

# Regulatory Impact Statement

## Rebuilding retaining walls in Christchurch

### Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Department of Internal Affairs (the Department).

It provides an analysis of a request from the Christchurch City Council (the Council) for an Order in Council under s71 of the Canterbury Earthquake Recovery Act 2011 that will expedite the repair and rebuild of Council owned retaining walls that were damaged in the Canterbury earthquakes. Two regulatory options are considered alongside the status quo.

A major impediment to the expeditious repair of the retaining walls is the time taken to obtain the consent of some affected private land owners to undertake work, resulting in delays and continued risk to public safety. The extent of the delays, will depend on the particular circumstances of individuals whose response may be influenced by a wide range of matters and uncertainties. Analysis of the risks relies on the assessments by the Council and the Stronger Christchurch Infrastructure Rebuild Team (SCIRT). Current estimates indicate a widespread need for expeditious repairs to the retaining walls.

The preferred option, Option Two, may impair private property rights in some cases. The Department's assessment is that the benefits to the private land owner, and to the wider public, outweigh this loss. Rights of access and construction for the Council, and objection and appeal rights of affected land owners, will be the same as those currently available for sewage and stormwater drainage works.

The proposal will not:

- impair market competition, or the incentives on business to innovate; or
- override fundamental common law principles (as referenced in Chapter 3 of the Legislation Advisory Committee Guidelines).

Treasury has advised that a Regulatory Impact Statement is required but that the policy proposal does not trigger the significance criteria so will not be quality assured by the Regulatory Impact Analysis Team.

Paul James

Chair, Regulatory Impact Assessment Panel

Date

## Background and problem definition

### Proposal

1. The Christchurch City Council (the Council) has requested that regulatory options be considered to expedite the repair and rebuild of Council owned retaining walls that were damaged in the Canterbury earthquakes.
2. The proposal is for an Order in Council to be made under s71 of the Canterbury Earthquake Recovery Act 2011 (CER Act). The Order in Council would extend s181 of the Local Government Act 2002 (LGA02) for the construction of works on private land, to provide for retaining walls.
3. The Order in Council would:
  - extend the application of existing powers of the Council relating to the construction of works on private land so it can build, repair, rebuild and maintain retaining walls, without easements if necessary;
  - apply existing process under the LGA02 to cases where it is not practical to obtain the consent of owners and occupiers of affected private land; and
  - cease on 19 April 2016 in line with the cessation of the CER Act.

### Background

#### *Expeditious repair and rebuild of Council retaining walls needed*

4. The Council owns, and is responsible for, an estimated 2,596 retaining walls. Most are located on road, road reserve or other public land. Some are located on private land and affect the stability of public land or infrastructure. The Canterbury earthquakes extensively damaged many of these retaining walls, particularly in the Port Hills. Moving land, collapsed cliffs and rock falls caused many of the retaining walls to collapse, subside or crack. Refer to Appendix One for photos of retaining walls.
5. Some of the damaged retaining walls have moved or blocked underground services such as wastewater and water supply. Others have impeded vehicle access or access to private properties. There are on-going risks to public safety until repairs, replacement or strengthening of the damaged retaining walls are carried out. Temporary measures have been taken in some instances. The ongoing risks that the damaged walls present are a potential liability for the Council.
6. The Council is responsible for assessing, repairing and rebuilding the damaged retaining walls. The Stronger Christchurch Infrastructure Rebuild Team (SCIRT)<sup>1</sup> is the Council's delivery agent for the programme of work. The programme of work is scheduled and sequenced in a way that will optimise

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<sup>1</sup> SCIRT is an alliance made up of owner participants (Canterbury Earthquake Recovery Authority, Christchurch City Council and the New Zealand Transport Agency) and non-owner participants (City Care, Downer, Fletcher, Fulton Hogan and McConnell Dowell). SCIRT is responsible for rebuilding horizontal infrastructure in Christchurch. This comprises roads, fresh water systems, wastewater systems, storm water systems, stopbanks, footbridges and retaining walls.

resources, minimise costs and prioritise those retaining walls that have affected underground services or that have a high risk of failure.

