

Regulatory Impact Statement

Legislation to provide an order in council mechanism to assist recovery in the areas affected by the Kaikoura earthquake sequence from 14 November 2016.

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Department of the Prime Minister and Cabinet (DPMC). It provides an analysis of options to assist with short-term recovery efforts in response to significant damage caused by the Kaikoura earthquake sequence.

Caveats, uncertainties and limitations of analysis

The RIS has been prepared under significant time constraints in order to ensure requisite powers are available to facilitate recovery in an expedient manner. As such, DPMC's ability to test assumptions and dependencies, quantify risks, and develop and analyse options was limited. In many cases quantification of impacts was not possible due to the urgency required and the lack of data on social, community and economic rebuilding impacts. Given the time available, consultation on specific proposals relating to the legislation have been limited to date. DPMC continues to work with relevant agencies to ensure that the proposals in this RIS provide for an appropriate balance of power between the Executive, Parliament and the Courts.

If it were not for these extraordinary circumstances and consequent short timeframes, the analysis would be more comprehensive. That said, it is important the Government has flexibility (with appropriate constraints) to assist the recovery from the 14 November earthquakes, and their aftershocks. In developing the legislation, we have also learnt from the experience of the Canterbury earthquakes.

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Status quo and problem definition

14 November 2016 earthquakes have caused significant damage

1. A magnitude 7.8 earthquake occurred northeast of Culverden, New Zealand at 0002 NZDT on 14 November 2016. Strong to severe shaking was felt throughout New Zealand and lasted for over two minutes in some locations. There have been well over a thousand aftershocks, and seismic activity is expected to continue for some time.
2. This Kaikoura earthquake sequence has caused significant damage. The main impacts have been felt in Canterbury (Kaikoura and Hurunui Districts), Marlborough (Blenheim), and the Wellington central business district. Key immediate impacts include damage to local infrastructure and private and commercial buildings, roading network in the north-east of the South Island, Wellington's CentrePort, and railway routes from Picton to Christchurch.

Recovery needs are likely to be complex

3. Two weeks after the event, the affected areas are moving away from the initial emergency and response phase into the recovery phase, where the impact of the earthquakes and the community needs are broader and more complex. Assessing the magnitude of the problem associated with the status quo is difficult because the scale and extent of the recovery effort required is not fully known at this stage. It may also be exacerbated by aftershocks. In particular, at the time of preparing this Regulatory Impact Statement, GNS Science has reported unusual activity which has increased the uncertainty about the likelihood and size of future earthquakes and aftershocks.
4. Information to date suggests that in the short-term at least the following is required:
 - a. providing accommodation supplements (the Ministry of Social Development has already signalled the need).
 - b. undertaking geotechnical assessment of the large slips on State Highway One north of Kaikoura.
 - c. responding to the wine industry in Marlborough's need related to storage of wine, noting a large amount of damage to stainless steel tanks.
 - d. providing sufficient time for affected councils to do land revaluation for rating purposes and for preparation of audited long-term plans.

An appropriate and adequate regulatory framework is required

5. New Zealand's regulatory framework, in general, does not have the flexibility necessary to first respond and then to aid recovery after a significant emergency. While the status quo regulatory framework is generally fit for purpose, it does not respond well to the post-emergency needs of affected individuals, communities, and businesses. For instance:
 - a. **there is no relief from legislative obligations after an emergency:** New Zealand does not have legislation that can relax legislative requirements in the aftermath of an emergency (for example, to provide relief from tax deadlines).
 - b. **there is no flexibility to adapt legislation to changed requirements:** New Zealand does not have legislation that allows for a greater degree of flexibility,

within appropriate boundaries, in the aftermath of an emergency. There is a need to speed up standard processes and cut through impediments to recovery.

- c. **there is no means to address the volume of changes required:** New Zealand does not have legislation that caters to the sheer volume of decisions likely to be required or a mechanism that allow for speedy and timely decisions.
6. Failure of the regulatory framework at this crucial early stage of the recovery phase will have negative consequences on both response and recovery. The experience from the Canterbury earthquakes suggest that the flow-on effects are likely to be widespread and have social, economic, cultural and environmental impacts. They may include discouraging people from living and working in the affected areas, increasing social and economic inequalities, decreasing investor confidence, exacerbating health problems associated with inadequate housing, affecting tourism, and increasing costs in other parts of economy.
7. The scale of the Kaikoura earthquake sequence requires temporary recalibration of the usual regulatory and planning environment to allow the pace of the recovery to gain momentum.
8. In particular, a specific type of regulatory framework is required at this stage. Earthquake recovery requires swift action. Legislative powers need to be drafted, enacted and brought into force as soon as possible, rather than in the weeks or months that would be required to pass an Act of Parliament. Powers are needed to speed up standard processes, cut through impediments to recovery and enable timely decision-making given the sheer volume of decisions that would need to be made by a range of decision-makers (e.g. relevant Ministers, local authorities etc.). A regulatory framework for recovery also needs to be flexible enough to deal speedily with changing circumstances.
9. A timely and flexible mechanism (with mandatory constraints) is required to change a limited range of enactments to enable the next phase of recovery of the affected areas.

