

Regulatory Impact Statement

Canterbury Earthquake Response and Recovery Bill

Agency Disclosure Statement

1. This Regulatory Impact Statement has been prepared by the State Services Commission.
2. A proposal to establish a new government department is an administrative and machinery of government matter that does not impact on business, consumers, or the public. The proposed department, the Canterbury Earthquake Recovery Authority (CERA) will have responsibility for the overall leadership and coordination of the recovery of greater Christchurch from the earthquakes of 2010 and 2011. However, the powers that this department will need in order to provide for the overall leadership and coordination of that recovery have significant potential for regulatory impact.
3. Cabinet has set a tight timetable for establishing CERA and setting out its powers to assume the overall leadership and coordination of the recovery of greater Christchurch from the earthquakes of 4 September 2010 and 22 February 2011. This means the State Services Commission's ability to develop and analyse options is limited and focuses on areas with accessible evidence. If it were not for these unusual circumstances and the consequently short timeframe, our analysis would be more comprehensive and less constrained.
4. Introducing powers necessary in the timeframe provided by government will provide a level of certainty that the recovery is being actively addressed. Taking time now to consider other options may allow for a more durable solution but it will slow the momentum needed for the recovery of greater Christchurch.
5. The RIS has some gaps in quantifying the risks, costs and benefits of the options identified. While evidence of the need for physical infrastructure rebuilding is mostly available, there is a lack of evidence of the actual impact of the earthquakes on the social, community and economic rebuilding that may be necessary.

John Ombler
Deputy State Services Commissioner
State Services Commission

Date: ____/____/ 2011

Status quo

6. The status quo for leadership in response to the earthquakes in Canterbury can be read in two parts: first, the response following the 4 September 2010 earthquake; and second, the response to the aftershock of 22 February 2011.
7. The earthquake of 4 September 2010 caused widespread damage to areas of greater Christchurch and the Canterbury region. The response determined for this earthquake was based on a presumption that the local authorities would be leading the recovery process. The Canterbury Earthquake Response and Recovery Act 2010 was passed to enable the relaxation or suspension of provisions in other enactments. This was primarily to avoid resources being diverted away from the response to earthquake damage and to overcome the problem that some statutory expectations may not reasonably be complied with (due to circumstances resulting from the earthquake).
8. The Canterbury Earthquake Response and Recovery Act also established the Canterbury Earthquake Recovery Commission. The function of the Canterbury Earthquake Recovery Commission is to advise on access to the regulatory provisions made available under the Canterbury Earthquake Response and Recovery Act, and to provide a single conduit between local and central government with respect to access to central government funding. The Canterbury Earthquake Response and Recovery Act ceases to apply from the close of 1 April 2012.
9. The aftershock of 22 February 2011 caused significantly more devastation within greater Christchurch, with the Christchurch central business district and the eastern suburbs of Christchurch particularly hard hit. The final death toll remains unknown, but is expected to be around 180. Destruction of the physical infrastructure of Christchurch is on a vast scale and there is also significant damage to the economic and social systems within the city. A state of national emergency was declared under the Civil Defence Emergency Management Act 2002 (CDEM Act), which gives wide-ranging powers to the National Controller to affect immediate rescue and recovery. It is able to be extended under the Civil Defence Emergency Management Act 2002, so long as the Minister of Civil Defence is satisfied on reasonable grounds that the emergency has not ceased and an effective response continues to be beyond the resources of the local Civil Defence Emergency Management Group. Initial advice was that the state of national emergency would be in place for between 6-8 weeks.

Problem definition

10. The 22 February aftershock has meant that the recovery needs to be much bigger – involving more difficult decisions, many more parties and a lot more resource. The CDEM Act provides a framework for rescue and immediate recovery tasks. Ministers do not consider it is a vehicle for long-term recovery where the damage has been so extensive. The discussion in this RIS assumes that the state of national emergency will cease in the short term, and then the “status quo” that followed the 4 September 2010 would return.

11. However, the status quo approach outlined above, even with modifications to legislation as provided for under the Canterbury Earthquake Response and Recovery Act 2010, is no longer viable. Following the 22 February aftershock, it has not been clear that the role of the Canterbury Earthquake Recovery Commission will be adequate for the recovery effort that is now needed. The Canterbury Earthquake Recovery Commission was not set up, nor empowered, for managing and coordination, and if necessary directing the recovery effort.
12. A range of factors suggests that stronger governance and leadership is needed. These factors include:
 - the scale of the post-earthquake rebuilding effort;
 - lessons learned from international experience and from the recovery planning after the 4 September earthquake, including the strong indication to have a single entity leading and coordinating the recovery efforts;
 - the significant co-ordination needed between local and central government, residents of greater Christchurch, Ngai Tahu, NGOs, business interests and the private sector;
 - the need for timely and effective decision making processes; and
 - the advisory capacity of the Canterbury Earthquake Recovery Commission is not considered sufficient to deliver the leadership and governance now needed.
13. The dimensions of the greater task include:
 - strong governance and leadership across central and local government, business and communities;
 - the significantly greater central government investment required;
 - increased coordination (and potentially direction given) across multiple agencies and providers in order for recovery tasks to proceed efficiently;
 - a recovery effort that is multi-pronged, covering not just physical rebuilding but social, economic and community rebuilding, in order for any one part of the recovery to be effective;
 - coordinated engagement and more effective information management (gathering and disseminating) in order to build and maintain confidence in the recovery process.
14. The scale of the recovery effort is beyond the capability of current institutions. New institutional arrangements with specific powers and access to streamlined regulatory processes are required.

