

Regulatory Impact Statement

Canterbury Earthquake: proposal to remake the Canterbury Earthquake (Building Act) Order 2010

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Department of Building and Housing. It provides an analysis of options to remake the Canterbury Earthquake (Building Act) Order 2010 (the 2010 Order in Council) to:

- recognise the challenges faced by Canterbury councils in dealing with dangerous buildings and 'at risk' buildings following the Canterbury earthquakes in 2010 and 2011
- provide ancillary powers to facilitate earthquake recovery and response for specified councils and for the Canterbury Earthquake Recovery Authority
- ensure consistency with the provisions of the Building Act 2004.

This Regulatory Impact Statement also considers the likelihood of the ongoing need for these powers.

The problem identification and analysis in this document has largely been provided through input from the three Canterbury councils with authority to exercise the powers under the 2010 Order in Council. Discussions with the Canterbury Earthquake Recovery Authority, the Department of Civil Defence and Emergency Management and the Ministry for the Environment have also helped to identify issues and possible remedies. Through these discussions, we believe that the need for change has been clearly demonstrated.

The provisions of the Order in Council have a very strong social good focus in that the primary objective is to protect building users. The direct financial impact of protection of the public's safety is difficult to quantify.

Dave Kelly
Deputy Chief Executive, Building Quality

Signature:

Date: 12 July 2011

Status quo and problem definition

1. Councils have a number of powers under the Building Act 2004 (the Building Act) to deal with dangerous buildings. This includes a power to require a building to be demolished or for the council itself to demolish the building.

The need for change - problems faced by Canterbury Councils

2. Following the 7.1 magnitude earthquake on 4 September 2010, councils in Canterbury informed the Department of Building and Housing (the Department) that existing powers in the Building Act were not sufficient to address the full range of dangerous building situations they now faced. Specifically, councils sought the following changes to enable them to work more effectively for the social good of their communities:
 - issue notices warning people not to enter buildings that are not themselves dangerous but are at risk of being damaged, and the occupants killed or injured, because adjacent or nearby buildings are dangerous and could collapse
 - restrict entry into buildings that have not yet been inspected and had their safety assessed, including providing transitional arrangements so that the Civil Defence yellow and red building placards (issued under the Civil Defence and Emergency Management Act 2002) remain in place after a state of emergency has been lifted (until 60 days from the date of issue of the placard)
 - demolish dangerous buildings (where an owner refuses to do so) without the need to obtain District Court approval. (A District Court order is required to recover the costs of such demolition work from the owner in all but the most urgent cases.)

Enhanced powers under the Canterbury Earthquake (Building Act) Order 2010

3. The 2010 Order in Council gave effect to the changes outlined above (including consequential amendments necessary to give effect to the changes, such as clarifying powers of entry, consent and condition requirements and liability of the council). In addition to these matters, the 2010 Order in Council also:
 - empowers Department staff to enter onto property and into buildings to gather earthquake information (to help provide pivotal information to inform building science developments and in particular improvements to building safety in the event of earthquakes)
 - exempts certain low risk plumbing-related work (in relation to water storage heaters) from building consent requirements (to help facilitate reconstruction activities).
4. The 2010 Order in Council expires on 16 September 2011.
5. To help them deal with ongoing earthquake response issues promptly and effectively, the Canterbury councils have requested that the 2010 Order in Council be continued, with minor changes to improve the clarity and workability of provisions. Expiry of the 2010 Order in Council would mean that councils must revert to the powers accorded them by the Building Act. These do not address the full range of building situations that exist following the Canterbury earthquakes and do not recognise the ongoing uncertainties the region faces.
6. Councils have also requested that modifications be made to take into account new risks that have arisen since the 4 September 2010 earthquake in relation to certain land hazards. Christchurch City Council has advised that following the 22 February 2011 earthquake there are now a number of buildings (largely houses) that are at risk from

natural land hazards such as rockfalls, landslides, cliff collapse and subsidence. During the state of emergency following the 22 February earthquake, access to affected buildings was restricted through the use of red and yellow placards under the Civil Defence and Emergency Management Act 2002. However, Christchurch City Council has indicated that a longer term solution involving the use of Building Act powers (as modified by the 2010 Order in Council) would be desirable to protect the health and safety of users of these buildings.

Objectives

7. The objectives of the powers provided through the 2010 Order in Council are to protect the health and safety of building users in Canterbury, and to facilitate aspects of the wider response and recovery effort.

