06 budget round to enable future work to progress;

Legislation

29. **note** that the Minister for Rural Affairs proposes to seek renewal of the priority for access legislation for 2005; and

Communications

30. **invite** the Minister for Rural Affairs to release the government's policy on walking access.