Objectives

15. The purpose of the legislation is to provide:
 - appropriate measures to ensure greater Christchurch and its communities respond to and recover from the impacts of the earthquakes of 4 September 2010 and 22 February 2011, including aftershocks, and any subsequent events (the events);
 - the Minister and CERA with adequate statutory functions and powers to coordinate and assist with the recovery from the impacts of the events;
 - the ability, by Order in Council, to relax or suspend, grant an exemption from, or modify, or extend any provision of any enactment to facilitate the rebuilding and recovery of affected communities, including the planning, repair and rebuilding of community infrastructure and other property, to define processes, and to call in powers of others if required;

- enable the gathering of information about any structure or any infrastructure affected by the events that is relevant to how to minimise the damage caused by the events; and
- respond to the social, community and economic development issues that confront greater Christchurch following the events.

Regulatory Impact analysis

Organisational Form

16. The establishment of a new government department, the Canterbury Earthquake Recovery Authority (to have responsibility for the overall leadership and coordination of the recovery) is an administrative and machinery of government matter that does not impact on business, consumers, or the public.

Legislation options

17. The State Services Commission considered the following broad approaches to provide for overall leadership and coordination of the recovery effort:

Option	Key aspects of option
No additional legislation	Provisions in Canterbury Earthquake Response and Recovery Act continue (until 1 April 2012), and Orders in Council made under that Act only have force until 1 April 2012 A new department could be established to provide leadership and coordination through influence. A Recovery Strategy and Recovery Plans could be developed and consulted on, but would have no statutory force
Minimal amendment to current Act	Only change the Canterbury Earthquake Response and Recovery Act to extend its provisions and Orders in Council made under it beyond 1 April 2012 A new department could be established to provide leadership and coordination through influence, outside of that Act. A Recovery Strategy and Recovery Plans could be developed and consulted on, but would have no statutory force
Significantly amend current Act	Significantly amend the Canterbury Earthquake Response and Recovery Act by extending its expiry date, providing statutory powers for the new department and giving statutory force to the Recovery Strategy and the Recovery Plans A new department can still be separately established The Act would give clarity to land acquisition, re-designation, and land remediation powers needed to progress recovery Grounds for review and compensation regimes would be modified The Canterbury Earthquake Recovery Commission would be disbanded and a Review Panel be created
New legislation	Enact new legislation and repeal the Canterbury Earthquake Response and Recovery Act Establish new department to provide leadership and coordination providing statutory powers for the new department and giving statutory force to the Recovery Strategy and the Recovery Plans Give clarity to land acquisition, re-designation, and land remediation powers needed to progress recovery

Option	Key aspects of option
	Modify grounds for review and compensation regimes Disbanding the Canterbury Earthquake Recovery Commission and creating a Review Panel
Put in place new local governance arrangements	New legislation to replace the elected council/s with a central government appointed Commissioner

18. Each option, its risks and benefits, and costs, is discussed relative to the evidence we have available and the limited timeframe we had for analysis.

No change to current Act

19. The key risk is that there would be no certainty around the leadership or coordination of the recovery effort, except by influence. A department could be established, and a plan could be developed but it would have no statutory force and as such it could not override current provisions in Regional Policy Statements, district plans, Long Term Plans, for example. The Government would be reliant on approving funding to have influence over recovery proposals. It might be possible to augment this option by giving statutory force to the Recovery Strategy after it has been prepared, ie when it is more clearly known what the legislation is giving effect to. However this is unknown.
20. These factors would be likely to result in a slow and possibly contentious recovery process. We consider this means that this option is unviable.
21. We are unable to quantify the cost of a slow and possibly contentious recovery effort.

Minimal amendment to current Act

22. This option would have many of the attributes of the 'no change' option above. However, the key difference is that it would address the potential lapse of the existing Canterbury Earthquake Response and Recovery Act in April 2012, but extending its life. As time passes from the events themselves, Orders in Council are likely to be considered more intrusive and could incur a greater risk of legal challenge by judicial review (and with that is the potential for these Orders in Council to be struck down). This does not give the certainty necessary for decision making for the long-term recovery of greater Christchurch.
23. For similar reasons, we consider this option is unviable.
24. We are unable to quantify the cost of a lack of certainty in decision making for the recovery effort.

Significantly amend current Act

25. This option involves significantly amending the current Act. The changes would provide for clarity of powers in key areas, including the power of the new department to direct or "call-in" powers of other agencies. It would give a statutory basis for the Recovery Strategy and the Recovery Plans, providing a clearer regulatory regime.

26. However it would also end up looking so different from the current Act that it would be confusing for those operating under the legislation, and clarity is key to a speedy and effective recovery.
27. For these reasons, this option is considered unviable. It is not possible to quantify the costs consequential on this potential confusion.

