



**DEPARTMENT OF THE
PRIME MINISTER AND CABINET**

TE TARI O TE PIRIMIA ME TE KOMITI MATUA

Proactive Release

The following document has been proactively released by the Department of the Prime Minister and Cabinet (DPMC), and National Emergency Management Agency (NEMA), on behalf of the Minister for Emergency Management, Hon Kieran McAnulty:

**Regulatory Impact Statement: Emergency Management System Reforms – iwi and Māori contributions to emergency management, legal framework and critical infrastructure
(28 October 2021)**

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant section of the Act that would apply has been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to redaction code:

- Section 9(2)(h), to protect legal privilege.

Regulatory Impact Statement: Emergency Management System Reforms – iwi and Māori contributions to emergency management, legal framework and critical infrastructure

Coversheet

Purpose of Document	
Decision sought:	Agreement to the proposals for a new legal framework for the emergency management system, the new legislative arrangements for the critical infrastructure sector and for ensuring recognition and representation for the role iwi and Māori play in emergency management.
Advising agencies:	Department of the Prime Minister and Cabinet, National Emergency Management Agency
Proposing Ministers:	Minister of Emergency Management
Date finalised:	28 October 2021

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Proactively Released

Problem Definition

New Zealand's emergency management system must be improved if it is to realise the Government and public's ambition for a modern and fit-for-purpose system aligned with international best practice. NEMA has identified the following key improvements.

The current legal framework is no longer fit purpose given that:

- the Civil Defence Emergency Management Act 2002 (the CDEM Act) is out of date
- there is insufficient clarity of roles and responsibilities
- the current National Civil Defence Emergency Management Plan Order 2015 (the CDEM Plan)¹ meets neither its intended purpose nor the needs of stakeholders
- the large volume of guidance needs to be updated and rationalised.

The current Lifeline Utilities provisions in the CDEM Act have a number of gaps and inconsistencies and need to be updated, given:

- the CDEM Act currently does not have a definition of Lifeline Utilities
- there are currently vague and unmeasurable performance standards (e.g. under CDEM Act section 60(a) Lifeline Utilities must 'be operational to the fullest possible extent, even if it is at a reduced level')
- the absence of a requirement to proactively share information before, during and after emergencies
- the process for nominating an entity or a sector as a lifeline utility is unclear and inflexible
- NEMA is nominated as lead agency for infrastructure failure, which is inappropriate as NEMA does not have the technical expertise to fulfil the obligations of a lead agency.

Currently, there is a lack of recognition of the contribution iwi and Māori make to the emergency management system. The CDEM Act is silent on the role of iwi and Māori in emergency management, and representation in CDEM Groups is inconsistent across the country. Planning is another crucial element of emergency management. However, there are currently no legislative provisions requiring collaboration with, and mandatory notification of, iwi and Māori partners in emergency management planning.

This lack of recognition does not reflect the trajectory of the Māori-Crown Treaty relationship or the reality of ongoing, significant contributions of iwi and Māori to emergency management.

¹ The CDEM Plan is currently implemented via an Order in Council.

Executive Summary

The 2017 Ministerial Review into New Zealand's responses to natural disasters and other emergencies (Technical Advisory Group – TAG) identified vulnerabilities in Aotearoa's emergency management system.

Since then, the frequency, duration, complexity and socio-economic consequences of hazard events and emergencies have increased. This has resulted in multiple fatalities, serious injuries, serious harm to people's wellbeing, and damage to the environment and the economy. These events also demonstrated that vulnerabilities in the emergency management system identified in the TAG and other reviews remain a challenge.

In August 2018, the then Minister for Civil Defence released the Government's response to the TAG report. The Government's response addressed the concerns raised in the TAG report and set the direction for the transformation required to deliver better responses to natural disasters and other emergencies. The response set out five key areas for improvement:

- Strengthening the national leadership of the emergency management system
- Making it clear who is responsible for what, nationally and regionally
- Building the capability and capacity of the emergency management workforce
- Putting the safety and wellbeing of people at the heart of the emergency response system
- Improving the information and intelligence system that supports decision making in emergencies.

As part of a wider programme to improve the emergency management system, the National Emergency Management Agency (NEMA) is proposing:

- the development and implementation of a new legal framework involving a rule-making power for the Chief Executive of NEMA
- legislative changes to clarify and strengthen the roles and responsibilities of Lifeline Utilities (to be renamed 'Critical Infrastructure') within the emergency management system
- a range of legislative and operational changes intended to improve recognition and representation of iwi/Māori at the system, organisational and people levels.

These proposals are intended to address the following key areas for improvement:

- Strengthening the national leadership of the emergency management system
- Making it clear who is responsible for what, nationally and regionally.
- Building the capability and capacity of the emergency management workforce.

Part A: Legal framework of the emergency management system

The prescriptive form of the current legislation has created issues in terms of enabling flexibility and durability of systems, processes, roles and responsibilities. The regulation making powers in the CDEM Act, though broad, have not been extensively used. This is primarily due to the time and resource required to create regulations, and the inability to easily update regulations in response to technical changes and operational improvements. This lack of time and resources is also a consequence of MCDEM and NEMA being almost constantly in response mode while dealing with emergency events.

To address these issues, NEMA is proposing to create a new legal framework involving a new power for the Chief Executive of NEMA to make ‘Emergency Management Rules’ (EM Rules).

The proposed EM Rules would increase the emergency management system’s flexibility by enabling it to respond to changing or unforeseen circumstances and allowing minor updates to be more easily made to enable the smooth implementation and operation of the legislation.

This approach would enable NEMA to set mandatory requirements without the complex and lengthy compliance processes required by primary legislation and regulations. Setting mandatory requirements through the proposed rules would be an effective means of addressing incidents discussed by TAG where a participant in the emergency management system has refused to carry out their roles and responsibilities despite these being clearly set out in secondary legislation and documented in guidance.

The power to make EM Rules is distinct from the emergency powers wielded (and delegated) by the Director of Civil Defence Emergency Management (the Director). This proposal will not impact on the Director’s emergency powers, and EM Rules cannot be used to confer such powers on the Chief Executive.

No new funding powers are proposed to be created in the legislative reforms or funding provided in any supporting package of policies to address any capacity issues in the emergency management system. In addition, it is *not* proposed to change the distributed structure of the CDEM system, and the proposed EM Rules will not impact on this structure.

Part B: Legislative arrangements for the Lifeline Utilities/critical infrastructure sector

Currently, the CDEM Act is weak in relation to the role and responsibilities of Lifeline Utilities within the emergency management system. Since 2002, the importance of having a more comprehensive legal framework for Lifeline Utilities has been emphasised by events.

NEMA proposes changes to the Lifeline Utilities provisions in the CDEM Act are proposed to address the gaps and inconsistencies in the current provisions. The proposed changes include:

- Replacing the term ‘Lifeline Utilities’ with ‘Critical Infrastructure’, which is more fit for purpose and reflects international practice.
- Creating a definition of ‘Critical Infrastructure’ in the CDEM Act: “*critical infrastructure means essential and enabling assets, systems, networks, and services.*”
- Identifying a lead agency for each Critical Infrastructure sector.
- Specifying the critical infrastructure sectors and entities via a *Gazette* notice, made by the Minister. This change from an Order in Council would allow for increased flexibility in nominating an entity or a sector as Critical Infrastructure.
- Developing criteria to inform the Minister’s decision-making about the classification of infrastructure as critical infrastructure.

- Introducing obligations for sector-specific national response plans, to be updated at three-year intervals, which would enable effective and efficient response if services were to be majorly disrupted.
- Introducing a requirement for Critical Infrastructure entities to proactively, and on request, share information with lead agencies, risk owning agencies, other Critical Infrastructure entities and/or NEMA for monitoring and planning. The sharing of information will also extend to immediately before, during and after emergency events.

Part C: Ensuring recognition and representation for the role iwi and Māori play in emergency management

The lack of recognition of the contribution iwi and Māori make to the emergency management system, along with inconsistent representation in CDEM Groups, does not reflect the trajectory of the Māori-Crown Treaty relationship or the reality of ongoing, significant contributions of iwi and Māori to emergency management.

The 2020 Labour Party Manifesto committed to ensuring New Zealand's emergency management system is geared towards inclusive, community-led responses to natural disasters and health events, as well as continuing to work with iwi and Māori on the role they play in emergency management. The Government has also committed to strengthening the Māori Crown relationship to improve outcomes for Māori and to realise opportunities for Māori and all of New Zealand.

To address these issues, NEMA is proposing that the following provisions be introduced via the EM Bill to:

- ensure iwi and Māori be represented on Joint Committees (JCs) with full voting rights and on Coordinating Executive Groups (CEGs).
- include a requirement for JCs to partner and engage early and meaningfully with Māori, interested community groups, and others.
- require JCs to have systems and processes to ensure that they have the capability and capacity to engage with Māori and to understand perspectives of Māori.
- provide for iwi and Māori roles and responsibilities in the CDEM Plan, ensuring that they are enabled to participate in all levels of the emergency management system
- enable the Crown to directly reimburse iwi and Māori for the costs incurred while caring for affected people in the course of an emergency event.

Limitations and Constraints on Analysis

The time available for consultation was constrained by the timeframe set for progressing the new legislation. In view of this, and the highly technical nature of the proposals in Part A and Part B, the public were not consulted. Consultation has been targeted at the sectors directly affected:

- participants in the emergency management system were surveyed about the legal framework proposals
- lifeline utility entities and their regulatory agencies were consulted about the critical infrastructure proposals.

Part A: Legal framework of the emergency management system

There is a large volume of research available on the regulatory models informing the options for a new legal framework. However, this research does not focus on the regulation of emergency management systems. To address this gap, the legislative basis of New Zealand's emergency management system was compared and contrasted with those in comparable jurisdictions. This exercise indicated that a solution focused on secondary legislation supported by guidance and primary legislation, was the best way forward.

In May 2021, stakeholders and other participants in the emergency management system were surveyed about the usability and usefulness of the CDEM Act, the CDEM Plan, and the Guide, and how these could be improved. The results of this survey were favourable towards the proposal, with:

- 66% of respondents supporting, in principle, replacing the current CDEM Plan and Guide with more flexible alternative forms of secondary legislation and guidance. 2% disagreed with this proposal. Of the 32% who were undecided, the primary reasons were a desire for more information and better understanding of the proposal and concerns about the framework becoming too flexible and thus increasing uncertainty.
- 95% of respondents support the proposal of accessing all documents in the framework via a single online resource.

In July 2021, the Ministerial Advisory Committee (MAC)² was consulted about the proposal to empower the Chief Executive to make rules. MAC noted the intention to include a Treaty analysis policy in the rule development process and recommended that the proposed Māori Emergency Management Advisory Group include advising the Chief Executive on rule development as one of their functions. MAC endorsed the recommended approach.

Part B: Legislative arrangements for the Lifeline Utilities/critical infrastructure sector

As part of the policy development process, in June/July 2021 NEMA sought feedback from organisations in the sector to understand the impacts of proposals, identify any issues that have not been considered thus far and identify practical and financial implications.³ A total of 63 submissions on the proposals were received from:

- Government/CDEM Group (15)
- Transport (9)
- Water (4)
- Energy (28)
- Telecommunications and Broadcasting (7).

² The MAC was established to advise the Minister of Emergency Management on the iwi and Māori work programme.

³ This was a separate survey with different respondents from the survey discussed in the previous section.

The response was positive:

1. Feedback was strongly in favour of replacing ‘Lifeline Utilities’ with ‘Critical Infrastructure’. 83% of respondents agreed that the change would modernise the framework and would more accurately reflect the work carried out across the sector.
2. Respondents were largely in favour of the proposed definition of ‘Critical Infrastructure’, with 77% of respondents supporting this proposal.
3. 84% of respondents supported allocating lead agency roles for the Critical Infrastructure sector. Respondents indicated that:
 - it will be good for sector-based synergy,
 - ensure coordination and communication, and a
 - allow for clear direction without ambiguity.
 - NEMA will need to consider the relationship between regional and local infrastructure to ensure that effective response and coordination is not compromised.
4. Consultation showed a clear preference within the sector for the Minister determining, by way of Gazette notice, all Critical Infrastructure entities. 77% of respondents in favour of this option, noting that this proposal is the most flexible and simplest approach.
5. 75% of respondents supported the proposed Criteria for considering an infrastructure sector or entity as critical Infrastructure. However, some respondents indicated that the criteria are nationally focused and does not capture critical infrastructure at regional and local area (i.e. regional/local water service providers, transport infrastructure etc.)
6. 76% of respondents were in support of the proposal to require sector specific response and recovery plans, noting that plans will need to be co-developed with relevant agencies and organisations for efficient delivery.
7. The proposed information sharing requirements before, during and after emergencies was supported by 73% of respondents, who noted that:
 - commercially sensitive material will need to be protected from disclosure
 - an “all care but no responsibility” clause might be needed so as to ensure that the data owner is not held liable for unforeseen safety-related outcomes as a result of the information being provided.

Part C: Ensuring recognition and representation for the role iwi and Māori play in emergency management

NEMA has focused on building strong relationships with iwi and Māori to facilitate engagement regarding recognition and recognition. NEMA has:

- built a relationship with the National Iwi Chairs Forum, through its Pou Tangata
- supported the establishment of a Ministerial Advisory Committee on Emergency Management (the MAC)
- hosted the *Hui Taumata o Te Uepū Whakahaere Haumaru* at Te Papa to provide a platform for Māori and indigenous perspectives on emergency management

- expanded its network of key Māori partners, including Māori communications experts, Māori academics, key staff from rūnanga, kaiārahi, Māori wardens, and Māori leaders within the public service
- developed its Māori work programme, which features heavily in its Strategic Framework
- introduced the role of Kaitohutohu into the National Coordination Centre to provide support and guidance to NEMA response staff.

The MAC have been consulted throughout the development of the proposals to recognise the contribution of iwi and Māori to the emergency management system and ensure adequate representation in CDEM Groups.