Regulatory impact analysis

Option 1 – Rely on the provisions of the primary statutes

8. Under this option, the 2010 Order in Council will expire on 16 September 2011 and will not be re-made. Councils and the Christchurch Earthquake Recovery Agency (CERA) will then need to manage their earthquake response and recovery activity through the existing provisions of the Building Act 2004 (Building Act), the Canterbury Earthquake Recovery Act 2011 (CER Act) along with any subordinate legislation.
9. The current provisions of the Building Act 2004 contain a power to require a building to be demolished, or for a council to itself demolish a building. However, the current provisions do not recognise the full range of dangerous buildings situations that exist in Canterbury after the September 2010, February 2011 and June 2011 earthquakes, and do not recognise the ongoing uncertainties faced by the region. Accordingly, the Building Act does not provide councils with adequate powers to protect the health and safety of users of dangerous buildings or enable them to contribute effectively to the earthquake response and recovery effort
10. The CER Act does provide CERA with a range of 'back stop' powers to address the dangers posed by buildings classified as dangerous and 'at risk'. Some of these powers are currently being used to restrict access to the Christchurch central business district. However, the ongoing dependence on these powers is not considered appropriate as a mechanism to deal with individual buildings across the region. Both CERA and the councils prefer a mechanism that promotes the direct involvement of local councils leading the affected communities. Such involvement is essential to support informed decisions which meet the needs of each community.
11. Reliance on the provisions of the Building Act and the CER Act has no new fiscal implications, and no new legislative implications.
12. However, this option does not meet the objectives and diminishes the ability of Canterbury councils to participate effectively in the earthquake response. It is not preferred by the Canterbury councils or CERA.

Option 2 – Extend the current provisions of the Canterbury Earthquake (Building Act) Order 2010

13. Under this option, the 2010 Order in Council will be remade with an expiry date of 16 September 2013. Councils will continue to have the ability to issue dangerous building and 'at risk' building notices for up to 60 days, and to renew them an unspecified number of times. This 60-day provision in respect of dangerous buildings is not consistent with the Building Act, which requires dangerous building notices to remain in force until the danger has been removed.

14. This option continues provide councils with an immediate mechanism to protect the public health and safety by restricting access to specified buildings. It does not, however, address the new risks that have arisen since the 4 September 2010 earthquake in relation to certain land hazards.
15. The proposed two year extension to the expiry date recognises the ongoing uncertainties which Canterbury continues to face, and provides an assurance to councils that they will have powers to act into the future.
16. The option has no new fiscal implications but may have administration and resource implications on councils who may need to renew a potentially significant number of dangerous building and 'at risk' building notices every 60 days on an ongoing basis.
17. This option has no major legislative implications. However, it does not allow the inconsistency between the Building Act 2004 and the 2010 Order in Council to be addressed. This places an administrative burden on councils, requiring them to re-issue dangerous building notices every 60 days until the danger is removed.
18. This option is workable and will help to achieve the objectives. However it is not preferred by councils, which have expressed a desire for changes to the provisions of the remade Order to enhance their ability to protect their communities and contribute effectively to recovery and response activity.

Option 3 – Remake the Canterbury Earthquake (Building Act) Order 2010 and modify to address certain issues raised by Canterbury Councils to improve their ability to respond to the Canterbury earthquakes

19. Under this option, the 2010 Order in Council will be remade with an expiry date of 16 September 2013 and adjustments to some of the current provisions.
20. To ensure Canterbury councils have appropriate powers to deal with dangerous buildings and 'at risk' buildings, the following changes are proposed:
 - remove the current 60-day time limit for notices restricting entry to dangerous buildings so that the notice remains in place under the danger is removed
 - extend to 12 weeks (unless the danger is removed sooner) the current 60-day time limit for notices restricting entry to:
 - i. buildings that are not themselves dangerous (but are at risk because of other dangerous buildings or land hazards)
 - ii. buildings that have been identified as potentially dangerous but have not yet been inspected by a council
 - provide transitional deeming provisions so that red and yellow placards issued under a state of emergency endure for a specified period once the state of emergency is lifted
 - provide Canterbury councils with the authority to exercise these powers for a further two years until September 2013.
21. It is proposed that the remade 2010 Order in Council will continue the current powers of councils to demolish dangerous buildings where an owner refuses to do so without the need to obtain District Court approval. (Note that to recover costs from the owner for

demolition work a District Court order will still be required in all but the most urgent cases.)