New legislation

28. This option would, if implemented effectively, provide the greatest certainty in leadership and decision making for the current parties and would provide a single entity, CERA, with appropriate powers to ensure that the recovery is well-delivered.
29. The benefits of this option include that it would save and validate existing Orders in Councils and provide for additional orders to be made (as not all the necessary powers and processes can be identified in advance), but it would also specify in primary legislation the powers and procedures that can be identified now. Giving a clear leadership and coordination to one entity will remove confusions locally, together with creating statutory force for the Recovery Strategy and the Recovery Plans.
30. A key risk to this option is that CERA would be a unique entity, and that the powers assigned to the Minister and to CERA would be unique. However this is a response to a unique natural disaster, and in acknowledgement of this it is proposed that CERA and these powers only exists for 5 years (and with a review at 4 years).
31. This is the preferred option, as it provides for the clearest process for recovery. In the time available it has not been possible to quantify the costs associated with this option, as a number of powers etc will not be known until the Recovery Strategy and the Recovery Plans are in place and further Orders in Council are made.

Put in place new local governance arrangements

32. A further option was considered but discounted early. That option would have replaced the democratically elected local councils and replaced them with a Commissioner, as was done for ECAN; although this model could have been further modified to have the Commissioner reporting directly to the Minister. This would have required legislation. We did not consider that this option would meet the Government expectations of maintaining local democracy and the confidence of the people and organisations of Canterbury, so did not explore this option further.

Costs and benefits

33. There will be significant costs associated with the recovery of Canterbury (currently estimated at \$10b to \$15b) of which much will be funded by the government. However this overall cost means that it is important to put robust governance arrangements in place. Although it is not possible to quantify the cost of the options due to the constrained timeframe for developing these options, there are a number of opportunity costs associated with the options which are outlined below. In addition for each of the options below, there will be a cost of running a department for 5 years.

Option	Cost	Benefit
No change to current Act	Any OICs or other changes will not apply past 1 April 2011. There is an extremely high likelihood that recovery would fail to meet expectations of coordination and efficiency. Legislation may still be required to give effect to the strategy and plans, as existing plans and consents would limit the ability to implement the plan	Planning can continue but without statutory force.
Minimal amendment to current Act	As above, except that OICs could be for a longer period (as determined by the amendment to the Act). Some OICs will be more intrusive than those that have already been made, and this will create a greater risk of legal challenge.	As above.
Significantly amend current Act	There is a risk that parties involved in planning and implementing the plan will be confused by the statutory basis, as there will be so much change to the Act required (it would resemble a new Act more than the current Act)	This would allow for better coordination and leadership of the recovery, including the ability to “direct” other parties, and to answer the “big” questions. This would also enable the strategy and plans to have legal force.
New legislation	It will also require the repeal of the existing Act.	As above. But this option would also provide clarity for all parties; it would set out new roles and powers clearly.
Put in place new local governance arrangements	This would override local democracy and be locally controversial.	It would provide greater certainty for Ministers regarding the local spend of its funding.

Risks

34. The risks are similar to the general costs outlined above. As noted for the costs, it has not been possible to identify all the risks associated with these options due to the constrained timeframe for developing them.

Preferred Option

35. Our preferred option is that of new legislation.

Powers

36. The powers proposed for the ongoing recovery effort are based on the activities that we anticipate will need to be undertaken. These activities and powers are set out in Annex 1 – Powers for the Minister for Canterbury Earthquake Recovery and the Canterbury Earthquake Recovery Authority.
37. In considering these powers, the following factors have been taken into account:
- All powers will be subject to the purpose provision within the legislation
 - Current roles and responsibilities of all parties are regarded as the default position
 - The proposed powers have been tested against a series of questions as set out in the Legislation Advisory Committee guidelines
 - Consideration has been given to the potential trade-off between speed of decision making and public participation in that decision making
 - To be transparent by specifying the powers in legislation as much as possible.
38. The Minister and CERA (for the most part through delegations) will have a range of functional roles associated with its planning and monitoring activities. These include leader, planner, doer, coordinator, communicator, monitor, influencer and, if necessary, director. In certain situations, CERA will require a legislative power to enable it to undertake a particular function.
39. The powers necessary to enable CERA to assume overall leadership and coordination have significant potential for regulatory impact. These powers will include planning and coordination but also the power to direct other entities in Christchurch if necessary and to call-in powers when the Long-term Recovery Strategy and Recovery Plans are not being adequately implemented.

Exercise of the powers

40. There will be a sequence to CERA's activities as reflected in Annex 1. This sequence involves responding to the immediate needs of the earthquake recovery, followed by planning and implementing the Recovery Plans. But there is no overall timetable guiding the recovery process. In some cases, immediate issues will require quick decisions before planning is completed. Each set of activities will move as rapidly as possible through to implementation and implementation of one of the Recovery Plans will only be held up by another slower Plan if coordination between the two is essential.
41. Just as the Minister's and CERA's activities will be guided by the phases of the recovery cycle, so too will the exercise of their powers. Where the Minister or CERA has used a power to take over responsibility for activities normally

undertaken by a local authority or council organisation, this power will be relinquished once the need for it has passed and responsibility will revert to the local authority or council organisation.