Responsible Manager(s) (completed by relevant manager)

Adam Allington

Manager

Policy Unit

National Emergency Management Agency

Date: 28 October 2021

Quality Assurance (completed by QA panel)

Reviewing Agency:	Department of the Prime Minister and Cabinet
Panel Assessment & Comment:	<p>A quality assurance panel has reviewed the Regulatory Impact Statement “Emergency Management System Reforms – iwi and Māori contributions to emergency management, legal framework and critical infrastructure” produced by NEMA. The panel considers that it partially meets the quality assurance criteria.</p> <p>Part A</p> <p>The panel considers that the proposed option would benefit from more detail about implementation, monitoring and evaluation.</p> <p>Due to the complexity of the proposal and the tight timeframe, the public were not consulted about the options and the final proposal. However, the panel notes that NEMA undertook targeted consultation with key stakeholders.</p> <p>While it questions whether the recommended option is a ‘new’ framework, and considers the link between the problem definition and the options could be further refined to better help the reader, the panel considers the case for the addition of a rule making capability is sufficiently made. The RIS provides an analysis of the</p>

risks and benefits of adding a new rule making power for the Chief Executive of NEMA.

Part B

The panel considers that Part B would benefit from more detail about implementation, monitoring and evaluation.

Overall, this section of the RIS is clear and concise.

Due to the complexity of the proposal and the tight timeframe, the public were not consulted about the proposals. However, the panel notes that NEMA undertook targeted consultation with key stakeholders.

The Panel notes that the status quo and a series of proposals are presented rather than an analysis of fully developed options. Nevertheless, the panel finds that the case for change is sufficiently justified.

Part C

The panel considers that Part C would benefit from more detail about implementation, monitoring and evaluation.

Overall, this section of the RIS is clear and concise.

The panel notes that NEMA has focused on relationship building and that consultation has mainly involved the Ministerial Advisory Committee. The panel also notes the intention to undertake wider and more detailed consultation on the proposals in the near future.

The RIS provides an analysis of the status quo and a set of proposals rather than an analysis of fully developed options. Nevertheless, the panel finds that the case for change is sufficiently justified.

Part A – legal framework of the emergency management system

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the Status Quo expected to develop?

The current legal framework

1. The existing emergency management legal framework consists of:
 - Primary legislation; the Civil Defence Emergency Management Act 2002 (the CDEM Act)
 - Secondary legislation:
 - Civil Defence Emergency Management Regulations 2003 (the Regulations)
 - Civil Defence National Emergencies (Information Sharing) Code 2020
 - National Civil Defence Emergency Management Plan Order 2015 (the CDEM Plan)
 - National Disaster Resilience Strategy
 - Non-legislative instruments issued under s9(3) of the CDEM Act:
 - The Guide to the National Civil Defence Emergency Management Plan Order 2015 (the CDEM Plan Guide)
 - 17 Director's Guidelines
 - 3 supporting plans
 - 4 technical standards.

Report of the Technical Advisory Group

2. In April 2017, the Minister of Civil Defence tasked a Technical Advisory Group (the TAG) with providing advice on the most appropriate operational and legislative mechanisms to support effective responses to natural disasters and other emergencies in New Zealand.
3. In January 2018, the Minister of Civil Defence released the TAG's final report "Better Responses to Natural Disasters and Other Emergencies" (the TAG Report), which provided advice and options on how to deliver better response to emergencies. The TAG Report made a number of recommendations aimed at improving emergency responses, including strengthening national-level leadership, direction and standards.
4. In August 2018, the Government released its response to the TAG Report. This outlined the Government's vision that people in New Zealand receive a consistent level of support in an emergency, no matter who or where they are. The response set out five key areas for improvement:
 - Putting the safety and wellbeing of people at the heart of the emergency response system

- Strengthening the national leadership of the emergency management system
 - Making it clear who is responsible for what, nationally and regionally
 - Building the capability and capacity of the emergency management workforce
 - Improving the information and intelligence system that supports decision making in emergencies.
5. The Government instructed the Department of the Prime Minister and Cabinet to commence work on the legislative change necessary to support those agreed responses.
6. In 2019, the National Disaster Resilience Strategy (NDRS) came into effect and outlined the Crown's goals in relation to civil defence emergency management. The NDRS reaffirms the integrated 'all hazards, all-risks' approach to emergency management and the importance of working across the '4 Rs' of risk reduction, readiness, response, and recovery. It also introduced a priority of enabling, empowering and supporting community resilience.
7. Cabinet agreed to establish the National Emergency Management Agency (NEMA) and it was stood up as a departmental agency on 1 December 2019, replacing the Ministry of Civil Defence & Emergency Management. NEMA's establishment was an important preliminary step in implementing the Government response to TAG's objective of strengthening the national leadership of the emergency management system. Once NEMA was in place, it established a policy function that picked up the role of developing advice on legislative change, referred to in paragraph 5.

Status quo

8. Maintaining the Status Quo, will, over time, result in the framework becoming increasingly outdated and not fit for purpose. The vulnerabilities identified by the TAG, particularly the lack of role clarity, can be expected to intensify, compromising the effectiveness of the emergency management system. The threat to life, property, community and the economy posed by the risk of system failure is too great to allow the current legal framework to remain in place.

What is the policy problem or opportunity?

The CDEM Act is out of date

9. Introduced in 2002, the CDEM Act reflects drafting practices in use at the time. During the 1990s, there were several instances of regulatory failure and unintended consequences resulting from regulatory regimes based on the 'hands off' approach in favour at the time. For example, the role of Building Act regulations in the onset of the 'leaky building' crisis, and the regulatory overreach of the vehicle window tinting rules.
10. As a result, from the early 2000s, legislation became more process driven and prescribed mandatory operational requirements in much greater detail. The emergency management legislative framework has retained this prescriptive form, with the result that New Zealand's emergency management legislative framework requires modernisation to bring it into line with current legislative practice.
11. A new Emergency Management Bill (EM Bill), that builds on these achievements and retains what already works within the emergency management system, is required. The

proposed Bill will address the shortcomings of the current emergency management system, by:

- adopting an inclusive and community-led approach to emergency management with a focus on disproportionately impacted communities
- introducing a new power for the Chief Executive of NEMA to make ‘Emergency Management Rules’ (EM Rules) to improve the flexibility and responsiveness of the legal framework, separate to the use of emergency powers and to be used to steward the system outside of a response
- modernising the treatment of Lifeline Utilities, including renaming to critical infrastructure and clearly setting out the roles and responsibilities of critical infrastructure sectors and entities
- clarifying roles and responsibilities across the system at the national, regional and local levels
- setting out NEMA’s functions and roles (including as a steward and assurer of the emergency management system)
- introducing a truly integrated ‘4 Rs’ (risk reduction, readiness, response, and recovery) approach to emergency management.

Greater role clarity is needed in the legal framework to support improved performance

12. In its report,⁴ the TAG noted that CDEM legislation is not as clear as it should be. TAG regularly heard that the authority to act, or the authority to task someone, either does not exist or is not clear. This situation can lead to a lack of coordination, no one really in charge, and the risk of poor outcomes for the community.
13. A particularly important example of how the current legal framework is not fit for purpose relates to role clarity. In its 2017 report, the TAG found that the distribution of command and control authority during an emergency was not always well understood. The TAG noted instances where it was not clear if anyone had either the responsibility to carry out a task or the ability to task an agency to do so. There were also examples of responsible agencies not turning up to the emergency operations centre, even though their functions had been set in the CDEM Plan, and an emergency had been declared.
14. This has led to a perception that responding agencies can pick and choose what they do, despite agreement to tasking for these roles in foundational documents such as the CDEM Plan. Although there are powers in the CDEM Act to require compliance, these compliance powers have never been used. Such powers may have been viewed as too heavy handed in view of MCDEM/NEMA’s historical preference for achieving compliance through effective working relationships.

The current Plan meets neither its intended purpose nor the needs of stakeholders

15. Analysis of the CDEM Plan has identified key weaknesses, including:

⁴ [Ministerial Review: Better Responses to Natural Disasters and Other Emergencies in New Zealand - Technical Advisory Group - 18 January 2018 \(dpmc.govt.nz\)](https://www.dpmc.govt.nz/reviews-and-advice/ministerial-review/better-responses-to-natural-disasters-and-other-emergencies-in-new-zealand-technical-advisory-group-18-january-2018)

- a lengthy and complex approval process for the CDEM Plan which is out-of-step with the purpose of the CDEM Plan. As set out in the CDEM Act, the current process to create or amend the CDEM Plan includes:
 - the requirement for drafting by Parliamentary Counsel Office and
 - the requirement for the Minister to present the proposed CDEM Plan to the House of Representatives at least 90 days before recommending the making of the CDEM Plan
 - the need for the CDEM Plan to be a more nimble, clear, and outcomes-focused instrument
 - a level of concern as to whether the CDEM Plan adequately achieves the requirements as per the CDEM Act (and conversely, whether the CDEM Act requirements of the CDEM Plan are appropriate in the modern context).
 - the CDEM Plan contains a significant volume of material that is not legislative in nature, for example numerous ‘Introduction’ and ‘Principles’ sections and lists that are more suited to guidance than legislation.
16. Feedback from stakeholders supports our analysis that the CDEM Plan does not meet their needs because it is unwieldy, complex, and does not provide the clarity necessary to enable them to perform their roles.

The large volume of guidance needs to be updated and rationalised

- 17. The existing guidance material supports implementation of the CDEM Act and the CDEM Plan with detailed operational guidance unsuitable for primary or secondary legislation. Relationship instruments, such as Memoranda of Understanding (MOU) set the parameters of regulatory relationships and define the operational details of who does what and when.
- 18. NEMA has published a considerable volume of guidance, some of which dates back to 2008. To ensure that legislation and guidance are aligned and accessible, the existing guidance material needs to be reviewed and updated, and the number of guidance products rationalised. New guidance material is also required to support the new provisions in the proposed Bill and the wider legal framework.
- 19. Taken together, the shortcomings described above have resulted in a legal framework that is no longer fit for purpose as it:
 - is inflexible, and requires considerable time and effort to update even the most minor provisions in regulations, which then tend to become out of date relatively quickly
 - is too difficult to navigate, being comprised of various legislative and non-legislative instruments with no clear and consistent standard governing the use of these instruments for their required purposes
 - lacks clarity about key roles and responsibilities.

What objectives are sought in relation to the policy problem?

20. To address these issues, NEMA proposes, via the EM Bill, to create a modern, fit-for-purpose legal framework that:
- is flexible, durable and responsive
 - incorporates Treaty of Waitangi analysis
 - provides a clear statement of roles and responsibilities
 - ensures optimal use of resources and coordination of effort
 - is easy to understand and navigate
 - aligns with best practice in comparable jurisdictions
 - empowers the system and the functional roles of NEMA in the long-term.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the Status Quo?

21. The options will be assessed against the following design principles, where applicable:
- The selected option must:
 - reflect the principles of the Treaty of Waitangi and fulfil the Crown's obligations under it.
 - be consistent with the fundamental rights and freedoms set out in the Bill of Rights Act and the Human Rights Act.
 - comply with the information privacy principles and codes of practice set out in the Privacy Act 2020.
 - allow for the implementation of commitments made under various international instruments, for example, the Sendai Framework.
 - not depart from the default approach in the Legislation Guidelines produced by the Legislation Design and Advisory Committee.
 - Responsiveness – NEMA must consider the wider context to enable NEMA to determine in that context which is the best regulatory intervention or the best balance of interventions.
 - Legitimacy – important policy content should be a matter for Parliament to determine in the CDEM Act through an open democratic process. Too much delegation or having delegated powers that are too broad or uncontrolled, undermines the transparency and legitimacy of the law. However, it is not necessary for Parliament to do everything, as Parliamentary time is scarce, this time is best spent on the policy issues, not details.
 - Durability and flexibility – delegation can be important to how a law (and the regulatory system it is part of) performs over time in terms of responding to changing or unforeseen circumstances or allowing minor flaws to be addressed. Delegation

can give an opportunity for experimentation. Delegation can also allow emergencies to be dealt with quickly, which can be important at least for short-term solutions.

- Clarity – if too much policy content is delegated or delegations are given to different decision makers without clearly scoped mandates, clarity about what is required by the law can be undermined.
- Transparency – transparency about the underlying purpose of the new legal framework, the way in which it will be applied and enforced and all underlying documents and information are critical to engender support for the regulatory response and to foster a willingness to co-operate and participate constructively in adaptation
- Navigability – too much technical detail in an Act might make it difficult to navigate. However, multiple layers of secondary legislation can create complexity and fragmentation in a regime, making it difficult for readers to find and understand the law.
- Risk-based – the proposed regulatory interventions need to ensure that current and possible future risks have been identified and assessed and that measures are in place to respond to those risks.
- Proportionality – the strength and costs of the interventions should be commensurate with the impact of the identified risks.
- Effectiveness – regulatory and non-legislative interventions must be effective in addressing the risks identified through the way it is designed, applied and implemented.
- Efficiency – regulatory and non-legislative interventions should represent the most effective response at the lowest overall cost
- Consistency and predictability – regulatory and non-legislative interventions should be inherently consistent and predictable to provide a stable regulatory environment and foster business confidence.

What scope will options for change be considered within?

22. The options will be considered within the scope of existing regulatory models and the regulatory tools available. In considering the options for change, it is recognised that regulatory frameworks provide for a range of matters. For example, frameworks can establish roles of existing entities, create new entities, set out coercive powers, create general obligations, set standards, and create an offence and penalty regime. Different regulatory approaches can be used for differing aspects of a regulatory framework, i.e. a single approach is not required (nor desirable).
23. In view of this, all three of the options for change discussed below will have an element of each of these regulatory tools. The difference between the options lies in the extent to which each aspect is emphasised. For example, option one emphasises prescription, whereas option three focusses on responsive regulation.

Prescriptive

24. Prescriptive regulatory models can be structured in a number of ways, but are generally described as an approach based on regulations:
 - that are precisely drafted and highly particularistic in specifying regulated actions.

- which are prescriptive and tell regulatees what actions they can and cannot engage in
 - which give advance notice to the regulatee about how to comply, and provide no, or limited, exceptions and limited flexibility when applying the rule to a specific factual context
 - which entail the advance (ex-ante) determination of what conduct is permissible by a regulator. Accordingly, regulatees make largely mechanical decisions by applying the facts to a crisply formulated directive.
25. Enforcement is a largely mechanical process involving the collection of facts for the purposes of determining whether or not the regulated party has complied with the regulations.