Regulatory framework needs to be in place as soon as possible

10. The ongoing significant aftershocks and the probability of further events have highlighted the need to put in place an enabling regulatory framework as soon as possible, to positively influence the pace and trajectory of the recovery. This is particularly so given the adjournment of the House of Representatives from 16 December to 7 February.
11. The recovery phase from the Kaikoura earthquake sequence has now reached the point where it is appropriate for central government to intervene and address the regulatory environment. Taking these steps would speed the recovery itself, and allow local institutions to play an appropriate role in decision-making.

Objectives

12. The impetus for the proposed legislation is to assist earthquake-affected areas, councils and communities to respond and recover from the Kaikoura earthquake sequence. The objective is to:
 - a. support economic recovery, planning processes, rebuild and recovery of land, infrastructure, people, and built and natural environments.
 - b. enable safety enhancements and improved resilience of infrastructure.

- c. ensure that an adequate and appropriate regulatory framework is in place as soon as possible, to expedite the pace and trajectory of the recovery and increase resilience.
- d. give people and communities affected by the earthquakes confidence that an enabling regulatory framework is in place to maximise recovery opportunities.

Options and impact analysis

13. There are no non-regulatory options available to wholly or partly achieve the objectives set out above. An analysis of the regulatory options are set out below.

Need for new legislation

Option 1: Status quo (no legislative changes at all)

14. As set out in the problem definition a range of recovery works need to be undertaken as soon as possible. The status quo option is not supported as the standard timeframes and processes are insufficient to deal with the scale of the damage caused by the Kaikoura earthquake sequence. It would not provide for appropriate relief from statutory deadlines. It would also place significant time pressures on those undertaking recovery works and those in need of recovery support. These factors are likely to result in a slow, complex and contentious recovery process, reduced public confidence and diversion of resources from the recovery.

Option 2: Amending legislation on a case by case basis

15. Under this option, amending legislation would be developed by each relevant Minister on a case-by-case basis and each amendment bill would be presented to the House of Representatives individually. The core benefit of this option is that it would enable changes to the current regulatory framework.

16. However, this option is not supported. Standard processes available for enacting legislation do not provide sufficient certainty and confidence that laws will be enacted within specified timeframes. It would be possible to progress each Bill under urgency, but this would reduce the usual safeguards provided by the legislative process, such as public consultation, without any countervailing benefit. Critically, the breaks in the House sitting timetable, especially during the Christmas - New Year adjournment period, would exacerbate issues. Further, until each Bill had made its way through the House, those affected by the earthquake sequence would still be subject to the standard legislative regime.

Option 3: Omnibus legislation

17. Under this option, a single omnibus bill would be presented to the House. This would require all of the amendments needed to respond to the earthquakes to be ready for inclusion in that Bill at the same time. The Business Committee's approval would also be required (Standing Order 263). The benefit of this option is that it would mean the House would only need to pass one Bill.

18. However, this option is not supported. When compared to Option 4 (the preferred option), it is administratively unwieldy. More importantly, given the significant unknowns at this stage, it is not possible to anticipate every statutory provision that may be required to be

amended to meet the policy objective before the Bill is enacted. This in turn will not guarantee that the most appropriate and adequate regulatory framework is in place. This would likely affect public confidence. It might mean that several omnibus Bills had to be prepared and taken through the House, to refresh the new legislative environment as other problems arise.

19. Further, unless the Bill was to be passed under urgency, each Bill would take approximately six months from introduction to Royal Assent. While Bills would be improved through the select committee process, an important consideration, this option would not respond to the need for speedy and flexible solutions.

Option 4: Provide an order in council mechanism to amend legislation (*preferred option*)

20. Under this option an order in council mechanism would be established to allow amendment of enactments (including plans and bylaws), for a short period of time (e.g. 16-18 months) to assist the earthquake-affected areas to respond to and recover from the Kaikoura earthquake sequence.