7. Of the estimated 2,596 Council owned retaining walls, 643 of the most significant walls have been assessed by SCIRT engineers for damage. Initial estimates are that 400 to 500 of these will need to be repaired or rebuilt at an estimated cost of \$45 million. An ongoing programme of assessment by SCIRT engineers is underway to assess the extent of damage of the remaining 1,953 retaining walls. The complete programme of work including assessment, design and rebuild of all the walls is scheduled to take until 2016.

*Affect on adjoining private land owners*

8. In some instances private land owners will be affected by, or will benefit from, the repair or rebuild where retaining walls:
  - are located adjacent to, or partly on, private land;
  - require the repair, rebuild or relocation of services or structures on private land; and/or
  - require ground anchors to be affixed onto or into private land.
9. In these instances the Council may require:
  - temporary access to private land during the construction phase;
  - easements<sup>2</sup> for ongoing access to private land for ongoing repair and maintenance;
  - easements for ground anchors<sup>3</sup> to be constructed on or that extend into private land; and/or
  - acquisition of small strips of private land.
10. Initial estimates, based on assessments to date, are that there are 225 retaining walls requiring repair or rebuild in locations likely to affect private land. In each case there may be 3 or 4 private properties affected. The Council therefore estimates around 600 to 700 private land owners may be affected.
11. The Council has agreed to pay up to \$1000 to those private land owners who wish to seek independent legal advice on easements for ground anchors. The Council is, however, not legally required to offer compensation to affected land owners.
12. The Council is undertaking a comprehensive information and consultation process to seek agreements from affected private land owners at suburb, street and individual owner level. Despite this effort, the consent of some affected private land owners may not be obtained in time to progress the

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<sup>2</sup> An easement is a registered interest on the certificate of title of a property that grants rights and responsibilities to another party (for example access rights), often to an adjoining owner.

<sup>3</sup> A ground anchor is a metal bar that is inserted into a pre-drilled hole in the sloping land and is then encased in cement grout which, as it hardens, fixes the ground anchor in place. The protruding end is affixed into the retaining wall. The ground anchors are approximately 8 - 9 mm in diameter, are approximately 1 - 1.5m apart and are up to 5m deep.

programme of work as scheduled. In other cases consent may not be able to be obtained at all. This could be for a range of reasons including absentee, disengaged or misinformed owners, uncertainty or owners choosing not to give consent.

### **Problem definition**

13. A major impediment to the expeditious progress of the repair and rebuild of the retaining walls is the time taken to obtain written consent from some affected private land owners.
14. The Council has advised that to date, no owners have immediately agreed to easements for ground anchors. The Council has had to engage in lengthy discussions to secure the easements needed to commence work. The longest negotiation process was for the Cunningham Terrace wall which took approximately 6 months of negotiation before all affected owners agreed to easements for the work.
15. The costs arising from the damaged retaining walls, that will increase with delays to the repair and rebuild, include:
  - limited vehicle or pedestrian access to properties - this cost and inconvenience is primarily borne by residents and also by the general public who may have constrained use of the road;
  - maintenance costs - borne by the Council;
  - cost of damage to wider infrastructure network such as underground services, roads and footpaths - borne by utility owners and the Council
  - deterioration of the retaining walls from water damage or further seismic shock, creating further risk of failure - increased costs of repair borne by the Council.
  - ongoing risk to public safety - borne by the general public
16. Although assessments for damage are still underway, evidence to date has established the nature of the issue and current estimates have established a widespread issue.

### **Objectives**

#### **Christchurch City Council objectives**

17. The Council has advised that its objective is to promptly progress the repair and rebuild of its retaining walls because of the:
  - on-going risk to public safety if repairs/replacement of retaining walls are not carried out;
  - constrained vehicle access to properties and the risk of losing access to properties in the future;
  - need to protect Council owned and commercial infrastructure assets;
  - need to protect adjoining private and public land;
  - risk of weakened infrastructure being further damaged by water damage or further seismic activity;

- need for resilient replacement infrastructure that complies with the current building code to adequately cope with on-going seismic risk;
- additional cost and inefficient use of resources that could occur if the Council programme of work is delayed or not progressed as sequenced; and
- Council's liability arising from any of the circumstances described above.