42. Where these powers are exercised, they may impact on individuals and businesses including access to property and ability to trade. These interferences with peoples' lives and business activities would only be exercised where necessary for the recovery of the greater Canterbury area; in effect it would usually be where there is a greater public benefit than the private interference.

Extent of the powers

43. CERA will not be able to rate nor direct local authorities to rate. Local government will continue to hold rating powers and be expected to strike rates in accordance with normal statutory processes.
44. CERA will not assume any role, functions, or powers specifically provided for within the Civil Defence Emergency Management Act. If another emergency occurs in greater Christchurch, the Civil Defence Emergency Management framework will prevail for the *response* period. The *response* roles and functions of agencies such as the New Zealand Police, the New Zealand Fire Service, and the New Zealand Defence Force will not be altered. Any recovery from a new emergency event would fall within the new framework proposed in this paper for the period this framework is in place.

Overview of Planning Process

45. Planning for the recovery of the greater Christchurch region will occur through the development of a document that will set the overall direction for the recovery efforts and a series of more detailed plans that will set out the detail of what needs to be done and how it will be implemented (the Recovery Strategy and Recovery Plans). Special legislative powers will enable the planning and implementation processes to be streamlined.
46. The recovery planning will not take place in a vacuum. Although substantial damage has been done to Christchurch and some of the areas nearby, much of the city and neighbouring areas remain more or less intact or repairable. Existing planning documents such as the Greater Christchurch Urban Development Strategy, Environment Canterbury Regional Policy Statement, and Christchurch City Plan provide a useful basis from which to manage development, particularly in areas of the city with little or no damage. However, decisions over the demolition of damaged buildings and the use of land and rebuilding in damaged areas of the city will require direction and coordination to help ensure recovery efforts are timely, efficient and cohesive.

The Recovery Strategy

47. it is proposed that the legislation will require the CERA to prepare an overarching Long-Term Recovery Strategy (the Recovery Strategy) for the reconstruction and rebuilding of greater Christchurch. The Recovery Strategy will provide a purpose for the recovery and address some of the high level questions that will need to be addressed for the recovery to occur in a coordinated way. The Recovery Strategy will provide direction and coordination for Recovery Plans. The Recovery Strategy

will be prepared by CERA in collaboration with Christchurch City Council, Environment Canterbury, Selwyn District Council, and Waimakariri District Council, Ngai Tahu and other parties deemed necessary.

48. A draft of the Recovery Strategy would be prepared for consultation within three months of enactment of the legislation. Consultation will include a process that incorporates an opportunity for public input through written submissions and a series of hearings. The power to approve the final Recovery Strategy will rest with the Minister for Canterbury Earthquake Recovery following consultation with Cabinet. The legislation will require the relevant parts of the Recovery Strategy to be immediately incorporated to the extent necessary into the existing statutory plans of councils in the Greater Christchurch area, in order that those plan and any consents issues under them give effect to the Strategy.

Recovery Plans

49. The Minister will also be given the power to require, as necessary, the preparation of Recovery Plans by CERA, councils, or other bodies, authorities (including requiring authorities and network utility operators), or entities. Whereas the Recovery Strategy provides the overarching direction, the Recovery Plans have the purpose of setting out the detail of what needs to be done, where, how, when and by whom. These Plans may cover any social, economic, cultural, infrastructural or environmental matter (such as public transport, economic recovery, communications, or heritage buildings), or combination thereof. Recovery Plans may be area-specific (limited in extent to Halswell or Avonside for example), or apply to the entire Greater Christchurch area (such as when tied to rebuilding network infrastructure). However, they should be sufficiently flexible and robust enough to enable the opportunities presented by rebuilding to be captured, whether through managed coordination of network providers or other initiatives which will future-proof Christchurch and return it to being an effective, modern and competitive city.
50. It is proposed that the legislation will require a Recovery Plan be produced for the Christchurch commercial business district (CBD) within nine months of enactment. Christchurch City Council will lead development of the CBD Recovery Plan with input from CERA, Ngai Tahu and other parties deemed necessary. The CBD Recovery Plan preparation process will incorporate a public process that allows for input by way of submissions.
51. At this stage, we can not be definitive about which other Recovery Plans will be required. We can foresee for example that there will be decisions around prioritising repairs and rebuilds of schools, to be coordinated with decisions around transport networks, housing and health facilities. The necessity for other Recovery Plans will be determined by the Minister for Canterbury Earthquake Recovery and set out in a schedule notified in the Gazette for the purpose of public notification. The Minister may modify this schedule since changing needs or circumstances may require further Recovery Plans to be created, or proposed Plans amended or abandoned if they are no longer required. Any change to the schedule must be notified in the Gazette.
52. In cases of urgency, a Recovery Plan may be prepared in advance of the Recovery Strategy being completed (as in the case of restoring essential utilities such as water, where the plan prepared by the National Controller could be approved by

the Minister as a Recovery Plan when the state of national emergency is lifted). However, where this occurs, in order to ensure the Recovery Plan gives effect to the Recovery Strategy, the Recovery Plan should be reviewed by those who prepared it once the Recovery Strategy is approved.