21. This mechanism was successfully used to respond to the Canterbury earthquakes (under the now expired Canterbury Earthquake Response and Recovery Act 2010 and the Canterbury Earthquake Recovery Act 2011) for a range of recovery activities. Orders in council for Canterbury including orders for:

- a. **Waste Management:** Permitted the storage, sorting and processing of earthquake waste through a modified resource consent process.
- b. **Temporary Housing and Accommodation Supplements:** Enabled councils to permit reserves to be used for earthquake response and recovery efforts including erecting temporary housing. Extended accommodation supplements to people who would otherwise be eligible, but who were unable to remain in their homes due to the Canterbury earthquakes and who still had associated expenses.
- c. **Planning:** Provided a streamlined process for the review of existing Christchurch district plans and for the preparation of a comprehensive replacement district plan for the Christchurch district.
- d. **Reclamation:** Provided for up to 10ha of land reclamation to the Port of Lyttelton without being unduly impeded by resource consent processes.
- e. **Tax:** Allowed the Commissioner of Inland Revenue to extend time limits if a person was unable to comply with the original limit due to the earthquakes.

22. In 1995, the Regulations Review Committee identified principles that should apply to the use of transitional override powers. In particular, that Committee noted that a provision that allows the making of regulations to amend the empowering Act should be used only in exceptional circumstances and should not be used routinely in reforming legislation. As set out in the problem definition, the recovery from the Kaikoura earthquake sequence constitutes that exceptional circumstance.

23. The order in council mechanism is the most cost-effective and appropriate means of resolving both immediate and future problems for which the scope is currently unclear. This is because the nature of the order in council mechanism is such that it will be able to address a range of issues affecting the likely pace and trajectory of the recovery. It will

allow the immediate exercise of powers to resolve some recovery problems, while also enabling powers to be held in reserve and used when future issues emerge.

24. It will allow for necessary orders in council to be made throughout the Christmas/New Year break during the adjournment of the House.
25. The proposed option may be controversial as the delegation infringes established principles of the rule of law. Measures can be put in place that will partially, but not fully, mitigate these concerns and these are discussed below.

Retrospectivity

26. It would be possible for orders in council to apply from the date each order is made. This option is not supported as it would not provide for recovery activities, done in good faith, from the beginning of the earthquake sequence.
27. Therefore the preferred option is to allow orders in council to have retrospective effect to the date of the first Kaikoura earthquake (14 November 2016). This is likely to be contentious, as generally legislation should operate prospectively not retrospectively. There will be circumstances, however, where actions will have been taken to respond to or recover from the earthquakes, and it is appropriate that those actions are protected, even if retrospectively, given that the policy objective is to lift burdens from earthquake affected communities, subject to applicable general law. Generally, however, it is expected that orders in council would be prospective.

Appeal rights

28. Generally appeal rights provide a measure of protection against the exercise of powers. Under the status quo, the Minister's recommendations to the Governor General and any decision made can be challenged in the courts – i.e. aggrieved parties have the right to seek redress. However, given the scale of the natural disaster, delays caused by litigation could interrupt the delivery of key recovery activities. This could have significant implications for the trajectory and momentum of recovery.
29. Therefore, the right of aggrieved parties to ask the courts to examine decisions needs to be balanced against the adverse consequences of litigation. When appeal rights are limited, then checks and balances on the exercise of powers become more important, as a way of providing oversight. Further, they are part of the package, whereby greater flexibility in an emergency comes with appropriate checks and balances. For example a limitation of rights may be more justifiable where public confidence and rights can be protected by other means such as providing participatory rights before decisions are made.
30. It is not desirable to exclude the courts' jurisdiction to review the exercise of public powers. Therefore, courts would still be able to review whether orders themselves are ultra vires. On the other hand, to ensure the Executive's ability to move with speed is not unduly constrained, it is proposed that there is no right to judicially review the recommendation to the Governor-General that the order in council be made (or other associated decisions made by the Minister). This option does reduce the jurisdiction of the courts, but there are other remedies. In particular, the Regulations Review Committee provides a check on the process that may offer speedy and effective relief.

31. Should recourse to the Courts cause lengthy delays, there are also options as to whether an appropriate body should be set up, or changes be made to court processes to expedite hearings. Options include a specialist tribunal, appeals straight to High Court etc. However, given that the Regulations Review Committee is able to examine proposed orders in councils and investigate complaints about the orders, these options are not supported.

Checks and Balances

32. The delegation of Parliament's legislative power via an order in council mechanism is a significant option. As such, procedures for bringing these powers into effect need to be scrutinised, and the controls and safeguards need to be attached to their exercise. The primary check is the requirement that the powers can only be exercised for the specified purposes of the legislation. The secondary check is that the effect of the orders in council would be limited to earthquake-affected areas. In addition the following checks and balances could be included to limit the use of this mechanism.