### **Crown objectives**

18. The primary Crown objective is to expedite the recovery of greater Christchurch. A critical component of this is the repair and rebuild of horizontal infrastructure, comprising roads, fresh water systems, wastewater systems, storm water systems, stopbanks, footbridges and retaining walls.
19. An Order in Council can be made under s71 of the CER Act only if it will meet one or more of the Act's purposes under sections 3(a) to 3(g). Of particular relevance is s3(f) - to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property.

### **Status quo**

#### **Current legislative provisions for constructing works on or under private land**

20. The Council currently has powers under s181 of the LGA02 to construct works on or under private land or under a building on private land that it considers necessary for functions such as the supply of water, trade wastes disposal and sewage and stormwater drainage.
21. Section 181 allows the Council to undertake such works on or under private land or buildings, and to have ongoing access onto the land for maintenance of the work, without the need for an easement. Works under s181 may be undertaken either:
  - with the prior written consent of the owner; or
  - in accordance with Schedule 12 – Conditions of constructing or undertaking works on private land without the owner's consent.
22. The key provisions of Schedule 12 are that:
  - the Council must give notice of the work in writing to the occupier if possible and the owner if known;
  - if the owner or occupier objects in writing within one month of the notice being given, the Council must hold a hearing and make a determination. If the objector is aggrieved by the determination they may appeal to the District Court within 14 days. The work may not proceed pending the decision of the District Court;
  - if no objection is received within one month of giving notice to the occupier or owner, the Council may proceed with the work as notified; and
  - compensation is payable for any detriment to the land under the Public Works Act 1981 (PW Act).

23. Section 181 and Schedule 12 provisions are fit for purpose for the repair and rebuild of drainage and sewerage infrastructure in Canterbury.

### **Most retaining walls are not covered by s181 of the LGA02**

24. Most of the Council owned retaining walls are not necessary for the functions listed in s181 and so were not constructed under, and are not covered by, these provisions. In these cases the Council must obtain written agreements from any affected private land owner to access their property or to undertake work on or under their land. In the case of ground anchors, or other structures, easements need to be registered to ensure ongoing maintenance and access rights. This involves survey and legal costs and can be time consuming.

### **Current provisions for the Council if consent not forthcoming**

25. If consent by private land owners is not forthcoming, the Council has recourse to provisions under the PW Act and the CER Act. The PW Act provides for powers under s18 to acquire land, or an interest in land (for example an easement). The process can be slow and cumbersome and could cause delays for months or possibly years. This mechanism does not provide the Council with the certainty it needs to expedite the Council programme of work.
26. The CER Act provides for carrying out or commissioning works, and acquiring land, with or without the owners consent under sections 38 and 54. The Canterbury Earthquake Recovery Authority (CERA) does not favour the use of these provisions as this would result in CERA getting involved in operational aspects of a programme of work, such as land acquisition and compensation, which are more appropriately dealt with by the Council. In addition, any ongoing rights of access should be vested in the Council, and not with CERA, as this power aligns with Council's ongoing rights of access onto private land under s181 of the LGA02.

## **Regulatory impact analysis**

### **Options**

27. There are two options, in addition to retention of the status quo, for an Order in Council under s71 of the CER Act to address the issue of lack of timely consent by private land owners affected by the repair and rebuild of Council owned retaining walls.

#### *Option One: Status Quo*

28. This is the status quo option where:
- the Council continues to use a combination of written agreement and easements to construct and maintain works on or under private land or under a building on private land that it considers necessary for the support and stability of public land and public infrastructure; and
  - there is no regulatory intervention.

#### *Option Two: Order in Council to extend section 181 to retaining walls*

29. Option Two proposes an Order in Council under s71 of the CER Act that would:

- extend s181(2) of the LGA02 by means of an Order in Council under the CER Act to give the Council the power to construct works on or under private land or under a building on private land that it considers necessary for the support and stability of public land or public infrastructure;
- extend s181(4) to include existing Council owned retaining walls not constructed under s181 and adjoining land;
- leave the application of all other provisions of s181 unchanged, including the complete application of Schedule 12; and
- cease on 19 April 2016 in line with the cessation of the CER Act.