53. The Minister for Canterbury Earthquake Recovery (or the Chief Executive of CERA acting under delegation) will have the discretion to determine the process to be followed in regard to the preparation of each Recovery Plan and the extent of engagement or consultation with councils and other stakeholders, having regard to:
 - the nature and scope of the Recovery Plan;
 - the needs of people affected by it;
 - the need to act expeditiously; and
 - the impact and effect of the Recovery Plan.
54. Recovery Plans must be approved by the Minister for Canterbury Earthquake Recovery. The Minister's approval will give each Recovery Plan legal authority. The legislation will provide the Minister with a discretion to seek an independent review of the draft Recovery Plan before it is approved, but there will be no right of appeal in respect of decisions to approve Recovery Plans by the Minister. All plans and the strategy will be Gazetted, to provide transparency.
55. It is desirable for the legislation to allow all, or parts, of a Recovery Plan to have immediate legal effect from the date the Plan is approved or a date specified in the Plan, with respect to plans and planning processes under the Resource Management Act 1991, the Local Government Act 2002, the Land Transport Management Act 2003, and the Reserves Act 1977. To this effect, it is proposed that the Recovery Plans will be "read into" the statutory plans and prevail to the extent they are inconsistent with those statutory plans.
56. One effect of this will be to ensure Recovery Plans can immediately begin to influence decisions made on RMA resource consents or notices of requirements before relevant provisions of the Recovery Plans are included in RMA policy statements and plans. Resource consents will be able to be granted by the consent authority if they are consistent with the relevant Recovery Plan (or Plans), even if those resource consent applications are inconsistent with the existing RMA plans. Likewise, where a resource consent application or activity is consistent with an RMA plan but inconsistent with a Recovery Plan the application must be declined by the council.

Other planning provisions

57. CERA will monitor the implementation of Recovery Strategy and Recovery Plans in conjunction with the councils of Greater Christchurch area and any other authority required to produce a Recovery Plan. Councils will be responsible for the monitoring of provisions that are deemed or directly incorporated into their plans (be they prepared under the RMA, Local Government Act, or other legislation that requires or enables the preparation of such plans).
58. It is proposed that where any local authority or council organisation is not exercising or performing any of its functions, duties or powers under a Recovery Plan, the Minister for Canterbury Earthquake Recovery may step in and take over those functions, or appoint a person, persons or other entity to perform all or some of those functions, duties or powers.

Other provisions

59. In addition to the legislation conferring the necessary powers, other provisions will be needed to provide for:
- a penalty or enforcement section that requires compliance with the directions given under the powers and that would make it an offence to refuse to follow a lawful direction (empowered by legislation to be given), and enable CERA to obtain an ex-parte enforcement order from the High Court;
 - an immunity from liability clause for employees acting in good faith when exercising or carrying out the powers;
 - a requirement to consider alternatives and assess benefits and costs when approving a Recovery Plan;
 - prior to the approval of the Recovery Strategy, the Minister to lay before the House, at no less than quarterly intervals, a report on the operation of the statutory powers and include in the report a description of what powers have been exercised.

Compensation and Appeals

60. The powers described previously mean the Minister and CERA will be making decisions that impact on personal property and property rights. In exercising these powers, consideration needs to be given to compensation and appeal rights, each of which introduce financial and timing dimensions.
61. Compensation and appeals are related rather than being distinct as each provide some measure of protection against the exercise of powers. Where appeal rights are truncated the fairness of compensation can become more important.

Compensation for takings of land

62. It is proposed that CERA will have the power to acquire land or an interest in land (including fixtures such as buildings), compulsorily if necessary and to demolish buildings, rebuild or change the use of an area. For example, in order to facilitate the recovery of Christchurch it may be necessary for CERA to demolish a building (that is otherwise sound), or rebuild on a site, or otherwise take control of land and use it in a new way (such as to form part of a new commercial centre, or a park, or for remediation). Legislation will broaden the purposes for which land can be taken by CERA, because some projects may not come within the existing scope of the meaning of a public work under the Public Works Act 1981 (PWA).
63. In the absence of any statutory provisions the common law will generally imply a right to compensation where an interest in land (which includes fixtures such as buildings) is compulsorily acquired for any public purpose. Any legislation that provides for acquisition will, therefore, need to explicitly address questions of compensation. The magnitude and urgency of the task of rebuilding and revitalising greater Christchurch, however, means that any compensation framework needs to be carefully considered to ensure that it is fair, but also minimises uncertainty and delay.

64. To avoid delaying the actions required to revitalise greater Christchurch, the legislation will need to provide that compensation arguments need not be resolved until after the land is taken and used by CERA and that there should be no appeal of the decision to acquire. CERA will also need to be able to nominate in whose name the interest in land is being acquired because CERA itself is not an enduring entity or long term asset owner. This means it may buy in the name of the relevant local authority (eg, for a reserve or public space) or through a special purpose vehicle which may be part owned by another party such as a council.
65. A range of possible options on a spectrum from limited or no compensation to full compensation to enhanced compensation have been considered.