Performance based

26. Performance (or goal) based regulatory approaches are generally defined by a lack of prescription about how regulatees achieve specific regulatory goals (which can involve engaging in, or avoiding, specific actions).
27. Performance objectives or goals are generally high level, setting out broad principles, outcomes or standards that regulatees' actions must seek to achieve or satisfy. Consequently, compliance involves a focus on the substantive achievement of a regulatory goal.
28. In determining how best to comply with a regulatory goal, regulatees are encouraged to use the information available to them and exercise judgement in making compliance decisions.
29. The enforcement task involves assessing whether or not the actions of the regulatee accord with the required goals, and, if not, imposing penalties.

Responsive

30. Responsive regulation is based on the regulator considering the wider context and determining in that context which is the best regulatory intervention or the best balance of interventions. Responsive regulation aims to encourage compliance and cooperation with the regulated party by allowing for a degree of flexibility in enforcement.
31. In this type of intervention, the regulator works with the regulated party to achieve the desired outcome taking into consideration the particular circumstances faced by that party.

Non-regulatory tools

32. An updated and rationalised body of non-statutory guidance along with wider use of relationship instruments such as memoranda of understanding are the main non-regulatory options available.
33. Overseas, the position on the non-binding nature of guidance is evolving. For example, in the United Kingdom, courts have held that non-statutory guidance should be adhered to unless it is good for departing from it. This suggests that more use could be made of non-statutory guidance to achieve regulatory objectives.

34. NEMA already has memoranda of understanding in place with Radio NZ and TVNZ, which set out expectations on media during an emergency. These sorts of instruments could be used to address the problem of role clarity and ensure that all participants in the emergency management system understand who does what, how and when.

What options are being considered?

Features common to all options for change

35. All options for change include:
 - an enforcement regime in the EM Bill (the use and development of a wider range of enforcement tools is being pursued in the Bill Project)
 - elements of prescription, performance-based and responsive regulation
 - an online resource to address concerns about the navigability of the framework – similar to an online manual, the proposed resource would allow users to access all parts of the framework from a single location through browsing a folder system, hyperlinks and a search engine
 - a mix of primary legislation, secondary legislation and non-legislative instruments.
36. The differences between the options lie in the combination of these common features. For example, primary legislation and prescriptiveness, secondary legislation with less prescription and more emphasis on voluntary compliance supported by non-statutory guidance.

Option One – prescriptive, process driven framework

37. Although criticised as limiting innovation and for being inflexible in the face of rapid technological change, there is still a place for prescriptive approaches where mandatory safety outcomes are achievable only through compliance with strict technical standards.
38. The regulation of civil aviation is an example of a prescriptive framework. Due to the inherent safety risks associated with aircraft operations, the aviation industry is regulated under various national rules and international regulations. Safety sensitive aviation activities such as training and aircraft maintenance are regulated under a regulatory regime based on prescriptive standards.
39. Prescriptive regulation is possible here due to a range of factors such as clearly defined classes and types of aircraft, the measured pace of technological change and the unchanging physical requirements of powered heavier than air flight. For example, any one type of aircraft will always be built to identical design specifications. New classes and types of aircraft have extended development periods, allowing the regulatory framework to keep up with technological progress. Whatever the class and type of aircraft, its ability to achieve and maintain safe flight will always depend on a balance between the same physical forces.⁵

⁵ However, even in the sphere of aviation, this prescriptive regulatory model is coming under increasing pressure. Airports and commercial aircraft operators are experiencing tremendous commercial pressure due to the globalization and liberalization of the industry in recent years. Consequently, the civil aviation industry is moving progressively from prescriptive safety rules to performance-based legislation.

40. It is at least theoretically possible to capture, document and regulate all aspects of the emergency management system. For example, the lack of clarity about roles and responsibilities identified in the TAG report could be addressed through empowering provisions in the EM Bill and by detailed regulations specifying who does what, when and how. This could also be linked into an enforcement regime in primary legislation setting penalties for non-compliance.
41. This approach would fully exploit the strengths of prescriptive regulatory frameworks:
- mandatory requirements can be clearly expressed and easily understood by regulated entities
 - clarity makes the application of such requirements comparatively straightforward
 - consistent standards can be created and applied to all regulated entities
 - it satisfies the demand from regulated parties and regulatory staff for certainty and consistency
 - enforcement is relatively uncomplicated when compared with performance-based regimes.
42. In addition, building upon the existing framework, this option would require much less re-drafting and re-structuring of the framework than the other options. Some parts of the framework could simply be rebranded and updated with the new empowering provisions.

Option Two – a structure based on non-legislative instruments

43. In this option, the emphasis is on the use of non-legislative instruments, supported by the CDEM Act and a small number of secondary instruments, to implement a ‘willing compliance’ model of regulatory relationships.
44. A regulator may need to issue guidance to those regulated by the regime. The nature and status of guidance should be appropriate to achieve the policy objective. Mandatory compliance with statutory guidance may be required for some critical functions where the failure to comply with the guidance could be severe.
45. Non-legislative instruments take a variety of forms and include the following:

Non-legislative instruments	
Non-statutory guidance	Relationship instruments
Guidelines (e.g., Directors guidelines)	Memoranda of understanding
Performance standards	Protocols
Codes of practice	Service Level Agreements
Technical standards	Contracts

46. Such instruments are administrative rather than legislative, as they do not have a significant legislative effect and simply record agreements between entities, or provide information, non-binding guidance or strategies.
47. In the current CDEM Act, the legislative basis for issuing guidance is section 9(3). This section empowers the Director to issue a wide range of standards, codes, guidelines etc. Wider use can be made of this power to establish a framework with maximum flexibility and responsiveness to support the emergency management system.

48. This option is a form of ‘soft’ regulation, in that it is based on non-statutory guidelines and relationship instruments which are intended, through reputational advantage and issues of liability, to motivate the desired behaviour in the regulated party.

Option Three – a new regulatory framework involving emergency management rules

49. In this option, the emphasis will be on the use of secondary legislation supported by non-legislative instruments.
50. At the core of this proposal, is the introduction of a new rule-making power for the chief executive. The proposed ‘Emergency Management Rules’ (EM Rules) would be developed in-house and signed into law by the Chief Executive.
51. A number of Acts, such as the Civil Aviation Act and the Maritime Transport Act contain provisions empowering the Governor-General, on the recommendation of the Minister, to make rules by Order in Council. Rules made under these Acts must be approved by the relevant Minister. Transport rules tend to be highly prescriptive and require regular amendment. Maintaining rules of this type is labour-intensive, time consuming and costly.
52. However, in New Zealand and in comparable jurisdictions, there is a trend towards primary legislation empowering chief executives to make rules without requiring the Minister’s sign off. For example, under section 89 of the Education and Training Act 2020, the Secretary of Education is empowered to make rules on a wide range of matters without involving the Minister or the Governor-General.
53. In Australia, the Commonwealth Australian Maritime Safety Authority (AMSA) may issue Marine Orders with the approval of the Chief Executive. Marine orders are regulations made under the authority of Commonwealth legislation. The primary legislation sets out broad objectives, key certification requirements, compliance and enforcement powers, and administrative matters, and describes the major offences and penalties. Marine orders contain the detailed requirements and processes ensuring legislation keeps up to date with technical and operational advances in maritime safety and environment protection. They also put international and national maritime standards into effect.
54. Similar to the marine orders issued by AMSA, the proposed EM Rules will contain the detailed requirements and processes to ensure that the legislative framework keeps up to date with technical and operational advances in emergency management.
55. Powers granted under a secondary instrument may impose costs or burdens on others. In these circumstances, the scrutiny involved in an order in council is necessary. However, given that the proposed EM Rules will deal with operational, technical and administrative matters, this level of legislative heft is not required.
56. The proposed rule-making power is distinct from the emergency powers conferred by the CDEM Act on the Director of Civil Defence Emergency Management (the Director) and delegated from the Director to the National Controller and National Recovery Manager. The emergency management Rules are a form of secondary legislation dealing with administrative, operational and technical matters during ‘peacetime’, that best sit with the Chief Executive.

'Peacetime' powers	
Governor-General	Chief Executive
Current: Section 115A Power to make regulations (no change)	Current: appointment of Director (s8) & Acting Director (s106) (no change) Proposed: power to make Emergency Management Rules

Current emergency powers (no change)					
Minister	Director	National Controller	National Recovery Manager	Local Controllers s27	Local Recovery Manager s 30
Declaration, extension and termination of states of emergency (ss66, 68, 69, 71, 72). Power of direction (s84)	All the powers reasonably necessary to perform their functions (ss 8 &9) Power to act on default by others (s75) Power of direction (s10)	Delegated from Director: <ul style="list-style-type: none">• direct and control available resources• use and co-ordinate the use of personnel, etc.	Delegated from Director: <ul style="list-style-type: none">• direct and control available resources• use and co-ordinate the use of personnel, etc.	Sub-delegated from Group Controller: <ul style="list-style-type: none">• Evacuation, entry, Road closure, removal of vehicles personnel, etc. (s11A)• Requisition, direction, inspection.	Sub-delegated from Group Controller: <ul style="list-style-type: none">• transition powers• Information, direction evacuation, entry• Road closure

57. As secondary legislation, the rules will be subject to a range of strict safeguards, including review by the Regulations Review Committee (see 'Risks and mitigations' below). Emergency powers are not subject to the same safeguards, and the Director currently does not have the

delegated authority to make secondary legislation.⁶ In view of this, it is considered that the proposed rule-making power should be delegated to the Chief Executive of NEMA rather than the Director.

How do the options compare to the Status Quo?

Key

- ++ much better than doing nothing/the Status Quo/counterfactual
- + better than doing nothing/the Status Quo/counterfactual
- 0 about the same as doing nothing/the Status Quo/counterfactual
- worse than doing nothing/the Status Quo/counterfactual
- much worse than doing nothing/the Status Quo/counterfactual

Criteria	Status quo	Option One – mainly prescriptive framework	Option Two – a structure based on non-legislative instruments	Option Three – a regulatory regime involving new 'emergency management' rules
Treaty obligations	<p>- Currently, the Treaty is not mentioned in the primary legislation. The Crown is not living up to the principles of the Treaty (especially the principle of partnership). In view of this and the growing dissatisfaction with the lack of recognition of iwi/Māori in the emergency management system, the Status Quo is not sustainable.</p>	<p>+ Primary legislation can be used to mandate at a high-level compliance with Treaty requirements and principles.</p>	<p>+ Relationship instruments voluntarily entered into have the flexibility required to establish a partnership arrangement that reflects the status of the parties and allows for the clear expression of the principle of active protection by the Crown of iwi/Māori interests. However, such instruments (and guidance) are unenforceable.</p>	<p>++ EM Rules can mandate at a detailed level compliance with Treaty requirements and principles. This option may also involve the use of relationship instruments, which may be voluntarily entered into. This approach combines voluntarism with enforceability.</p>

⁶ The authority conferred by section 9(3) of the Act relates to non-legislative instruments such as guidelines and technical standards.

Criteria	Option One – mainly prescriptive framework	Option Two – a structure based on non-legislative instruments	Option Three – a regulatory regime involving new ‘emergency management’ rules
Bill of Rights Act and the Human Rights Act	0 Section 80 (powers conferred by warrant) sets out entry, search and seizure powers.	0 There is no intention to amend the current provisions relating to detention and the seizure of property. In any case, non-legislative instruments cannot be used for setting provisions relating to detention and the seizure of property.	0 There is no intention to amend the current provisions relating to detention and the seizure of property. In any case, as secondary legislation, EM Rules cannot override or amend primary legislation
Privacy	0 There are no privacy implications – personal information may only be collected, used and disclosed for a permitted purpose in accordance with the Civil Defence National Emergencies (Information Sharing) Code 2020.	0 There are no privacy implications – personal information may only be collected, used and disclosed for a permitted purpose in accordance with the Civil Defence National Emergencies (Information Sharing) Code 2020.	0 There are no privacy implications – personal information may only be collected, used and disclosed for a permitted purpose in accordance with the Civil Defence National Emergencies (Information Sharing) Code 2020.
International obligations - Sendai Framework for Disaster Risk Reduction 2015-2030⁷	0 The Act does not mention the framework. Given that New Zealand is a signatory, this needs to be addressed.	0 The Sendai Framework is a work in progress and may be subject to significant change as a result of monitoring and periodic reviews. A prescriptive regulatory regime may not be able to keep up with such changes, resulting in a misalignment	++ Non-legislative instruments are the most flexible and responsive means to maintain alignment with changes to the Sendai Framework for Disaster Risk Reduction 2015-2030. In addition, implementation via a legislative instrument is not required. ++ EM Rules can be used to implement new and updated international obligations as well as ensure compliance.

⁷ The Sendai Framework for Disaster Risk Reduction 2015-2030 (Sendai Framework) was the first major agreement of the post-2015 development agenda and provides Member States with concrete actions to protect development gains from the risk of disaster. It was endorsed by the UN General Assembly following the 2015 Third UN World Conference on Disaster Risk Reduction (WCDRR), and advocates for the substantial reduction of disaster risk and losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of persons, businesses, communities and countries.