*Option Three: Order in Council to extend section 181 to retaining walls and amend Schedule 12*

30. Option Three was suggested by the Council. This option proposes an Order in Council under s71 of the CER Act, as for Option Two, that in addition would:
- amend the objection period under clause 1(d) of Schedule 12 from one month to 14 days; and
  - apply a modified procedure that would streamline the appeal process to the District Court before a hearing commences under clause (2) of Schedule 12. This would be by way of a judicial conference taking place within 14 days of the Registrar of the District Court receiving the documents relating to the appeal. A judicial conference would allow the Judge to strike out the appeal, settle any issues to be determined or refer the case to appeal. The modified process is detailed in Appendix One.

**Table One: Summary of options**

	<b>Option One (Status quo)</b>	<b>Option Two</b>	<b>Option Three</b>
<b>Construction of retaining walls on private land</b>	Prior written agreement and registered easement	Prior written agreement or Schedule 12: <ul style="list-style-type: none"> <li>▪ Work can proceed if no objection made within one month of notice given</li> <li>▪ Objection and appeal rights by land owner</li> </ul>	Prior written agreement or amended Schedule 12: <ul style="list-style-type: none"> <li>▪ Work can proceed if no objection made within 14 days of notice given</li> <li>▪ Objection, judicial conference and appeal rights by land owner</li> </ul>
<b>Repair and rebuild of existing retaining walls on private land</b>	Prior written agreement and registered easement	Reasonable notice of intention	Reasonable notice of intention

**Criteria for Evaluation**

31. In considering Crown regulatory intervention the following criteria are relevant:

- conformity to the purposes of the CER Act;
- administrative practicality, including a clear exit mechanism from the intervention; and
- adherence to principles of natural justice; and
- delivery of highest net public and private benefit for least cost and risk to the Council and private land owners.

## **Options analysis**

### *Option One: Status Quo*

32. The status quo option relies on agreement of owners and legal documentation (for example easements) for works to be constructed or rebuilt by the Council on or under private land or under a building on private land that it considers necessary for the support and stability of public land or public infrastructure.
33. Keeping the status quo is likely to cause delays in progressing the programme of work to repair and rebuild Council owned retaining walls. This will result in increased costs and risks for the Council and for the public that could be reduced by the expedient attention to the retaining walls. The status quo does not progress the purposes of the CER Act and is administratively time consuming for the Council.
34. Under the status quo private land owners may choose to engage in lengthy negotiations with the Council for the construction of works or the rebuild of existing retaining walls. In all cases there will be a benefit to affected private land owners as either their land, or land adjoining theirs, will be supported or safely retained. Any detriment to the land due to the penetration of ground anchors, such as constraints to the building platform, are likely to be far outweighed by the stabilisation effects.
35. Option One, the status quo, is therefore not recommended.

### *Option Two: Order in Council to extend section 181 to retaining walls*

36. With regard to construction of works, Option Two would extend s181(2) of the LGA02 to provide for the Council to construct works on or under private land or under a building on private land that it considers necessary for the support or stability of public or private land or public infrastructure.
37. Section 181(3) would apply unaltered, which means that the Council would not be able to exercise the power to construct works unless it had:
  - prior written consent of the owner of the land to the construction of the work; or
  - complied with the requirements of Schedule 12.
38. Section 181(6) would also apply unaltered which means that compensation is payable for any detriment to the land under the PW Act.
39. The benefit to the Council with this option, compared to the status quo, is that it allows it to construct works with prior written consent but without the need for an easement. Easements involve time, survey costs and legal costs to prepare



and register. Also, if there is no engagement by the owner, the Council may proceed with the work if they do not hear from the owner within one month of notice of the work being given.