Sunset clause

33. In 1995, the Regulations Review Committee, when identifying principles that should apply to the use of transitional override powers, noted that such provisions should always have a limited lifespan of no more than 3 years. This was considered generally sufficient to allow adequate time for addressing any technical difficulties that arise. This was based on the notion that powers should only be in force for as short a time as is reasonably necessary to manage the consequences.

34. It is therefore proposed that the legislation and any order made pursuant to it apply for a short period of time (e.g. 16-18 months). This will mean that orders expire at the end of March 2018 and the legislation expires on 1 April 2018. This is a much shorter timespan than 5 years made available under the now expired Canterbury Earthquake Recovery Act 2011.

Review Panel

35. The Canterbury Earthquake Recovery Commission and the Canterbury Earthquake Review Panel (with legal expertise) performed an important function in advising Ministers on orders in council made under the Canterbury legislation. It is proposed that a similar Panel be established to examine proposed orders and provide advice to Ministers before the order is made. The Minister would be required to take the Panel's report into consideration.

36. It is also proposed that the Review Panel have iwi and local government representation to ensure that they are able to directly advise relevant Ministers. This is a significant improvements to the mechanisms provided in the Canterbury legislation.

Engagement

37. Both the international and Canterbury experience highlight the importance of engagement with local community throughout the recovery process. As such, it is proposed that there be mandatory engagement with substantially affected persons (for example community and iwi groups and Council) on draft orders. Requiring engagement with substantially affected persons, and requiring the Minister to take into consideration their comments, provides a greater degree of transparency, provides for participatory

rights and is a check on the Executive. This is a significant improvement on what was provided in the Canterbury legislation, where there was no such mandatory consultation.

Regulations Review Committee

38. In the interest of minimising unnecessary public concern or controversy regarding the limitations on the right to seek redress from the Courts, it is proposed that draft orders are provided to the Regulations Review Committee (or to leaders of all the political parties if the House is adjourned). This will enable cross party engagement on all draft orders before Ministerial recommendations are made; and is an entirely new mechanism that was not provided for in the Canterbury legislation.
39. The Regulations Review Committee would continue to have its usual jurisdiction to examining all final orders and investigate complaints about those orders. The disallowance mechanism set out in the Legislation Act 2012 would apply to all orders. This means that the House of Representatives, via the Regulations Review Committee's supervisory function, can monitor the exercise of the order in council power and ensure that it is being exercised within the limits Parliament intended. Moreover, any persons aggrieved at the operation of an order in council, can complain to the Regulations Review Committee, which can then carry out a technical scrutiny on behalf of the House. The Committee can then recommend that the House disallow any order made.

Other controls

40. The Bill proposes a positive list of Acts an order can amend, and also a list of excluded Acts (for example, the Bill of Rights and the Electoral Act).
41. There are still significant unknowns about the recovery. While care has been taken to identify a list of Acts that may require amendment circumstances may change. To address this issue, the Bill proposes mechanisms to allow new Acts to be added, subject to positive resolution in the House.
42. In the interest of increasing transparency and openness of decision-making it is proposed that reasons for Ministerial recommendations be made publicly available. This includes the Minister needing to publish reasons as to why a draft order is appropriate and required. Doing so recognises particular public interest in the exercise of the power and allows greater public confidence in the decisions being made.
43. Many of the proposed checks and balances are new and go well beyond those provided under the Canterbury legislation.
44. The proposed framework would provide flexibility to relax current legislative obligations and adapt legislation to reflect changed requirements resulting from the Kaikoura earthquake sequence. The amendments to individual enactments can occur as they are identified to achieve maximum flexibility in a timely manner. The disadvantage would be that the legislation provides for a significant power to amend primary legislation without reverting to Parliament, although this power is tempered with a number of controls.

Consultation

45. In the time available, the Department of the Prime Minister and Cabinet has not been able to undertake substantive consultation on the Bill itself, although it has had discussions with a number of government agencies, the Solicitor-General and the Legislation Design and Advisory Committee. Government agencies have been asked to

identify enactments that would be appropriate to be the subject of a future order in council.

46. Relevant local authorities and Te Rūnanga o Ngāi Tahu are aware of the possibility of the Bill and support the idea.

Conclusions and recommendations

47. To facilitate response and recovery in earthquake-affected areas, the preferred option is to enact legislation to provide an order in council mechanism to amend legislation, with appropriate controls to temper this power.

Implementation plan

48. The preferred option requires amendment to primary legislation, which is proposed to be undertaken through the Hurunui/Kaikoura Earthquake Recovery Bill 2016. The Bill is planned to be introduced, passed and implemented as soon as possible.

Monitoring, evaluation and review

49. All orders in council under this legislation would expire at the end of March 2018 and the Act would be repealed on 1 April 2018.