Criteria	Status quo	Option One – mainly prescriptive framework	Option Two – a structure based on non-legislative instruments	Option Three – a regulatory regime involving new ‘emergency management’ rules
		<p>between the commitments made and the policies implemented by the emergency management regulatory framework.</p> <p>-</p> <p>The current framework is weighted towards primary legislation and regulations. This does not comply with the recommendations in the Legislation Guidelines for a workable balance between primary legislation and the appropriate secondary instruments.</p>	<p>Legislation Guidelines</p> <p>0</p> <p>Prescriptive legislation cannot keep pace with the changing context of emergency management without a lengthy and complex amendment process. Introducing an even more prescriptive framework would exacerbate the problems with the current framework, with the result that NEMA would be even less able to deploy the best regulatory intervention or the best balance of interventions in response to this changing context</p>	<p>++</p> <p>The guidelines allow for secondary legislation to be made provided that there are appropriate empowering provisions in the CDEM Act.</p>
		<p>The current framework is weighted towards primary legislation and regulations. It cannot efficiently respond to the changing needs of the emergency management system.</p>	<p>Responsiveness</p> <p>0</p> <p>Non-legislative instruments have the highest degree of responsiveness of all the parts of the proposed framework. Using these instruments will enable NEMA to keep pace with the changing context of emergency management.</p>	<p>++</p> <p>Secondary instruments, with less onerous consultation and amendment processes than primary legislation, are more responsive than prescriptive primary legislation. The proposed EM Rules represent the optimum compromise between responsiveness and effectiveness.</p>
				<p>+</p>

Criteria	Status quo	Option One – mainly prescriptive framework	Option Two – a structure based on non-legislative instruments	Option Three – a regulatory regime involving new ‘emergency management’ rules
		<p>Upholds the legitimacy of the law in that most of the content of the framework would be subject to parliamentary scrutiny.</p> <p>However, given that parliamentary time is scarce, change of even a minor nature would be difficult to implement in a timely manner.</p>	<p>This criterion in the Legislative Guidelines is not applicable to non-legislative instruments.</p> <p>(Non-legislative instruments do require legitimacy, but this not in the legislative sense applied by the Legislation Guidelines).</p>	<p>Questions about the legitimacy of EM Rules may be raised stakeholders and others. The lack of ministerial approval could give rise to concerns about excessive delegation of law-making authority and inadequate consultation.</p> <p>These concerns can be addressed pre-emptively by ensuring that:</p> <ul style="list-style-type: none"> • the rules are designed and implemented in accordance with the Legislation Guidelines, • consultation requirements are specified in the empowering provisions • adequate safeguards are adopted.
				<p>++</p> <p>The policy development, consultation and implementation processes for EM Rules will enable the key element in this option to be amended and introduced comparatively quickly.</p>
		<p>0</p> <p>Is inflexible and requires considerable time and effort to update even the most minor provisions. Lacks durability in that once such amendments have been implemented, they tend to become out of date relatively quickly.</p>	<p>0</p> <p>Is inflexible and requires considerable time and effort to update even the most minor provisions. Lacks durability in that once such amendments have been implemented, they tend to become out of date relatively quickly.</p>	<p>++</p> <p>Non-legislative instruments can be updated or implemented comparatively quickly and have the highest degree of flexibility of all the parts of the proposed framework.</p>
		<p>0</p> <p>Durability and flexibility</p>	<p>0</p> <p>As noted by TAG, the roles and responsibilities in the current framework require clarification.</p>	<p>++</p> <p>Delegations will be enabled by the CDEM Act and set out in secondary legislation. Non-statutory guidance can document these delegations and</p>
				<p>++</p> <p>Mandatory requirements can also be clearly expressed in higher level (e.g., regulations).</p>

Criteria	Status quo	Option One – mainly prescriptive framework	Option Two – a structure based on non-legislative instruments	Option Three – a regulatory regime involving new ‘emergency management’ rules
Transparency	Provided that such requirements are exhaustive and well structured, the application of such requirements and enforcement are comparatively straightforward.	Explain in plain English exactly what is required. A high standard of clarity can be achieved through drafting with the target audience in mind.	++	The proposed EM Rules will have reduced legislative compliance requirements compared with other types of secondary legislation. This will facilitate regulatory stewardship and enable NEMA to keep the rules up to date.
Navigability	The purpose of the framework and how it will be applied can be stated clearly via prescriptive purpose statements in the legislation.	-	As non-legislative instruments, there will be no established processes in legislation, making this option less transparent than the other two.	++ ++ ++
Risk-based	Is difficult to navigate, requiring users to search through hundreds of pages of primary and secondary legislation to find a particular provision.	0	Prescribing all requirements in sufficient detail to address the lack of clarity identified by TAG would result in a more voluminous framework that would even more difficult to navigate.	+ ++ ++ ++ ++
			Updating a framework based on prescriptive legislation to keep up with an ever-changing risk map would involve a complex and lengthy process. In this type of structure, it is anticipated that maintenance may become deprioritised, leading to a misalignment between the risk map and legislation.	0 0 0 0 0

Criteria	Option One – mainly prescriptive framework	Option Two – a structure based on non-legislative instruments	Option Three – a regulatory regime involving new ‘emergency management’ rules
Proportionality	0 There is a disproportionate emphasis on instruments that take too much time and effort to update. Operational requirements in the Plan do not require the legislative lefth of an Order in Council.	0 Interventions to address the risks identified can be prescribed in more detail, however, this is unnecessary to achieve a proportional result and could be regarded as legislative ‘overkill’.	++ Non-statutory guidance can be tailored to target particular outcomes and behaviours with proportionate responses.
Effectiveness	0 Of variable effectiveness. Clear statements of mandatory requirements can facilitate compliance and enforcement, but the lack of durability and flexibility would compromise effectiveness in the long term.	- Of variable effectiveness. However, more prescriptive detail would make such a framework more difficult to maintain, compromising effectiveness in the long term.	++ Generally, more effective than prescriptive frameworks, as clear statements of mandatory requirements in regulations and rules are easier to update and could be backed up with sanctions in the CDEM Act. The proposed EM Rules represent the optimum compromise between legislative effectiveness and flexibility.
Efficiency	0 The current framework requires considerable effort to update. This has discouraged regular updates due the effort and cost involved.	- Highly prescriptive frameworks require considerable and constant effort to maintain and are consequently too costly in comparison with other frameworks.	+ Non-legislative instruments will not be drafted by PCO and have none of the compliance requirements of primary and secondary legislation. They represent the most cost-effective mechanism for implementing emergency management policy.

Criteria	Option One – mainly prescriptive framework	Option Two – a structure based on non-legislative instruments	Option Three – a regulatory regime involving new ‘emergency management’ rules
Status quo 0	<p>Consistent standards can be created and applied to all regulated entities. This satisfies the demand from regulated parties and regulatory staff for certainty and consistency.</p> <p>However, over time this may lead to a ‘set and forget’ approach, with piecemeal updates driven by necessity resulting in inconsistent approaches to regulating participants in the emergency management system.</p>	<p>0</p> <p>Consistent standards can be created and applied to all regulated entities. This satisfies the demand from regulated parties and regulatory staff for certainty and consistency.</p> <p>Although this approach allows for comparatively quick updates, this strength could, in the long term, turn out to be a weakness, as there may be a tendency to introduce ad hoc guidance in response to pressing needs.</p>	<p>++</p> <p>As secondary instruments, EM Rules will be more likely to achieve consistency and predictability. This is because:</p> <ul style="list-style-type: none"> • Rules must comply with the Legislation Guidelines • Consultation with specified interests will be mandated in primary legislation.
Consistency and predictability	<p>The current legal framework has some serious omissions and does not reflect modern drafting practice. It is no longer fit for purpose and maintaining the Status Quo will, over time, result in an increasing ineffective legal framework.</p>	<p>This option, while offering some advantages in terms of clarity and specificity, is too difficult and costly to maintain. Adopting this approach would exacerbate some of the issues with the existing framework.</p>	<p>Option three combines flexibility and responsiveness with the ability to impose mandatory requirements on participants in the emergency management system. This approach therefore represents the best compromise between flexibility and enforceability to achieve effectiveness.</p>
Overall assessment		<p>Option Two has the highest level of flexibility and responsiveness. However, it is ultimately unenforceable and as a result of this, a framework based on this option could become largely ineffective.</p>	

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

58. Option Three, a legal framework involving a new rule-making power for the Chief Executive of NEMA, is the only option that will fully address the issues, meet the policy objectives, and deliver the highest net benefits.
59. This option was selected in preference to options one and two because:
 - Option One, a mainly prescriptive framework, has too many drawbacks in terms of flexibility and responsiveness and would reproduce many of the problems with the Status Quo.
 - Option Two, a structure based on non-legislative instruments, is very flexible and responsive, but ultimately suffers from a lack of enforceability.

Option Three will address the problem, meet the objectives and deliver the benefits

60. The new rule-making power will have a key role in ensuring the resilience of the primary legislation. In this context, resilience refers to the problem of enabling the law to be clear and certain, yet able to adapt to changing conditions while staying true to its purpose and constraints.
61. To enhance the resilience of the CDEM Act, it is proposed that administrative procedures and technical detail be delegated to the new rules through an empowering clause. In this way, the ability of the legislative component of the framework to be resilient in the face of changed circumstances can be improved.
62. Setting mandatory requirements through secondary instruments would be an effective means of addressing incidents where a participant in the emergency management system has refused to carry out their roles and responsibilities despite these being clearly documented. Anecdotal evidence from NEMA staff in the regions indicates that emergency management actors have refused to carry out their assigned role on the grounds that ‘...it’s not in the [CDEM] Act...’ This attitude, combined with the lack of penalties for non-compliance noted by the Technical Advisory Group, indicates that there is still a place for specifying mandatory requirements in legislation.⁸ However, this doesn’t need to be exclusively in primary legislation. Supported by an effective enforcement regime in the CDEM Act, secondary instruments such as rules can be used to assert the roles and responsibilities of all participants in the emergency management system.

Flexibility, responsiveness and durability

63. Flexibility and responsiveness will be enhanced by the new rule-making power in the CDEM Act. The current CDEM Plan could be reconfigured as a series of discrete ‘EM Rules’. This would address some of the concerns raised informally by our stakeholders, who have indicated their dissatisfaction with the lengthy and complex legislative

⁸ [Ministerial Review: Better Responses to Natural Disasters and Other Emergencies in New Zealand - Technical Advisory Group - 18 January 2018 \(dpmc.govt.nz\)](#)

approval process for the CDEM Plan, as set out in the CDEM Act.⁹ The CDEM Plan could, for example, be reconfigured into subject matter based rules such as Lifeline Utilities, welfare services and building management, or into a structure based on functional roles or the 4Rs.

64. In contrast, Option One (a prescriptive approach) would exacerbate some of the key issues with the existing framework identified above:
- inflexibility
 - lack of durability
 - poor navigability
 - lack of clarity.

Effectiveness and efficiency

65. Option Two is a form of soft regulation based on a combination of non-binding guidance and relationship instruments. However, guidance and relationship instruments are unenforceable. Despite its appeal for flexibility and allowing efficient innovation, where participants have little or no reputational investment, soft regulation could result in non-compliance, as the 'soft regulations' are viewed as optional.
66. In the long term under Option Two, a lack of buy-in and non-compliance could endanger the achievement of NEMA's strategic goals by undermining its ability to act as a system steward and assurer.
67. Though somewhat less flexible than guidance, EM Rules have the advantage of enabling NEMA to set mandatory requirements without the complex and lengthy compliance processes required by primary legislation and regulations. Under the Legislation Act and Secondary Legislation Act, the proposed EM Rules will be secondary legislative instruments and will have the power to require compliance from participants in the emergency management system. This power will address one of the key concerns raised by NEMA staff that participants can and do refuse to comply due to the requirement not being in the legislation.
68. Option Three is also a more cost-effective approach than the Status Quo and Option One. It is anticipated that the bulk of the CDEM Plan will be reformatted into EM Rules.¹⁰ In this way, the lengthy and costly process to develop, draft and approve the CDEM Plan will be avoided. That is, there will no requirement for:
- legal drafting by Parliamentary Counsel Office and
 - the Minister to present the proposed CDEM Plan to the House of Representatives at least 90 days before recommending the making of the CDEM Plan.
69. Option Three therefore represents an optimal compromise between the effectiveness of primary legislation (Option One) and the flexibility of guidance and relationship instruments (Option Two).

⁹ Principally, the requirement for drafting by Parliamentary Counsel Office and 90 days of public consultation.

¹⁰ The CDEM Plan can be reformatted into either a series of discrete rules, or a single set of rules. Regulations may also be required for matters such as Critical Infrastructure.

Role clarity

70. In its report,¹¹ the TAG noted that CDEM legislation is not as clear as it should be. TAG regularly heard that the authority to act, or the authority to task someone, either does not exist or is not clear. This situation can lead to a lack of coordination, no one really in charge, and the risk of poor outcomes for the community.
71. The authority to act and the authority to task someone to act is spread across both primary and secondary legislation (see Part 4 Management of Emergencies in the CDEM Plan). EM Rules will provide NEMA with an additional tool that is more flexible and responsive than the current CDEM Plan. This flexibility will enable NEMA to quickly update a rule where an emergency event has revealed that the authority to act or to task someone to act is unclear in a specific (and potentially unforeseen) set of circumstances. The reduced legislative compliance requirements compared with the current CDEM Plan will also help NEMA to keep the rules up to date.
72. As an in-house instrument, NEMA can work directly with stakeholders to ensure that the rules are drafted and refined in a manner appropriate for the intended audience. Although adopting EM Rules will not in itself resolve the role clarity issues, it will provide NEMA with an effective tool to do so.

Relationship management

73. Successful emergency management planning and responses require strong collaborative working relationships to achieve shared objectives. A prescriptive regime such as that in Option One doesn't necessarily include a fully developed command and control structure of relationships. However, given that prescriptive regimes tell those involved in the regulatory system what to do and how to do it, such regimes tend to emphasise this style over other more collaborative styles.
74. Option Two would tend to be ineffective without a supporting structure where:
 - compliance personnel (internal inspectors) have clout, with supported authority to invoke consequences for non-compliance
 - clear lines of meaningful accountability for compliance performance placed online managers
 - compliance performance is monitored, and poor performance is communicated as unsatisfactory
 - processes are set so that problems are communicated to those who can resolve them
 - compliance training and supervision that is mandatory and meaningful.

Risks and mitigations

75. Options One and Two entail critical risks that cannot be meaningfully mitigated:
 - As a prescriptive framework based on primary legislation, option one suffers from a critical lack of flexibility, durability and responsiveness. There are no mitigations available that would address these problems.