40. For the land owner, the most significant difference between this option and the status quo is that it puts the onus of engagement on the land owner. It also provides an established process for recourse by the land owner through the District Court and provides for compensation for any detriment to the land, if any.
41. The Department's view is that where private land owners prior consent is not obtained for the construction of works, it is appropriate that full objection and appeal rights under Schedule 12 apply as for other functions under s181 and to provide consistency in the law. This would fully align any additional functions with all existing functions under s181 and would be consistent with principles of natural justice.
42. With regard to rebuilding, Option Two would extend s181(4) to allow the Council to enter onto private land, or adjoining land, to inspect, alter, renew, repair or rebuild existing retaining walls including those not originally constructed under s181.
43. Section 181(5) would apply unaltered which means that the Council would not be able to exercise these powers without first giving reasonable notice of the intention to enter the land to the owner and occupier (if any). Section 181(6) would also apply unaltered which means that compensation under the PW Act is payable for any detriment to the land.
44. For the Council the benefit of these powers is that the repair and rebuild programme could proceed without delays.
45. The cost to land owners would be the loss of the legal right to decline entry onto their land for the specific purpose of repairing and rebuilding retaining walls. The comprehensive communications programme by the Council would continue, to ensure residents are fully informed. The Council would continue to be as accommodating as practically possible to requests by owners. The benefit to land owners is that their land, or adjoining land, will be safely retained and stabilised.
46. The public good function of retaining walls in supporting or stabilising public land or infrastructure is akin to that of drainage and sewerage. Any infringement of private property rights is countered by the benefits to the wider public good. The Department considers that provision for retaining walls within the scope of s181 to be appropriate. Rights of access and construction of the Council, and objection and appeal rights of land owners, will be the same as those for works necessary for sewage and stormwater drainage works.
47. The powers under Option Two would contribute to achieving the purposes of the CER Act as they would facilitate the repair and rebuild of land and infrastructure and mitigate risks of further damage and public safety.
48. From an administrative point of view, Option Two can be readily implemented by the Council in line with drainage and sewerage works. As the proposed

Order in Council will cease in 2016, it would be prudent for the Council to obtain easements over those properties where continuing access is needed for the ongoing maintenance of the retaining walls.

49. The Department, CERA and the Council support this option. This is the recommended option.

*Option Three: Order in Council to extend section 181 to retaining walls and amend Schedule 12*

50. Option Three has all the features of Option Two and in addition would amend Schedule 12(1)(d) by decreasing the objection period from one month to 14 days and applies a modified procedure to streamline the appeal process to the District Court before a hearing commences under Schedule 12 (2).
51. For the Council, the reduced objection period for affected private land owners, would reduce costs and time delays for the Council before work can begin should no private land owner consent be available and if no objection is made. It could also reduce the time and costs involved for the Council should an appeal be made by a private land owner to the District Court. The modified procedure inserts an interim step of a judicial conference which provides opportunity for a case to be struck out or determined within 14 working days by a Judge, rather than going through the full District Court appeal process. This could save as much as six to twelve months time on an individual case.
52. As there is no way to estimate how many people may object to the Council and go on to appeal to the District Court, the overall benefit of a modified appeal process is not able to be quantified.
53. The reduced objection period would put more pressure on land owners to respond quickly.
54. The Department's view is that the curtailment of the existing objection period and the modified appeal process for private land owners for retaining walls is not warranted, and may be a breach of natural justice under s27 of the New Zealand Bill of Rights Act 1990 – (right to justice). The Department does not consider there to be justification for the existing procedure in Schedule 12 to be modified. While this option is in line with the purposes of the CER Act, having a 14 day objection period rather than a full month is unlikely to expedite matters by any great degree, at the risk of not allowing owners sufficient time to consider the proposed works and their response.
55. The suggested amendments to Schedule 12 to allow for a modified appeal process also have limited merit as provisions currently exist under the District Court Rules 2009. Under rules 2.44 to 2.46 the court or the Registrar may allocate a short trial, and under rules 2.47 to 2.48 Judges may convene judicial conferences should they consider it to be appropriate. Parties to the appeal may request the use of one of these processes. Appeals that are frivolous or vexatious or an abuse of court process can be dealt with under rule 2.50. These provisions under the District Court Rules are commonly used.
56. The Council supports this option. This option is not recommended.

## Consultation

57. The Selwyn District Council, the Waimakariri District Council and Environment Canterbury were consulted on whether they would benefit from the provisions in the proposed Order in Council. They all responded that would not as damage to retaining walls is not an issue in their jurisdictions.
58. The Canterbury Earthquake Recovery Authority, the Treasury, Ministry of Justice, Ministry of Transport, Land Information New Zealand and the Christchurch City Council have been consulted. The Department of Prime Minister and Cabinet has been informed.