22. Both CERA and the councils requested that the 60-day time limit for notices restricting entry be removed. This would help to address ongoing issues (for example addressing the risks posed by rockfalls, landslides and other land hazards) arising from, in particular, the 6.3 magnitude earthquakes of 22 February and 13 June 2011.
23. The outright removal of the 60-day time limit would have the effect of restricting entry to both dangerous and 'at risk' buildings until expiry of the Order in Council without any obligation on councils to inspect the buildings or review their decision during the period.
24. There has been no evidence that councils have used their powers under the 2010 Order in Council inappropriately. However, the exercise of these powers does significantly impact on the rights of owners to access their property. The Department therefore considers that extension of the 60-day time limit to 12 weeks is sufficient to address the practical issues facing councils whilst balancing the impact of the restrictions on building owners. The 12 week period is consistent with the duration of emergency management continuation measures accorded to CERA upon expiry of authorisations by the National Co-ordinator of Civil Defence under a state of national emergency.
25. Similarly, while councils have requested that a remade Order in Council should continue until the CER Act expires on 19 April 2016, given the nature of the provisions, an expiry date of 16 September 2013 is considered sufficient at the present time. The expiry of the Order in Council can be reconsidered at a later date should circumstances justify it.

Ancillary powers

26. The Department recommends the following powers be continued under the remade Order:
 - building consent exemptions - this will exempt certain low risk plumbing-related work (in relation to water storage heaters) from building consent requirements (to help facilitate reconstruction activities).
 - information gathering - this will help the Department to obtain pivotal information to inform building science developments and, in particular, improvements to building safety in the event of earthquakes.
27. The impact of the proposal to exempt low-risk plumbing work will be to ensure that repair work to water storage heaters can be done promptly and efficiently.
28. The impact of the proposal to retain information gathering powers will help ensure the Department has access to information that will assist to review and set appropriate building and rebuilding requirements and standards for the region following the earthquakes. The Department will also be able to use this information more widely, and apply learnings to improving building safety in the event of earthquakes across New Zealand and internationally.
29. The proposals in this option are supported by the Christchurch City Council, Waimakariri District Council and Selwyn District Council and CERA.

Consultation

30. The following agencies have been consulted on this paper: Department of Internal Affairs, Ministry of Civil Defence and Emergency Management, Ministry of Justice, Ministry for the Environment, Treasury, Ministry of Economic Development,

Land Information New Zealand and CERA. The Department of the Prime Minister and Cabinet has been informed.

31. Councils in Canterbury had input into the development of the 2010 Order in Council. The proposals in this paper have been informed by discussions with, and comment from, councils in Canterbury (Christchurch City Council, Waimakariri District Council and Selwyn District Council).

Conclusions and recommendations

32. The existing powers in the Building Act were not sufficient to address the full range of dangerous building situations that existed following the 4 September 2010 Canterbury earthquake. Additional provisions, in particular to protect the safety of users of dangerous buildings and 'at risk' buildings, were implemented through the 2010 Order in Council.
33. Councils in Canterbury have requested that the 2010 Order in Council be continued, with modifications to take into account the new risks that have arisen and to improve the clarity and workability of the provisions.
34. The Department's preference is for an approach that best meets the objectives of ensuring that users of buildings are adequately protected from public health and safety risks following the Canterbury earthquakes, and to ensure that recovery activities are facilitated. The councils and CERA consider that continuing an Order in Council approach that utilises (modified) Building Act powers is the best way of meeting these objectives.

Implementation

35. Normally Orders in Council come into effect 28 days after they are notified in the Gazette. In this case, it is highly desirable that the Order comes into effect as soon as possible, in the event that future earthquakes may require the provisions to be used immediately. At the appropriate time, I will therefore be recommending that the Order comes into effect on the day after it receives the Royal assent.
36. The proposals would be given effect through an Order in Council made under the Canterbury Earthquake Recovery Act 2011. While the Department is not aware of any instances of powers being used inappropriately by councils since the 2010 Order in Council came into force on 16 September 2010, the Department will provide guidance to councils to assist them in their use of the powers. Should a building owner disagree with the exercise of dangerous building powers by councils, they can apply to the Department for a determination that is binding on the parties.

Monitoring, evaluation and review

37. The impact of the proposals will be monitored through discussions with the councils and CERA.
38. The need for ongoing provision of the powers accorded to by a remade 2010 Order in Council will be reviewed prior to its expiry in September 2013.