¹¹ [Ministerial Review: Better Responses to Natural Disasters and Other Emergencies in New Zealand - Technical Advisory Group - 18 January 2018 \(dpmc.govt.nz\)](https://dpmc.govt.nz/ministerial-review/better-responses-natural-disasters-and-other-emergencies-new-zealand-technical-advisory-group-18-january-2018)

- As a form of ‘soft’ regulation, Option Two is inherently unenforceable and therefore in the long term, ineffective.
76. The key risks for option three are potential concerns about inadequate consultation and the excessive delegation of law-making authority as a result of the lack of ministerial approval of EM Rules. This risk can be mitigated by the adoption of a range of safeguards. Safeguards provide a vital check on the exercise of the Chief Executive’s power. Under Standing Order 327(2), the Regulations Review Committee (the Committee) can provide this accountability assurance by drawing the Rules to the attention of the House if the Committee considers the rule or regulation exceeds the mandate of its empowering legislation.
77. The proposed rules will be designed to prevent exceeding the mandate of empowering legislation by ensuring that:
- each rule supports the purposes of the new EM Act and is made in accordance with its general objects and intentions
 - there are no provisions in the rules relating to detention and seizure of property that could be interpreted as trespassing on personal rights and liberties
 - no rule exceeds the specifications and limitations on the powers conferred by the empowering provision in the EM Act in an unusual or unexpected way
 - any provision relating to the rights and liberties of persons, and to reviews of decisions, are restricted to primary legislation
 - the empowering provision in primary legislation does not permit a rule to exclude or infringe on the jurisdiction of any court
 - there is no capacity for the retrospective application of a rule in the EM Act’s empowering provisions
 - every rule is made in accordance with the notice and consultation requirements stipulated in the primary legislation.
78. The limited subject matter of the EM Rules will also act as a safeguard against exceeding the mandate of the empowering legislation. EM Rules will be limited to administrative, operational and technical matters, including:
- prescribing the form and content of emergency management plans at the national, regional and local levels
 - specifying the roles and responsibilities of participants in the emergency management system under specific conditions
 - prescribing forms for the purposes of the CDEM Act and any rules and regulations made under it
 - prescribing technical standards, performance standards, operating practices and procedures, operating systems, organisational arrangements, training systems, and qualifications for the purposes of the CDEM Act
 - prescribing reporting requirements that Groups must comply with
 - providing for the establishment of shared emergency management services agreements
 - prescribing the form and use of identification passes, warrants, badges, or other insignia
 - providing for the establishment, maintenance, control, and operation of warning systems

- prescribing the level of competence or standard to be met by persons carrying out specified emergency management functions, and
 - providing for the identification and promotion of emergency management services.
79. As an additional safeguard, it is envisaged that the empowering provision in the Bill will set out a transparent and participatory development process for the rules. This process will provide for initial and repeated engagement with iwi and Māori partners and other stakeholders to ensure that these groups are involved in development and implementation throughout the rule-making process.
80. Through adherence to Standing Orders and to the Legislation Design and Advisory Committee (LDAC) Legislation Guidelines, along with design principles that reflect previous Committee decisions, it is intended that the form or purpose of the proposed rules will not require elucidation by the Committee.

Accessibility and navigability

81. LDAC has expressed general concerns about secondary legislation in relation to:
- accessibility – secondary legislation can be difficult to access, being distributed over the Legislation Online website and agency websites
 - navigability – multiple layers of secondary legislation can create complexity and fragmentation in a regime, making it difficult for readers to find and understand the law.
82. One of the key objectives in this project is to streamline and rationalise the existing body of secondary legislation and guidance. Introducing a new type of secondary legislation into the legal framework may seem contrary to this objective and could potentially give rise to extra paper and more work for our stakeholders. However, this will not be the case under the new framework, as stakeholders will have access to an easily navigable and integrated volume of legislation and guidance. Our intention is that stakeholders will be able to quickly access the information they need when they need it.
83. One option for achieving this is the development of an online resource integrating and linking all elements of the proposed legal framework. Similar to an online manual, this resource would allow users to access all parts of the framework from a single location through browsing a folder system, hyperlinks and a search engine.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option (Option Three) compared to taking no action			
Civil Defence Emergency Management Groups	Possible one-off cost when the local CDEM plans are reviewed	Not monetised (likely to be low)	Medium
Iwi and Māori	Low	Low	High
Regulator – NEMA	1. The costs of drafting and implementing the new framework will be	1. None	Medium

	<p>accommodated within the programme budget.</p> <p>2. Ongoing maintenance is not expected to increase and will be accommodated within baseline expenditure.</p> <p>3. Possible one-off cost to develop an online resource for the new framework. Staff time will be accommodated within baseline expenditure.</p>	2. None	
Others:	None	Low	High
Total monetised costs		Low	Medium
Non-monetised costs		Low	Medium

Additional benefits of the preferred option compared to taking no action			
Civil Defence Emergency Management Groups	Efficiency gains from having a legal framework that directly addresses their needs	Medium	Medium
Iwi and Māori	Improved relationships as a result of implementing a framework that formally recognises the principles and spirit of the Treaty.	High	Medium
Regulator – NEMA	Long term efficiency gains due to a framework that can keep up with the pace of change	High	High
Others	None	None	High
Total monetised benefits		Medium	Medium
Non-monetised benefits		Medium	Medium

Section 3: Delivering an option

How will the new arrangements be implemented?

84. Implementation of the new legal framework is dependent on the passage of the EM Bill through Parliament. Commencement is currently timetabled for 1 December 2022. Provided the empowering provisions for the proposed EM Rules are passed without amendment, implementation of the EM Rules can begin following commencement.
85. Re-drafting the considerable volume of primary and secondary legislation and guidance into the new EM Rules is expected to take around 1-2 years. This timeframe depends on the extent to which progress can be made with the re-drafting in the period between introduction and commencement. It is anticipated that some matters, such as the translation of requirements inappropriately mandated in guidance, can be re-drafted into EM Rules relatively quickly. Consultation on EM Rules covering these matters can begin immediately following commencement, with implementation following in around 1-2 months.
86. A decision regarding the format of the CDEM Plan under the new framework has yet to be made. Two options are available for re-formatting the legislative elements¹² of the CDEM Plan into EM Rules:
 - all legislative elements are combined into one integrated set of rules
 - the CDEM Plan is re-formatted into a series of discrete rules structured around, for example, the 4Rs, subject matter, or function.

How will the new arrangements be monitored, evaluated, and reviewed?

87. As a newly established and comparatively small departmental agency, NEMA's evaluation and monitoring framework has not yet reached optimal maturity. A project has been initiated to consolidate existing governance, reporting and monitoring processes into an organisation-wide framework, develop more meaningful performance measures and improve internal and external reporting (e.g. to Minister/s, Select Committee, Hazard Risk Board, Office of the Auditor General/Audit New Zealand).
88. The NEMA Senior Leadership Team (SLT) will oversee the implementation of the new arrangements through existing governance arrangements. Monitoring and performance reports will follow the same frequency as other NEMA programmes (monthly programme reports, quarterly intervention reports). An escalation pathway will be available to senior responsible officers to ensure issues impacting implementation are addressed in a timely manner.
89. Any minor and technical changes required will be implemented via an omnibus rules update, with more substantive changes being made only after consultation. Feedback from users will be obtained through surveys and by operational staff escalating any questions or complaints about the rules to the nominated head office staff member.

¹² The CDEM Plan currently contains a considerable volume of information that is non-legislative in nature, such as introductions and lists. It is proposed to incorporate such material into guidance.

Part B – Legislative arrangements for the critical infrastructure sector

What is the policy problem or opportunity?

Current legislative arrangements

90. The CDEM Act and the CDEM Plan provide for the obligations that relate to Lifeline Utilities across five infrastructure sectors:
 - Water (potable, storm and wastewater)
 - Energy (electricity, liquid fuel and gas)
 - Transport (air, marine and land)
 - Telecommunications, and
 - Broadcasting.
91. The Lifeline Utilities provisions in the existing CDEM framework are the only statutory provisions that set out the government's expectations for how Lifeline Utilities should prepare for, respond to and recover from emergencies.
92. Over recent years, it has become apparent that the current provisions are no longer fit for purpose, so a working group focused on Critical Infrastructure has been established under the Regulatory Review Programme. It includes NEMA officials alongside representatives from the Department of the Prime Minister and Cabinet, The Treasury, New Zealand Lifelines Council and local CDEM Groups. Te Waihanga, the New Infrastructure Commission, has also been involved in an advisory capacity.
93. The proposed amendments highlighted in this RIS have been developed by the working group, and reflect the discussions, research and engagement undertaken to date from sector engagement. The working group also considered comparative legislation in other jurisdictions including Australia, Canada, South Africa and EU countries.
94. The current Lifeline Utilities provisions are insufficient to provide a reasonable level of assurance that critical services will continue to be provided during and after an emergency event. Unless remedial action is taken, the risk of a Lifeline Utility refusing or failing to provide critical services in the course of an emergency event will continue to increase. The threat to life, property, community and the economy posed by a failure of Lifeline Utilities is too great to allow the current provisions to remain in place.

The current Lifeline Utilities provisions need to be updated

Definition of ‘Lifeline Utilities’

95. The definition of Lifeline Utilities needs updating to make it more current, accurately reflect the criticality of identified infrastructure and services, better aligned with other OECD countries and is fit for purpose.
96. Almost all of the OECD countries, including Australia, have moved away from the term ‘Lifeline Utilities’. They consider ‘Critical Infrastructure’ to more accurately encompass

the infrastructure and services that underpin the functioning of society and the economy, and that are integral to the prosperity of the nation.

97. Reflecting their more holistic view of ‘Critical Infrastructure’, these countries also include a broader range of sectors under their definition of that which is necessary for society and economy to function. Other such sectors include Health, Food and Grocery, Financial Services, and Government. Some countries go as far as to include manufacturing, emergency services and commercial facilities as Critical Infrastructure.

Obligations

98. There are a number of gaps and inconsistencies with the obligations on Lifeline Utilities currently outlined in the CDEM Act and the CDEM Plan. Specifically:
- The current wording for primary obligations for Lifeline Utilities is that they ‘be operational to the fullest possible extent, even if it is at a reduced level’. This is vague and not measurable. There are no mechanisms set out in the CDEM Act for sectors to establish minimum service levels or provide assurance of performance during and after an emergency event.
 - There is also a lack of consistency around the duties laid out in the CDEM Act and the CDEM Plan. Some duties currently only apply when there is a declared state of emergency, which limits CDEM’s ability to enforce required levels of service.
 - The Act allows for supporting plans for Lifeline Utilities but does not impose an obligation for Lifeline Utilities to create sector-specific response plans that would enable effective and efficient response during major disruption to services. Currently the only supporting plan that exists is the National Fuel Plan.
 - There is also no obligation for Lifeline Utilities to proactively report on how well the various organisations/entities in a sector are meeting their obligations under the CDEM framework.
 - There is currently no provision for Lifeline Utilities to provide assurance that they are meeting the requirements set upon them in the CDEM Act and/or the CDEM Plan.
 - There are also no requirements for Lifeline Utilities to proactively share information before, during and after emergencies.

Legislative Considerations

99. Parts A and B of Schedule 1 in the CDEM Act list all the Lifeline Utilities. However, this schedule has not been updated since 2002, and requires considerable time and effort to update.
100. Additionally, there is a level of confusion amongst Lifeline Utilities around whether the CDEM Act or the CDEM Plan is the more appropriate document for items outlining duties and guidance.

Infrastructure Failure as a Hazard

101. Infrastructure Failure is a named hazard in the CDEM Plan. Currently, NEMA is identified as the lead agency for this hazard, however NEMA does not have the technical expertise to fulfil the obligations of a lead agency, should critical infrastructure be disrupted. Therefore, there is a need to identify appropriate agencies to lead a response to infrastructure failures from a variety of sectors, and to lead the coordination of risk assessment and reduction strategies.
102. NEMA is progressing the proposals regarding Lifeline Utilities to address the weaknesses identified above. The proposals range from matters of definition which

may be relatively simply agreed and implemented, to relatively more complex matters of regulation and oversight.

What objectives are sought in relation to the policy problem?

103. The Critical Infrastructure proposals have the following objectives:

- Better define 'Critical Infrastructure' so that it encompasses services that are essential for everyday life and aligned with international best practice.
- Create flexibility to assess and capture sectors and services that meet the definition of Critical Infrastructure and are aligned with other jurisdictions.
- Strengthen the definition of, and obligations on Critical Infrastructure providers to maintain, service level requirements before, during and after disasters.
- Strengthen arrangements to enhance resilience of critical infrastructure through close collaboration and enhanced monitoring with Critical Infrastructure providers
- Clarify roles and responsibilities of lead agencies for risk assessment, mitigation/reduction and response for critical infrastructure failure.
- Provide assurance that Critical Infrastructure providers are meeting their legislated responsibilities.
- Strengthen requirements for proactive information sharing for situational awareness before, during and after emergencies.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the Status Quo?

104. The proposals will be assessed against the following design principles, where applicable:
- The selected option must:
 - reflect the principles of the Treaty of Waitangi and fulfil the Crown's obligations under it.
 - be consistent with the fundamental rights and freedoms set out in the Bill of Rights Act and the Human Rights Act.
 - comply with the information privacy principles and codes of practice set out in the Privacy Act 2020.
 - allow for the implementation of commitments made under various international instruments, for example, the Sendai Framework.
 - not depart from the default approach in the Legislation Guidelines produced by the Legislation Design and Advisory Committee.
 - Responsiveness – NEMA must consider the wider context to enable NEMA to determine in that context which is the best regulatory intervention or the best balance of interventions.
 - Legitimacy – important policy content should be a matter for Parliament to determine in the CDEM Act through an open democratic process. Too much delegation or having delegated powers that are too broad or uncontrolled, undermines the transparency and legitimacy of the law. However, it is not necessary for Parliament to do everything, as Parliamentary time is scarce, this time is best spent on the policy issues, not details.
 - Durability and flexibility – delegation can be important to how a law (and the regulatory system it is part of) performs over time in terms of responding to changing or unforeseen circumstances or allowing minor flaws to be addressed. Delegation can give an opportunity for experimentation. Delegation can also allow emergencies to be dealt with quickly, which can be important at least for short-term solutions.
 - Clarity – if too much policy content is delegated or delegations are given to different decision makers without clearly scoped mandates, clarity about what is required by the law can be undermined.
 - Transparency – transparency about the underlying purpose of the new legal framework, the way in which it will be applied and enforced and all underlying documents and information are critical to engender support for the regulatory response and to foster a willingness to co-operate and participate constructively in adaptation
 - Navigability – too much technical detail in an Act might make it difficult to navigate. However, multiple layers of secondary legislation can create complexity and fragmentation in a regime, making it difficult for readers to find and understand the law.