Option one: No compensation

66. It would be possible through legislation to empower CERA to acquire land without specifically providing for compensation provided the legislation made it clear that no compensation is to be provided despite any taking of property rights. Taking buildings that cannot be used and meeting the costs of their disposal may be seen as creating a benefit and not something the Crown should pay compensation for. This could be provided for. However, taking land without compensation, even if it can no longer be used for supporting buildings, is less likely to have support and would be highly unusual. The Courts are likely to attempt to read down any such legislation unless it is clear.

Option two: Market compensation

67. Full compensation could involve any person who has an estate or interest in land or other property taken for remediation or revitalisation purposes or who was injuriously affected (permanent depreciation in the value of any retained land) or who otherwise suffered any loss from government action being compensated in the same manner as under the Public Works Act – at market rates.

Option three: Enhanced compensation

68. It would also be possible to provide for enhanced compensation, for example a 10% premium, to encourage people to accept the compensation offered without further dispute (saving on transaction costs). Such a compensation regime may provide additional stimulation to the Canterbury economy though it would come at an additional cost to government finances. Such a premium may be a reasonable trade-off to justify limiting the extent of the usual rights of the affected person to participate in or appeal the decision to acquire or to prevent the act of taking before compensation has been determined and paid.
69. The paper recommends the legislation outline the orthodox approach, ie, option two. This would mean compensation would be payable at the market value at the date of taking, and would also reflect the extent to which property was undamaged and avoid paying compensation for loss that was or ought to have been insured.

When Should Compensation be assessed?

70. One question which applies to all options above is the date at which compensation should be assessed. Options include the date of taking, or as at 3 September

2010 or at 21 February 2011. The date of taking is the normal point for assessing compensation. This reflects the true value of the interest in land that the Crown is acquiring, and what the owner could otherwise have obtained in a private sale.

71. In the present circumstances this would mean that in some cases the value of the land (and thus the compensation payable) would be significantly reduced, because some land (eg land affected by liquefaction) may be considerably less valuable as a result of the damage caused by the 2010 and 2011 earthquakes and insurance may not have been payable.
72. A compensation framework will also need to take account of issues of betterment and insurance to prevent windfall gains as much as possible. Assessment as at the date of taking would reflect the extent to which property was undamaged and avoid paying compensation for loss that was or ought to have been insured. For example, compensation should not include the value of a building destroyed in the earthquake or aftershock, which ought to have been covered by insurance, but should include the value of an undamaged building acquired.
73. Together with option 2, this would mean compensation would be payable at the market value at the date of taking, and would also reflect the extent to which property was undamaged and avoid paying compensation for loss that was or ought to have been insured. It would also mean not factoring in the impact on value of any Recovery Plan with regard to the future use or status of that land.

Offer Back

74. The former owners of land taken under the Public Works Act are ordinarily entitled to have the land offered back to them if and when the land is no longer required for a public work. Consideration needs to be given to whether such a right is appropriate here, given for example that these works will be to recover a whole community from a natural disaster rather than to initiate a new project. One complication may be that the title boundaries and land use framework may be varied significantly. (This is proposed to be dealt with in terms of powers relating to the issuing of titles under the Land Transfer Act 1952.) Due to where title boundaries are more likely to be changed and the unique reasons for taking the land in the first place (which may include an intention to develop and resell the land), it is proposed that there be no offer back for commercial land and to the former owners only in respect of residential land. The paper proposes the legislation outline this.
75. A similar question could arise with respect to the right of first refusal under the Ngai Tahu Claims Settlement Act 1998. In order to permit a focused and timely recovery process for Christchurch, it may not be appropriate to continue to apply the right of first refusal under that Act in respect of any relevant land over which the Crown wishes to transfer to other parties. Yet it is not evident whether any such relevant land will be affected in such a way to activate the relevant provisions of the Ngai Tahu settlement legislation. That will only become evident once the Recovery Strategy and Recovery Plans are prepared and decisions are taken affecting any such relevant land. The paper proposes that the legislation provide a process for discussions between the Minister and Ngai Tahu.