## Conclusions and recommendations

59. The full extent of the damaged retaining walls is yet to be assessed; however the current estimates have established a widespread issue.
60. The Department considers that the proposed Order in Council, analysed in this Regulatory Impact Statement as Option Two, is the most effective way to expedite the repair and rebuild of retaining walls owned by the Council that were damaged in the Canterbury earthquakes.
61. The proposed Order in Council will, to some extent and in some cases, benefit the Council by assisting with progressing work as programmed. The Department considers this is warranted as it will have flow-on cost benefits for the Council by their improved ability to progress work as sequenced and as prioritised, and by being able to manage resources efficiently. It will also mitigate safety risks and Council's liability for the further failure of retaining walls.
62. The key cost to land owners will be the loss of the legal right to stop the Council coming onto their land for the specific purpose of repairing and rebuilding retaining walls. The comprehensive communications programme by the Council will continue, to ensure residents are fully informed and the Council will continue to be as accommodating as practical to any operational requests by owners. Land owners will continue to have the right to say no to any new works constructed on or under their land. Any infringement of private property rights is countered by the benefits to the wider public good.
63. The benefit to land owners is that their land, or adjoining land, will be safely retained and stabilised as quickly as practical.
64. Rights of access and construction of the Council, and objection and appeal rights of land owners, will be the same as those for works necessary for sewage and stormwater drainage works.
65. The Department considers that the proposed Order in Council will meet the statutory criteria of fulfilling the purposes of the CER Act, particularly s3(f) which is to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property.

## **Implementation**

66. The proposal will be given effect by an Order in Council under the CER Act. No transitional requirements are required.

## **Monitoring, evaluation and review**

67. No formal monitoring and review process is proposed as the intervention is temporary.

# Appendix One

## Photos of repair and rebuild of retaining walls in Christchurch

Fitzgerald Avenue, by the Avon River



Sumner Road, Lyttelton



Temporary precautions



Photos taken from the Stronger Christchurch Infrastructure Rebuild Team (SCIRT) website [strongerchristchurch.govt.nz](http://strongerchristchurch.govt.nz), August 2012

## Appendix Two

### Modified process for clause 2 of Schedule 12 under Option three

Notwithstanding the provisions of clause 2, the following procedure will apply in respect of an appeal lodged against a determination of the Christchurch City Council under section 181:

- (a) the appeal must be lodged with the Council within 14 days after the date of the determination.
- (b) within 7 days after the notice of appeal is received the Council must send to the registrar of the District Court:
  - (i) copies of the notice of objection, written submissions, statements, reports and other papers lodged with the council;
  - (ii) any exhibits in the custody of the Council;
  - (iii) a copy of the written record of the hearing held under clause 1(c);
  - (iv) the determination of the Council under clause 1(d).
- (c) within 14 days after the registrar of the District Court receives the documents referred to in clause 2A(b) a notice of a judicial conference must be sent to all parties to the appeal and the judicial conference must be presided over by a Judge alone.
- (d) the Judge presiding at any conference under 2A(c) must, after giving the parties an opportunity to be heard, do the following things:
  - (i) assess the grounds of appeal to ascertain whether an order for striking out should be made;
  - (ii) assess any applications to hear new evidence, and any applications to have any witness cross-examined;
  - (iii) issue a direction to fix the dates by which the respective parties must deliver to the Court and to the other parties statements of the evidence to be given on their behalf.
- (e) the Judge may, if he or she thinks fit, order that the whole or any part of the appeal be struck out if the Judge considers that it:
  - (i) is frivolous or vexatious; or
  - (ii) discloses no reasonable or relevant case; or
  - (iii) would otherwise be an abuse of process of the District Court to allow the appeal to be taken further.
- (f) if the appeal is not struck out under clause 2A(e) the Judge may:
  - (i) settle any issues to be determined;

- (ii) fix a time and place for the hearing of the appeal;
  - (iii) give directions as to the manner in which evidence is to be brought before the court;
  - (iv) give any other directions necessary for the proper determination of the appeal.
  - (v) the Judge may exercise any of the powers specified in clause 2A(f) without holding a judicial conference.
- (g) the hearing of an appeal shall proceed in accordance with the provisions set out in rules 14.17 - 14.25 of the District Court Rules 2009.