- Risk-based – the proposed regulatory interventions need to ensure that current and possible future risks have been identified and assessed and that measures are in place to respond to those risks.
- Proportionality – the strength and costs of the interventions should be commensurate with the impact of the identified risks.
- Effectiveness – regulatory and non-legislative interventions must be effective in addressing the risks identified through the way it is designed, applied and implemented.
- Efficiency – regulatory and non-legislative interventions should represent the most effective response at the lowest overall cost
- Consistency and predictability – regulatory and non-legislative interventions should be inherently consistent and predictable to provide a stable regulatory environment and foster business confidence.

What scope will options be considered within?

105. The proposals to modernise the legislative provisions covering Lifeline Utilities will be considered within the scope of:
- the mechanisms and legislative changes that could be used to make future amendments to Part A and Part B of Schedule 1 nimbler and more flexible
 - amendments to the Lifeline Utilities provisions in section 60 of the CDEM Act 2002 and sections 57-61 of the CDEM Plan to ensure that they are fit for purpose
 - the regulatory tools and instruments appropriate to fulfil objectives of the proposals and how these could be distributed in the CDEM Act and the CDEM Plan
 - non-legislative instruments, such as a performance standards framework and memoranda of understanding, and whether more use could be made of these to set good operational practice and specify who does what and when
 - the most appropriate agencies to act as Lead Agencies for risk coordination and response for each Critical Infrastructure sector.

What options are being considered?

Status quo

106. Under section 60 of the CDEM Act, every lifeline utility must:
- ensure that it is able to function to the fullest possible extent, even though this may be at a reduced level, during and after an emergency
 - make available to the Director of CDEM in writing, on request, its plan for functioning during and after an emergency
 - participate in the development of the National CDEM Strategy and civil defence emergency management plans
 - provide, free of charge, any technical advice to any CDEM Group or the Director of CDEM that may be reasonably required by that CDEM Group or the Director, and
 - ensure that any information that is disclosed to the lifeline utility is used by the lifeline utility, or disclosed to another person, only for the purposes of the CDEM Act.
107. The CDEM Plan sets out further expectation of lifeline utilities, which are to:

- identify and understand the full range of hazards and risks and implement reduction strategies
- prioritise the continuity of operations and supply of services in accordance with response priorities set by the Local Controller, Group Controller, or National Controller (even though this may be at a reduced level)
- plan co-operatively with local authorities, CDEM Groups, emergency services, and other lifeline utilities;
- establish emergency procedures for communication with government agencies, CDEM Groups, emergency services, and other lifeline utilities
- identify examples of best practice, and share and apply them where appropriate
- facilitate solutions to issues that are sector specific and do not require government assistance and support
- develop common and effective approaches to the 4 Rs, which are defined as:
 - **reduction** (identifying and analysing risks to life and property from hazards, taking steps to eliminate those risks if practicable, and, if not, reducing the magnitude of their impact and the likelihood of their occurrence to an acceptable level); and
 - **readiness** (developing operational systems and capabilities before an emergency happens, including self-help and response programmes for the general public and specific programmes for emergency services, lifeline utilities, and other agencies); and
 - **response** (actions taken immediately before, during, or directly after an emergency to save lives and property, and to help communities recover); and
 - **recovery** (the co-ordinated efforts and processes used to bring about the immediate, medium-term, and long-term holistic regeneration and enhancement of a community following an emergency)
- co-ordinate with other lifeline utilities to promote service restoration following an emergency
- provide information on the status of networks to the Emergency Operations Centre, Emergency Coordination Centre and the National Crisis Management as appropriate.

Proposal 1: Replace terminology ‘Lifeline Utilities’ with ‘Critical Infrastructure’

108. This update to the current terminology is more fit for purpose and reflects international practice.

Proposal 2: Defining Critical Infrastructure

109. Lifeline Utilities are currently defined in the CDEM Plan, rather than the CDEM Act. The current definition no longer accurately reflects the criticality of identified infrastructure and services.
110. Rather than amending the definition of Lifeline Utilities, it is proposed to repeal and replace it with a definition of ‘Critical Infrastructure’. This new definition would more closely align with international jurisdictions and be better fit for purpose.

111. The proposed definition of ‘Critical Infrastructure’ will encompass a wider range of infrastructure and services essential for everyday life than Lifeline Utilities. This definition is fit for purpose and aligns with other OECD countries. We propose shifting the definition from the CDEM Plan to the new Emergency Management Act, which will define ‘Critical Infrastructure’ as follows:

“critical infrastructure means essential and enabling assets, systems, networks, and services”

112. For the purposes of this Act, Critical Infrastructure entities are identified in the Critical Infrastructure notice issued under the proposed option as outlined in Proposal 4.

Proposal 3: Assigning a lead agency to each Critical Infrastructure sector

113. ‘Lead Agency’ means the agency with the primary mandate for managing the response to an emergency. Lead agencies are set out in Appendix 1 of the CDEM Plan.

114. Under the CDEM Plan, NEMA is the current lead agency for infrastructure failure. The following initial list of sector-specific lead agencies are proposed to better address critical infrastructure across Aotearoa:

- **Energy (incl. electricity, fuel and gas)** – Ministry of Business, Innovation and Employment
- **Telecommunications (incl. mobile and broadband)** – Ministry of Business, Innovation and Employment
- **Broadcasting** – Ministry of Culture and Heritage
- **Transport (incl. air, land and maritime)** – Ministry of Transport
- **Water (incl. potable, waste and storm)** – Department of Internal Affairs, noting that this may change once a regulator and new entity has been fully established.¹³

115. A recommendation for clarifying lead agency responsibilities was part of the TAG review. As a result of the TAG review, in August 2019 the Hazard Risk Board¹⁴ considered and supported in principle the need to clarify lead agency responsibilities in the above portfolios. This means there is already support across parts of Government for the direction of travel in this proposal.

116. NEMA is continuing to engage with the relevant agencies to clarify roles and responsibilities as part of the Lead Agency workstream under the Regulatory Review Programme.

¹³ Taumata Arowai is the dedicated water services regulator for Aotearoa.

¹⁴ The purpose of the Hazard Risk Board (HRB) is to build a high performing and resilient National Security System able to manage civil contingencies and hazard risks through appropriate governance, alignment, and prioritisation of investment, policy and activity. The HRB is chaired by the Deputy Chief Executive, National Security of the Department of the Prime Minister and Cabinet. HRB membership includes Chief Executives of a range of ministries, departments and agencies.

Proposal 4: Maintaining an up-to-date list of Critical Infrastructure sectors and entities

117. Currently, Lifeline Utilities are listed in Schedule 1 of the CDEM Act and adding or removing an entity requires an Order in Council. This type of legislative arrangement is increasingly seen as inflexible and requires considerable time and effort to make an update.
118. Two options were proposed for designating an entity as critical infrastructure:
- **Option 1: Regulations** – the Bill provides for regulations relating to Critical Infrastructure entities, which could include creating a list of such entities. The Minister would make recommendations based on the application of specified criteria (see Proposal 5).
 - **Option 2: Gazette Notice** – the Minister determines, by way of Gazette notice, all Critical Infrastructure entities. The Minister would be required to consult with NEMA and apply specified criteria (again, see Proposal 5) including minimum requirements for consultation.
119. Option 2 is preferred by NEMA, as publishing gazette notices is a simpler process and a more proportionate approach in relation to the significance of the matter.

Proposal 5: Criteria for considering an infrastructure sector or entity as critical Infrastructure

120. It is proposed to introduce criteria that meets the definition of Critical Infrastructure and aligns us with other jurisdictions. The criteria will support the Minister in deciding which sectors or entities to appoint as Critical Infrastructure sectors or entities (see Proposal 3).
121. The proposed criteria are as follows:

The Minister may declare infrastructure as Critical Infrastructure, if:

- a. The functioning of such infrastructure is essential for the economy, national security, public safety and the continuous provision of basic public and other infrastructure services, and
- b. The loss, damage, disruption or immobilisation of such infrastructure may severely prejudice:
 - i. The functioning or stability of the nation; or
 - ii. The public interest with regards to safety and the maintenance of law and order; or
 - iii. National security.

In determining whether the qualifying requirements contemplated in the section above are met, one or more of the following criteria must be applied:

- a. The infrastructure must be of significant economic, public, social and strategic importance;

- b. The nation's ability to function, deliver basic public services, or maintain law and order may be affected if a service rendered by the infrastructure is interrupted, or if the infrastructure is destroyed, disrupted, degraded or caused to fail;
- c. Interruption of service rendered by the infrastructure, or the destruction, disruption, degradation, or failure of such infrastructure will have a significant effect on the environment, the health or safety of the public or any segment of the public, or any other infrastructure that may negatively affect the functions and functioning of the infrastructure in question;
- d. The declaration as Critical Infrastructure is in pursuance of an obligation under any binding international law or international instrument; and
- e. Any other criteria which may, from time to time, be determined by the Minister by notice in the Gazette, after consultation with the Chief Executive of NEMA.

Proposal 6: Emergency response and recovery plans (or Supporting Plans)

- 122. While the CDEM Act allows for supporting plans, there are gaps and inconsistencies with the obligations on Lifeline Utilities as outlined in the CDEM Act and the CDEM Plan.
- 123. Of particular concern is that the CDEM Act does not impose an obligation on the sector to create sector-specific response plans that would enable effective and efficient response if services were to be majorly disrupted. Currently the only supporting plan which exists is the National Fuel Plan 2020.
- 124. The following requirements are proposed for the development of sector-specific response and recovery plans be included in the CDEM Act:

Each Critical Infrastructure lead agency (or agencies) in collaboration with NEMA and the Critical Infrastructure sector must develop sector specific response and recovery plans (supporting plans section 9) for each sector as described in Schedule 1 outlining the roles and responsibilities for readiness, response and recovery, coordination and communications arrangements.

The response plans are to be updated at 3-year intervals.

Proposal 7: Information sharing requirements before, during and after emergencies

- 125. There is currently no requirement under the CDEM Act or Plan for Lifeline Utilities sectors to proactively share information for situational awareness on a business-as-usual basis and immediately before, during and after emergencies, unless specifically requested by the Director, CDEM.
- 126. To address this gap, it is proposed to include the following requirements in the CDEM Act:

Introducing a requirement for a Critical Infrastructure entity to proactively, and on request, share information about its operational capability and status of their network and services with responsible agencies and other Critical Infrastructure entities provided that the information is reasonably required or desirable to enable the performance of the

responsible agencies or other Critical Infrastructure entities' functions . The sharing of information will also extend to immediately before, during and after emergency events.

Any information provided by Critical Infrastructure entities for Emergency Management purposes will be protected in accordance with (relevant legislative requirements, e.g. Privacy Act 2020).

Proactively Released

How do the options compare to the Status Quo?

Criteria	Status quo	Proposals
Treaty obligations	0 The current legislative provisions do not take into account the spirit and principles of the Treaty.	0 The new arrangements will allow for iwi and Māori interests (the Māori media sector and marae) to be protected under the principle of 'active protection'. However, a proposal to address this problem is still under development. Treaty provisions also overlap with the Bill project.
Bill of Rights Act and the Human Rights Act	0 Not applicable – none of the existing Lifeline Utilities provisions relate to detention or the seizure of property.	0 Not applicable – none of the proposed amendments relate to detention or the seizure of property.
Privacy	0 Not applicable No privacy impacts as there is currently no requirement under the CDEM Act or Plan for Lifeline Utilities sectors to proactively share information.	++ Information obtained under a requirement to share specified information on a proactive basis will be protected under the Official Information Act 1982
International obligations	0 Not applicable	0 Not applicable ++ The proposals are consistent with the 2018 edition of the 'Legislation Guidelines'. However, no public consultation has taken place (see Guideline 2.5) given the highly technical nature of the proposals and their limited impact. The Lifeline Utilities sector, which will be impacted by these proposals, was consulted.
Legislation Guidelines		

Key

- ++ much better than doing nothing/the Status Quo/counterfactual
- + better than doing nothing/the Status Quo/counterfactual
- 0 about the same as doing nothing/the Status Quo/counterfactual
- worse than doing nothing/the Status Quo/counterfactual
- much worse than doing nothing/the Status Quo/counterfactual

Criteria	Status quo	Proposals
Responsiveness	<p>0</p> <p>The Act prescribes the duties of Lifeline Utilities, their addition to and removal from Schedule 1 and the Minister's powers of exemption. Prescriptive legislation cannot keep pace with the changing context of emergency management without a lengthy and complex amendment process. NEMA would therefore be unable to deploy the best regulatory intervention or the best balance of interventions in response to this changing context.</p>	<p>Gazettal is a more efficient process than order in council to add or remove critical infrastructure from Schedule 1. However, the duties of critical infrastructure entities will continue to be prescribed in primary legislation, somewhat constraining NEMA's responses.</p>
Legitimacy	<p>+</p> <p>Upholds the legitimacy of the law in that the requirements set out in the CDEM Act are subject to full parliamentary scrutiny. However, a number of actions 'required' by NEMA (e.g., the provision of information) are not clearly specified in the current legislation and have therefore not been adequately scrutinised by Parliament.</p>	<p>++</p> <p>The legitimacy of the law will be enhanced by specifying all requirements, which will be subject to full Parliamentary scrutiny during the passage of the Bill.</p>
Durability and flexibility	<p>0</p> <p>Parts A and B of Schedule 1 in the CDEM Act list all the Lifeline Utilities, but the CDEM Act is inflexible and requires considerable time and effort to update.</p>	<p>++</p> <p>Determination and notification via a Gazette Notice that an entity has been classified as Critical Infrastructure by the Minister is the most flexible and simplest approach.</p>
Clarity	<p>0</p> <p>There is a level of confusion amongst Lifeline Utilities around whether the CDEM Act or the CDEM Plan is the more appropriate document for items outlining duties and guidance. The Act does not define Lifeline Utilities. They are defined under the CDEM Plan.</p>	<p>++</p> <p>Incorporating the definition of critical infrastructure into the new Act will remove doubt about which instrument applies.</p>
Transparency	<p>0</p> <p>The current definition of Lifeline Utilities and the process for classification as a lifeline utility is unclear or missing.</p>	<p>++</p> <p>The proposed definition of critical infrastructure and the criteria for classification as a critical infrastructure entity will align New Zealand with other jurisdictions and make the classification process transparent.</p>
Navigability	<p>0</p> <p>Not applicable – no navigability issues.</p>	<p>0</p> <p>Not applicable – no navigability issues.</p>