Other Forms of Loss Caused by Government

76. The question of compensation is not limited to acquiring land. While the permanent or temporary compulsory acquisition of land would normally be fully and fairly compensated, there are also other types of perceived loss that may need to be addressed. It is possible to limit or exclude other types of loss that persons might suffer. Decisions of CERA will affect individuals in a variety of ways that may leave them aggrieved and feeling that a valuable right or privilege has been taken from them. In some cases, they may seek compensation.
77. In particular, changes to regulatory provisions under Resource Management Act instruments (such as a district plan) will affect whether and how people are permitted to use their land. Ordinarily, changes to regulatory requirements governing the uses of land do not amount to a taking of land and do not give rise to compensation entitlements. To the extent that CERA may be changing district plan requirements (such as what activities are or, are not, permitted in a particular area), or making decisions to grant or refuse a resource consent application or impose conditions on a resource consent (even if such a condition requires the surrender of part of the land), that is unremarkable. Some might argue that such actions constitute a "regulatory taking" even if the affected rights are unexercised. However, under current law those matters do not amount to the taking of property rights.
78. In part the current lack of compensation for a regulatory taking is justified on the basis that individuals can participate in the relevant processes, and because they are not compelled to exercise the resource consents they obtain. In addition, the underlying property interest remains with the owner, as the regulatory change does not alter the extant property rights although it may affect the extent to which the property-holder may exercise them practically. The appellate courts in New Zealand have generally considered statutory systems of managing natural resources, such as land, as not having the effect of extinguishing property rights. The main difference in the present circumstances is that participation rights in decision-making and appeal processes may be curtailed under the new legislation. However, the paper proposes that compensation should not be available in these cases and this should be made clear in the new legislation to avoid doubt.
79. However, the legislation will be charting new territory if it enables the cancellation of existing resource consents that have already been exercised, or the cancellation of existing use rights (the statutory rights to continue existing activities that were lawfully established before the regulatory provisions were changed to prohibit them). Persons who have such consents or rights cancelled may argue that they are being deprived of something valuable, and more akin to property, for which they should be compensated. An example is a person whose house or office has been destroyed and who still owns the land but who is no longer permitted to rebuild to the same height or use the land in the same way. CERA may not wish to acquire the underlying land but may wish to limit or prevent the person exercising an extant resource consent for a period.
80. This is a more difficult issue. There may be a possibility for a Court to sympathise with arguments that such an act should be compensable on the grounds of the degree of compulsion involved, in circumstances where a person has invested time and effort in obtaining the relevant consents or occupied the area on the basis of the sorts of activities/uses previously allowed. Nevertheless, the orthodox legal position has been to treat the taking of real property (eg, fee simple title) or personal title (chattels) as compensable.

81. Furthermore, there could be considerable complexity in determining compensation for such regulatory takings and practical difficulties in determining appropriate valuations and compensation for a bundle of resource consents to do with a business activity (eg, discharge permits or land use consent). The legislation will need to expressly address whether compensation should, or should not, be payable for the cancellation of existing exercised resource consents or existing use rights. We consider that no such compensation should be payable. This will need to be clarified in the legislation to avoid doubt.
82. The paper does not propose creating new compensation entitlements for other losses that persons may suffer. The new legislation would need to specify that some matters will not be compensated. For example, there should be no compensation for government actions that result in:
- losses that were, or ought to have been, insured e.g. business interruption or a building that has already been destroyed and has no value (to avoid double-dipping or because that was the owners' choice);
 - economic or consequential loss e.g. the inability due to the cordon to obtain access to carry on a business or fulfil a lucrative order (because such a decision is taken in the wider interests of the community);
 - claims by insurers (because they have chosen to bear the risks);
 - losses of personal property worth more than \$20,000 which is the threshold in CDEMA (because more valuable property may or could have been insured); and
 - unwarranted and unjustified claims, with clear authority being given to reject such claims (because a residual discretion is necessary to deal with unforeseeable claims).

Rights of appeal and review

83. Rights of recourse to the courts, by way of appeal or judicial review, are an important component of many decision-making processes. Rights of appeal are embedded in many current statutes. The right to seek judicial review applies to all statutory powers of decision (but not to decisions of the High Court) and would apply to decisions of the CERA or the Minister. Rights to seek redress from the courts would ordinarily be expected where a decision is of a quasi-judicial nature, or otherwise directly and significantly affects rights and interests of a particular individual.
84. However, existing legal processes (such as the appeal and mediation processes under the Resource Management Act, Local Government Acts and Public Works Act) do not contemplate the extraordinary circumstances in greater Christchurch. Delays caused by litigation could represent a real risk to the success of the efforts to rebuild and revitalise greater Christchurch, by undermining the momentum and co-ordination that may be necessary. Rights of recourse to the courts may need to be structured so as not to unreasonably delay the delivery of certainty to greater Christchurch and its people.
85. The undesirable consequences of litigation over decisions need to be balanced against the usual expectations of aggrieved individuals to look to the courts to resolve disputes or scrutinise decisions. An absence of appeal rights may be more justifiable where public confidence and individuals' rights can be protected by other means, such as by providing means of participation or consultation in the first-

instance decision, or where the individual will be fairly compensated for the effects of the decision.

86. A number of options are available. As to the scope of appeal and review rights, they include:
- *Option one: Allowing existing appeal and judicial review rights to continue as usual.* This provides the greatest range of rights to individuals. It also carries the greatest risk of delays holding up key decisions and actions.
 - *Option two: A truncated version of existing appeal rights.* Legislation would remove some established rights of appeal that would otherwise apply. These might include appeals over decisions under district plans under the Resource Management Act, and over decisions to take land under the Public Works Act. In that case, the fairness of compensation becomes especially important. Appeal rights could be excluded for the creation of the Strategy, and for most other decisions made by the CERA.
 - *Option three: Fair, truncated, and speedy appeal rights could be provided for a limited range of decisions,* where the significance of the effects of a particular decision means that independent and robust legal scrutiny is desirable. For example: compulsory acquisition of land and interests in land (in particular, the quantum of compensation but not the decision to take).
87. It is not desirable to seek to exclude courts entirely from scrutiny of decisions where their involvement may be normally expected. That would be likely to significantly reduce public confidence in legitimacy of decision-making. Limiting appeal rights significantly may also encourage disaffected individuals to pursue judicial review, which would create greater delays than a speedy appeal process would provide. Nonetheless, the paper proposes that Option three is adopted because of the special circumstances applying to the recovery.
88. There are also options as to the appropriate body to determine appeals from decisions made by the CERA or the Minister. They include:
- *Option one: Using a specialist tribunal* (creating a new one or modifying an existing one). Such a process could be a way of including specialist experts, or local representatives, where desirable. It may be designed to be informal and quick. However, unless legislation provided otherwise, its decisions would still be able to be judicially reviewed in the High Court.
 - *Option two: Providing for all appeals on decisions by CERA or the Minister to be made direct to the High Court,* with the Court being given adequate resources and processes (whether formal or informal) to enable claims to be heard expeditiously and with a minimum of procedural delay so as to provide a fair yet speedy level of protection for those affected. An advantage of having appeals heard directly by the High Court is that decisions of the High Court are not subject to judicial review, so cannot give rise to separate proceedings. However, it would be appropriate to provide a right of further appeal to the Court of Appeal, limited to questions of law.
89. The paper proposes Option two. Consultation will occur with the Chief Justice and the Chief High Court Judge to determine how best to achieve this.
90. It is proposed the legislation will stipulate that appeals over council decisions on resource consents granted or declined, or notices of requirement granted, pursuant to the provisions of a Recovery Plan, will be to the High Court. The High Court would be provided with an ability to supplement its Resource Management Act

knowledge and decision making skills though being able to invite an Environment Judge to sit alongside a High Court Judge hearing appeals on a resource consent decisions.

Checks and balances

91. A range of checks and balances are proposed to guard against the inappropriate use of the powers given to the Minister and CERA. The primary check will be the requirement that the exercise of any powers granted to the Minister or CERA by legislation will be required to be for the specified purposes of the legislation, only exercised where the Minister or CERA reasonably considers it necessary. The intention is that many powers will only be used if other parties in the recovery are not appropriately implementing the Recovery Strategy or the Recovery Plans. In addition, the department and the powers will only be in place for 5 year, and will be reviewed after 4 years.

Review Panel

92. The Recovery Commission performed a valuable function in providing independent scrutiny of proposed Orders in Council. It is proposed that this role be continued by establishing a Review Panel. Members of the Panel would be appointed by the Minister for Canterbury Earthquake Recovery and would include a member with appropriate expertise in public law. Its role would be to review and advise on draft Orders in Council proposed by Ministers to relax or suspend legislative provisions that might be impacting on the recovery effort.

Community forum

93. International experience reinforces the importance of engagement with local community interests through the recovery process. A community forum gives the opportunity for the Minister for Canterbury Earthquake Recovery to encourage meaningful participation by community representatives in the process. Therefore, it is proposed that the Minister appoint approximately 20 members to the community forum. This forum would be for providing information and advice to the Minister and would meet at least 6 times per annum.

Cross-party parliamentary forum

94. It is also proposed that a cross-party parliamentary forum, comprising the Members of Parliament with a greater-Christchurch based constituency and those Members of Parliament with matched electorate responsibilities for greater Christchurch issues, should be convened in order that issues for recovery of Greater Christchurch from the 4 September and 22 February earthquakes can be worked through in a cooperative manner. It would assist in gaining broad political buy-in to the recovery effort.

Subject to other Acts

95. It is proposed that CERA will be subject to the Ombudsmen Act 1975 and the Official Information Act 1982.

Implementation

96. Officials' preferred option cannot be implemented without enacting new legislation, whether through an amendment to the Canterbury Earthquake Response and Recovery Act or new primary legislation.

Consultation

97. The following departments have been consulted in the development of the Cabinet paper: Crown Law Office, Department of Building and Housing, Department of Internal Affairs, Department of Conservation, Department of Labour, Ministry of Justice, Te Puni Kokiri, Ministry of Transport, Land Information New Zealand, Ministry of Culture and Heritage, Ministry of Economic Development, Ministry for the Environment, Ministry of Education, Ministry of Health, Ministry of Social Development and the Treasury.
98. The Department of the Prime Minister and Cabinet has been informed.
99. The Chair of the Canterbury Earthquake Recovery Commission and the chief executive of the Christchurch City Council were advised of the paper and provided opportunity to comment on earlier versions of the papers.
100. Feedback from consultation has been incorporated into the papers.

Conclusion and Recommendations

101. Stronger governance and leadership is required to ensure the effective and efficient recovery of greater Christchurch from the earthquakes of 4 September and 22 February. To achieve this, a new department is to be set up with a focus on Canterbury earthquake recovery. New legislation is required to provide the Minister for Canterbury Earthquake Recovery and/or the CERA with the necessary powers to be able to coordinate and direct the recovery effort.

Monitoring, evaluation and review

102. The legislation is to be reviewed after 4 years, and will have a sunset provision of 5 years.
103. Any Orders in Council made under this Act will be subject to scrutiny by the Regulations Review Committee.
104. The Minister for Canterbury Earthquake Recovery is required to report at regular intervals on the powers that have been exercised prior to the approval of the Long-Term Recovery Strategy.
105. Standard public management system mechanisms for a department, such as the Statement of Intent, Annual Report, and chief executive employment arrangements with the State Services Commissioner, will ensure the appropriate performance management of the department.