Criteria	Status quo	Proposals
Risk-based	In the current system, some information is provided by Lifeline Utilities to enable a certain level of risk analysis.	<p>Improved information requirements will enhance NEMA's risk analysis capabilities.</p> <p>++</p>
Proportionality	Prescribing requirements for Lifeline Utilities in the CDEM Act is proportionate to the critical importance of providing for the continuity of Lifeline Utilities in an emergency.	<p>Prescribing requirements for critical infrastructure in the CDEM Act is proportionate to the critical importance of providing for the continuity of critical infrastructure in an emergency.</p> <p>++</p>
Effectiveness	Effectiveness is currently constrained due to the CDEM Act being weak in relation to the role and responsibilities of Lifeline Utilities within the emergency management system.	<p>Clarification of information and planning requirements, along with improvements to the processes for assigning lead agency and critical infrastructure status will increase the effectiveness of critical infrastructure entities within the emergency management system.</p> <p>++</p>
Efficiency	Addition to, and removal from, the list of Lifeline Utilities in Schedule 1 of the CDEM Act involves an Order in Council, an unnecessarily complex and time-consuming process.	<p>Determination and notification via a Gazette Notice that an entity has been classified as Critical Infrastructure by the Minister is the most flexible and simplest approach.</p> <p>++</p>
Consistency and predictability	There is a lack of consistency around the duties laid out in the CDEM Act and the CDEM Plan. Some duties currently only apply when there is a declared state of emergency, which limits CDEM's ability to enforce required levels of service	<p>Setting out these duties in the CDEM Act will remove the inconsistency and enable critical infrastructure entities to accurately predict their obligations in particular emergency and other situations.</p> <p>++</p>
Overall assessment	The current framework has a number of gaps and weaknesses that needs addressing. The current framework also needs modernising and better aligned with comparative international jurisdiction and best practice.	<p>The changes proposed will lead to a more modern and fit for purpose legislation for Lifeline Utilities. The changes also enhance the resilience, response and recovery planning and collaboration amongst critical infrastructure entities that will help reduce impact of disasters on our communities and economy.</p>

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

Proposal 1: Replace terminology ‘Lifeline Utilities’ with ‘Critical Infrastructure’

127. The change to ‘Critical Infrastructure’ would modernise the framework and would more accurately reflect the work carried out across the sector.

Proposal 2: Defining Critical Infrastructure

128. The proposed definition of ‘Critical Infrastructure’ will encompass a wider range of infrastructure and services essential for everyday life than Lifeline Utilities. This definition is fit for purpose and aligns with other OECD countries.

Proposal 3: Assigning a lead agency to each Critical Infrastructure sector

129. A recommendation for clarifying lead agency responsibilities was part of the TAG review. As a result of the TAG review, in August 2019 the Hazard Risk Board considered and supported in principle the need to clarify lead agency responsibilities in the above portfolios. This means there is already support across parts of Government for the direction of travel in this proposal.
130. Adopting this proposal would improve sector-based synergy, ensure coordination and communication, and allow for clear direction without ambiguity. However, NEMA will need to consider:
 - the relationship between regional and local infrastructure to ensure that effective response and coordination is not compromised, and
 - trade-offs between public and private ownership, and centralised vs diverse providers.

Proposal 4: Maintaining an up-to-date list of Critical Infrastructure sectors and entities

131. Public notification that the Minister has designated an entity as critical infrastructure is a simpler and more flexible approach than developing regulations or amending Schedule 1 by Order in Council.
132. Gazette Notices are also a more proportionate (in relation to the significance of the matter) approach than a process based in primary or secondary legislation.

Proposal 5: Criteria for considering an infrastructure sector or entity as critical Infrastructure

133. Adopting the proposed criteria will align New Zealand with international practice and support the Minister in deciding which sectors or entities to appoint as Critical Infrastructure sectors or entities.

134. Formal criteria available to the public will also improve transparency of decision-making by the Minister.
135. The criteria along with the definition of Critical Infrastructure and the obligations imposed means that the list of Critical Infrastructure entities and sectors is not expected to be reviewed frequently. There are a few entities and sectors that may meet the requirement.

Proposal 6: Emergency response and recovery plans (or Supporting Plans)

136. The requirement to develop sector-specific national response plans enable effective and efficient response if services were to be majorly disrupted.

Proposal 7: Information sharing requirements before, during and after emergencies

137. Requiring critical infrastructure entities to proactively share information about their operational capability and status of their network and services with responsible agencies and other Critical Infrastructure entities will improve situational awareness during an emergency event for both NEMA and the sector. These provisions are to be carried out in accordance with the privacy and commerce commission requirements for sharing information during an emergency.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulators – responsible lifeline utilities sector regulating agencies	<ol style="list-style-type: none"> Cost of developing lead agency capability where applicable Cost of supporting sector in developing response plans 	<ol style="list-style-type: none"> Not monetised – low for some agencies and medium for others Not monetised (likely to be low) 	Medium
Regulators - NEMA	Cost of implementation and supporting embedding of proposed changes	Not monetised	Medium
Lifeline Utilities	<p>The proposed changes do not impose any additional cost on lifeline utilities as the changes are able to be absorbed under their business as usual planning. The consultation feedback also reflected low impact for their businesses. The planning pieces of work are long term planning programs and the Lifeline Utilities are already required to support planning CDEM planning under current legislation. The new proposals provide more structure and focus on these planning areas.</p> <p>The cost burden may be high for entities that are not currently lifeline utilities but may be identified as critical infrastructure in future. The RIS is based on the existing entities.</p> <p>There will be separate RIS for when the recommendation is made to the Minister on update to schedule 1.</p>	Not monetised	High
Total monetised costs		Not monetised	Medium
Non-monetised costs		Medium	Medium

Additional benefits of the preferred option compared to taking no action			
Regulators	Clarity of roles and responsibility and CDEM Act providing better tools in building resilience of critical infrastructure sector	Not monetised	Medium
Lifeline Utilities	Clarify of roles and responsibilities and better understanding of outputs required	Not monetised	Medium
New Zealand public	Clarity of levels of services expected post disasters and helping communities to prepare accordingly	Not monetised	Medium
Total monetised benefits		Not monetised	Medium
Non-monetised benefits		Medium	Medium

Section 3: Delivering an option

How will the new arrangements be implemented?

138. The critical infrastructure implementation plan will support entities and agencies in understanding the new arrangements, including education and support in developing capability and capacity.
139. Transitional provisions in the Bill will allow for a reasonable embedding period for the impacted parties.

How will the new arrangements be monitored, evaluated, and reviewed?

140. There is further work being done under the Critical Infrastructure workstream on reporting, monitoring and evaluation requirements for Critical Infrastructure as part of this program.

Part C – Recognition of iwi/Māori contribution to the emergency management system

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the Status Quo expected to develop?

Context – iwi and Māori contribution to emergency management

141. The emergency management system is a dispersed network of people and organisations that come together as part of a formal system to plan for, respond to, and recover from emergencies. Iwi and Māori appear across this network of people and organisations within the system.
142. At the system level, Māori may:
 - contribute as part of Civil Defence Emergency Management (CDEM) Group Joint Committees
 - be represented on CDEM Group Co-ordinating Executive Groups
 - be local government elected officials
 - develop their own initiatives mandated by their own governing structures (such as rūnanga).
143. At the organisational level, Māori may:
 - be members of their local Emergency Operations Centre
 - be an emergency management professional (through employment by the local council or Police, for example).
 - be part of a dedicated emergency management team within a national agency
 - deliver an emergency response from their NGO or marae or other Māori entity
 - provide all manner of services through business or not for profit structures.
144. At the people level, Māori may:
 - volunteer wearing a range of hats (from a marae trust board treasurer, through to providing food parcels during a response)
 - be a Māori Warden
 - be an essential worker
 - be a recipient of emergency management services.

Status quo

145. The contribution by iwi and Māori to emergency management is a part of the Status Quo but is not reflected in the structures and legal framework supporting it. Contributions to the management of emergency events by iwi and Māori without representation and recompense are not sustainable indefinitely given:

- that iwi and Māori provide services for the communities in which they are located,
- the increasing cost burden of providing these services.

What is the policy problem or opportunity?

Context

146. In its report, TAG recommended that the Government:
- recognise the capability that iwi and Māori bring to emergency management,
 - legislate to enable iwi to participate in planning for and responding to a natural disaster or other emergency.
 - bring clarity to their role.
147. In particular, the TAG recommended that appropriate iwi and Maori representatives:
- be part of Civil Defence Emergency Management Group (CDEM Group) Coordinating Executive Group (CEG); and
 - be included on the CDEM Group JCs.
148. The Government agreed with the TAG that iwi should play a formal role in CDEM Groups. It supported the inclusion of iwi and Maori representatives on CEGs but disagreed with the TAG's recommendation that iwi be represented on JCs.
149. Since the Government published its response to the TAG, it has strengthened its commitment to iwi and Māori, and to Te Tiriti o Waitangi. This is reflected in a range of wider developments such as the passage of the Public Service Act 2020 and the establishment of Te Arawhiti – the Office for Māori Crown Relations.
150. In parallel, there have been an increasing number of emergency responses ranging in scale and complexity. These have reinforced the significant role of iwi/Māori in emergency management, and the need to recognise this role appropriately, clarify Government expectations of CDEM Groups, and reflect the intent of the National Disaster Resilience Strategy.
151. These shifts mean there is value in revisiting the Government's original response to TAG with respect to iwi/Māori involvement in JCs.

Problem definition

152. The current arrangement is inequitable and inconsistent with the principles of the Treaty. Specifically it does not represent partnership as it does not allow for a direct relationship between Māori and the Crown, nor kāwanatanga as it does not support Māori to govern their own activities, nor rangatiratanga as it does not enable the autonomy of Māori. In addition, it does not support oritetanga as it does not allow for a range of options to support improved outcomes for Māori as citizens.
153. In reviewing the Status Quo, TAG noted that marae are often well resourced to provide assistance during an emergency event. TAG also noted that they had received many submissions from iwi and others who responded rapidly to community needs but were excluded from operations discussions. In some emergencies, iwi and Māori were not consulted at all during the response phase or included so late that they felt insulted.

154. Allowing the Status Quo to remain in place is incompatible with the trajectory of the Māori-Crown Treaty relationship or the reality of ongoing, significant contributions of iwi and Māori to emergency management. Long-term, this could lead to deteriorating Crown-Māori relations and will exacerbate the ill-feeling noted by TAG. Relations at the local and regional levels may also be undermined, potentially impairing the effectiveness of emergency responses and undermining the contribution iwi and Māori make to the emergency management system.
155. To address the policy problem, change is required to ensure that iwi and Māori are involved at every level of the emergency management system.

Better outcomes for iwi and Māori beyond emergency management

156. There is value in building an enduring partnership with iwi/Māori extending beyond the context of emergency management. Actively supporting Māori representation in emergency management can deliver better outcomes for Māori more broadly, for example as a means of:
 - demonstrating explicit recognition of iwi/Māori as Treaty partners of the Crown, and the mana that is afforded by that;
 - developing and maintaining Māori influence and recognition by providing for inclusion in decision-making and policy development at a local and national level; and influence in critical issues such as building community resilience;
 - acknowledging the disproportionate impact of emergencies on Māori communities, ensuring the system is working for Māori at the national and local level (for example by promoting an understanding of the needs of / advocating on behalf of whanau / hapū / iwi);
 - reinforcing the contribution of Mātauranga Māori and promoting Māori language, culture, identity, values and perspectives (for example by drawing on this to shape how we respond to and recover from events, particularly at the local level);
 - providing an additional source of mutual learning opportunities including for emergency management training and development.
157. Changes to the CDEM Act will contribute to the realisation of these outcomes, particularly by carving out formal space for iwi to influence and shape emergency management.

What objectives are sought in relation to the policy problem?

158. By addressing the policy problem, NEMA intends to achieve the following objectives:
 - the establishment of an inclusive, fit for purpose emergency management system that enables the Crown, CDEM Groups and other participants to work with iwi and Māori in accordance with Treaty principles to achieve shared goals
 - the building of enduring relationships with iwi and Māori to promote better outcomes for iwi and Māori beyond emergency management.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the Status Quo?

159. The proposals will be considered against the following principles of the Treaty of Waitangi (the Treaty):

- Kāwanatanga – this principle derives from Article 1 of the Treaty. Kāwanatanga does not have an exact equivalent in English, and has been variously understood as ‘governorship’, ‘governance’, ‘government’, and ‘sovereignty’. In the context of emergency management, kāwanatanga is used to describe the concept of governance.
- Rangatiratanga – this principle recognises Māori autonomy and self-determination, as guaranteed in Article 2 of te Tiriti. Active protection of tino rangatiratanga is required to ensure that iwi and hapū are able to express their autonomy in the maintenance and development of their language and their culture.
- Oritetanga – Article 3 of te Tiriti contains a provision which guarantees equality between Māori and other citizens.¹⁵
- Partnership – this is frequently described as an overarching tenet requiring the parties to act reasonably, honourably and in good faith.

What scope will options be considered within?

160. The options for change will be considered within the scope of a participatory design process rather than a co-design process. Iwi and Māori will contribute to the development process, but the final design decisions will rest with the Crown as the party responsible for legislation and the disbursement of funds.

161. The scope will also be defined by the contributions to emergency management that iwi and Māori make of their own accord, within their own governing structures and with their own money.

What options are being considered?

162. Five proposals are being considered:

- Proposal One – iwi and Māori representation in CDEM Groups
- Proposal Two – providing for an iwi and Māori function in the section of the Emergency Management Bill replacing section 17 *Functions of CDEM Groups*
- Proposal Three – inclusion of iwi and Māori roles and responsibilities in the National CDEM Plan
- Proposal Four – mandatory consultation of iwi and Māori in the development of CDEM Group Plans and strategies

¹⁵ “... the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.” Back translation of the Māori text by Sir Hugh Kawharu.

- Proposal Five – permanent legislative authority to reimburse iwi and Māori.
163. While these options are explained separately, NEMA proposes they be implemented as a package to address the overarching goal of ensuring iwi and Māori contributions to the emergency management system are appropriately recognised.

Proposal One – iwi and Māori representation in CDEM Groups

Joint Committees

164. Joint Committees are governance bodies which determine and lead emergency management in each region. Each JC is composed of elected members from local authorities. JC members represent their constituent local authorities and only local authorities may decide to rate and spend ratepayer funding, which are key governance decisions for emergency management.
165. The TAG Report stated that iwi alone have the mandate to determine the nature and extent of the role they may play in the emergency management system. However, in its response to the TAG report, the government stated that it does not support the inclusion of iwi and Maori representatives on JCs. The rationale given was that JC members are elected officials, while iwi and Māori members are not. Concerns were also raised about the iwi and Maori representatives' liability for decisions of the Group (including under the Health and Safety at Work Act (HSWA)), and the ability of iwi and Maori representatives being able to make declarations of states of emergency, particularly over areas that they have no democratic mandate to govern.
166. NEMA proposes that new provisions be introduced via the EM Bill to ensure iwi and Māori are represented on JCs with full voting rights. These provisions will enable iwi and Māori elect two members with full voting rights to the CDEM Group JCs.

Coordinating Executive Groups

167. Each CDEM Group has a CEG consisting of chief executives of local authorities along with representatives from the District Health Board, Fire and Police. The CEG's function is to advise the CDEM Group, implement its decisions, and develop and implement the group plan. In the CDEM group structure, the CEG is responsible for management, oversight and monitoring of CDEM activities within its area.
168. The inclusion of iwi and Maori representatives on CEGs is well advanced, with 12 CDEMs already having iwi representation on their CEGs, and a further 2 groups actively seeking iwi and Maori representatives. Of the 3 groups that do not currently have iwi representation, 1 is working on how this may be achieved.
169. In view of this, a non-legislative option building on the progress in expanding iwi and Māori representation is feasible. In this approach, CDEM Groups would be supported by NEMA with guidance and standards to ensure a consistent level of representation across all CEGs.
170. However, amending the legislation to provide for iwi and Māori membership of CEGs would also be relatively straightforward, and would underline the strength of the government's commitment to addressing iwi and Māori representation in the emergency management system. Legislating for iwi and Māori representation on CEGs would also set a clear standard which could be enforced to ensure consistency.

Proposal Two – providing for an iwi and Māori function in the functions of CDEM Groups in the Bill

171. Currently, section 17 of the Act outlines the functions of JCs. However, this does not include a specific function for iwi and Māori.
172. This is inconsistent with the Treaty in that it does reflect the principles of:
 - Kāwanatanga, as iwi and Māori have no mandated role in the governance of CDEM Group
 - Rangatiratanga, given that there is no allowance for self-determination and autonomy
 - Partnership, as there is no provision for a direct relationship between Treaty partners based on a requirement to act reasonably, honourably and in good faith.
173. To ensure that iwi and Māori are represented at this level of the emergency management system, NEMA proposes including requirements in the Emergency Management Bill requiring all CDEM Group members to:
 - identify the needs of iwi and Māori within their CDEM region
 - develop plans to address these needs
 - identify the contributions iwi and Māori can make to managing an emergency event
 - communicate this information to the wider CDEM Group, their communities and others as required.

Proposal Three – inclusion of iwi and Māori roles and responsibilities in the National CDEM Plan

174. Part 5 of the CDEM Plan sets out the roles and responsibilities of various entities who have a role in emergency management. Despite the contribution iwi and Māori make to emergency management, specific roles and responsibilities are not assigned to iwi and Māori entities on the same basis as for example the Police and fire services.
175. For example, clause 45 of the CDEM Plan assigns planning responsibilities to Fire and Emergency New Zealand during ‘peacetime’ (i.e., during reduction and readiness) and clause 46 sets out specific tasks that fire services must perform during response and recovery. In contrast, clause 41 requires the Police to engage with “iwi authorities” to ensure that legal, cultural, spiritual, and health-related matters are addressed rather than empowering iwi and Māori to address these matters as they see fit.
176. NEMA proposes that an additional clause be included in the National CDEM Plan (or its replacement instrument) outlining specific roles and responsibilities of iwi and Māori.

Proposal Four – mandatory consultation of iwi and Māori in the development of CDEM Group Plans and strategies

177. Currently, section 52 of the Act requires CDEM Groups to notify the public before making a civil defence emergency management group plan (CDEM Group Plan). At their discretion, CDEM Groups may also notify particular entities and individuals. There is no explicit requirement to notify and consult iwi and Māori.
178. To address this, NEMA proposes to introduce mandatory requirements for CDEM Groups to:

- collaborate with Māori and iwi partners in the development of CDEM Group Plans
- have systems and processes to ensure that they have the capability and capacity to engage with Māori and to understand perspectives of Māori
- notify iwi and Māori partners as a requirement of planning – starting with the CDEM Group Plan and moving to other plans, as appropriate
- have regard to the comments received from iwi/Maori on Group planning document
- set out the arrangements for coordination with Māori on a response/recovery in their CDEM Group Plan.

Proposal Five – permanent legislative authority to reimburse iwi and Māori

179. Section 115A of the Act currently provides for a permanent legislative authority (PLA) for incurring expenses to reimburse a Territorial Local Authority or regional council for certain expenses they incurred in connection with an emergency, subject to the expenses meeting the criteria for being reimbursed set in Government policy at the time.
180. NEMA proposes amending the current provisions to enable iwi and Māori to be provided government financial support directly for costs incurred while caring for affected people in an emergency.
181. The amendments will establish a PLA for the Crown to directly reimburse iwi and Māori for the costs incurred while caring for affected people in the course of an emergency event.

How do the options compare to the Status Quo?

Key

- ++/+++ much better than doing nothing/the Status Quo/counterfactual
- + better than doing nothing/the Status Quo/counterfactual
- 0 about the same as doing nothing/the Status Quo/counterfactual
- worse than doing nothing/the Status Quo/counterfactual
- much worse than doing nothing/the Status Quo/counterfactual

Criteria	Status quo	1 – Representation on CDEM Groups	2 – inclusion of function in Group	3 – Inclusion of aspect in CDEM Plan	4 – Development of plans and strategies	5 – Permanent Legislative Authority
Kāwanatanga	0	Provides for direct participation in the regulation of iwi & Māori governance and operational activities.	Enables iwi & Māori to participate directly in the determination and regulation of their contributions to emergency management.	Enables iwi and Māori entities to govern the activities they will engage in during an emergency event.	Establishes a clear role for iwi & Māori in governing the nature and extent of the support services to be provided in an emergency event.	Provides for a greater degree of control over their own emergency management activities.
	Assumes that the contributions of iwi & Māori to emergency management will be provided as required.	Legislative provision for representation enables iwi & Māori to exercise a degree of autonomy and to determine how they will contribute to emergency management.	The requirement to engage 'meaningfully' gives iwi & Māori a firm basis for exercising a measure of control over how iwi & Māori interests are dealt with and how iwi & Māori will contribute to emergency management.	Having specific roles and responsibilities assigned to iwi and Māori entities will enable these entities to determine their own emergency management activities on a reasonably autonomous basis	A mandated role in the development of emergency management Plans provides iwi & Māori with the autonomy to determine how tangata whenua interests are represented in the plan and what services	Central funding of participation allows iwi and Māori to choose how they will contribute to emergency management without a cost disincentive.

Criteria	Status quo	1 – Representation on CDEM Groups	2 – inclusion of function in Group management within their rohe.	3 – Inclusion of aspect in CDEM Plan	4 – Development of plans and strategies	5 – Permanent Legislative Authority
Oritatanga	emergency management.	0	Does not allow for a range of options to support equitable outcomes for Māori as citizens. In the absence of a formal role, iwi & Māori are in the position of accepting rather than consistently contributing to decision-making.	++ Ensures equity by enabling iwi & Māori to participate in emergency management on the basis of equality with other CDEM Group members	+	Management within their rohe.
Partnership		0	It does not represent partnership as it does not allow for a direct relationship between Māori and the Crown based on a requirement to act reasonably and in good faith.	++ Establishes a direct relationship with CDEM Groups based on the participants acting reasonably, honourably and in good faith	++ The proposed requirement to directly engage and 'partner' with iwi & Māori is a practical expression of partnership in a direct relationship.	++ Reinforces the principle of partnership by requiring all CDEM Group members to work collaboratively and in good faith in developing the CDEM Plan
Overall assessment		The Status Quo does not reflect the principles of the Treaty and the trajectory of Crown-Māori relations. For	A specific	The representation proposals will enhance the ability of iwi and Māori to participate in	-	Providing for participation in planning activities will expand the ability of iwi and Māori to influence emergency management.
						Reimbursing iwi and Māori for expenses incurred contributing to emergency management

Criteria	Status quo	1 – Representation on CDEM Groups	2 – inclusion of function in Group	3 – Inclusion of aspect in CDEM Plan	4 – Development of plans and strategies	5 – Permanent Legislative Authority
	these reasons, it is no longer sustainable.	emergency management.				

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

182. Combining the proposals into an integrated package of reforms, is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits.

Proposal One – iwi and Māori representation in CDEM Groups

Joint Committees

183. NEMA proposes that the EM Bill includes provisions enabling iwi and Māori to elect two members with full voting rights to JCs. However, NEMA has identified possible issues with respect to the proposal to include iwi and Māori on JCs. These are discussed below.

Democratic mandate

184. JCs are governance bodies which determine and lead emergency management in each region. Each JC is composed of elected members from local authorities. JC members represent their constituent local authorities and only local authorities may decide to rate and spend ratepayer funding, which are key governance decisions for emergency management. As a joint committee in terms of section 30A of the Local Government Act 2002, members may appoint any person that has the skills, attributes or knowledge that will assist the work of the JC.
185. The co-opting of unelected members to statutory bodies with authority to disburse public funds, though relatively common, raises issues about the extent to which an unelected member has a democratic mandate to disburse public funds.
186. To address this, NEMA will establish appropriate electoral processes for electing iwi and Māori JC representatives. These processes will be developed in consultation with the proposed Māori Emergency Management Advisory Group. This Group will provide broad guidance on electoral processes that reflects the diverse make-up of the CDEM regions.

Costs

187. Section 24(4) of the CDEM Act states that unless the members agree otherwise, the administrative and related service costs must be divided equally among the members and each member must pay 1 share of the cost. If iwi were made members, then unless the legislation exempted it, iwi could inherit the same cost liabilities as the existing members.
188. If iwi and Māori members were to be included on JCs, the question of whether they should contribute to funding emergency management in a region (or be exempt from this) would need to be considered.
189. NEMA recognises that if iwi and Māori members are to be included in JCs, they will need to pay 1 share each of the administrative and related service costs. To ensure that costs do not become a barrier to participation, NEMA proposes to centrally fund the membership fees and expenses of iwi and Māori members on JCs from NEMA's existing baseline and using the existing Cabinet Fees Framework.

190. Under the Cabinet Fees Framework, the costs are estimated to be:

- \$109,440 (for the minimum level 4 payment)
- \$227,520 (for the maximum level 3 payment).

Statutory Protections and liability

191. s9(2)(h)

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192. Under the CDEM Act, JCs are protected from liability for loss or damages that are due directly or indirectly to a state of emergency or transition period. This protection does not extend to breaches of duties under the Health and Safety at Work Act (HSWA). However, under the HSWA, a member of the governing body of a local authority elected in accordance with the Local Electoral Act, when acting in that capacity, does not commit an offence under the HSWA for a failure to comply with a duty as an officer. This means that although member representatives are officers of JCs, they cannot be prosecuted for offences under the HSWA for failing to comply with their duties. However, other members of the governance committee of a CDEM Group who are not elected officials (e.g. iwi and Māori members) may be prosecuted.

193. Extending statutory protection from prosecution in the health and safety context to a new and potentially wider group of individuals may be setting a precedent; however, the unequal treatment of members in respect of statutory protection could act as a disincentive for potential iwi and Maori representatives to serve on JCs.

194. NEMA does not regard this position as being acceptable and will seek further advice from the Ministry of Justice and WorkSafe on statutory protections and liability. Iwi and Māori will also be consulted to determine the extent to which this is of concern to them.

Enable Joint Committee participation with full voting rights

195. Given that current legislative settings preclude iwi and Māori participation in JCs with full voting rights, new provisions in the EM Bill are required to achieve this. NEMA proposes an approach where iwi and Māori elect two full members with voting rights to the CDEM Group JCs.

196. To achieve this, NEMA recommends that the EM Bill:

- amend the definition of “member” (along with associate provisions) to include iwi (currently in section 4)
- update the membership provisions (currently in section 13) to provide for two iwi and Māori members in each CDEM Group
- introduce a new section to regulate the declaration of local states of emergency.

Declaring a state of local emergency

197. It is not proposed that there be any change to the ability of the Mayor to declare a state of local emergency for their district, or the Groups ability to appoint one or more members of the Group to declare for the area of the Group. An emergency will also need to meet the criteria in the Act (including the definition of ‘emergency’ and geographical jurisdiction).
198. It is however possible, that the members of the Group could appoint the iwi representative as the person authorised to declare a state of local emergency over the area of the Group. Alternatively, the Act could provide that only elected officials of the local authority can declare an emergency. NEMA will consider both options and will consult iwi and Māori as part of the engagement on the roles and responsibilities for iwi and Māori members of JCs.

Coordinating Executive Groups

199. NEMA proposes the introduction of new provisions via the EM Bill to achieve participation of iwi and Māori in all CEGs.
200. Including iwi and Maori representatives on CEGs is a relatively uncomplicated matter. The CDEM Act allows CEGs to co-opt people as required. There are no liability issues, as CEGs are not persons conducting a business or undertaking (PCBU) and do not have health and safety responsibilities under HSWA.
201. Establishing how iwi are represented on CEGs in areas where multiple iwi and Māori are present is potentially problematic. Some groups operate in areas with very large numbers of iwi. The Bay of Plenty Regional Council has 13 iwi with statutory acknowledgements, and there are approximately 40 iwi active in the region. Other regional councils operate in areas with only a few iwi, but some of those iwi fell themselves to be pre-eminent.
202. Currently, some CDEM Groups address this problem by co-opting a representative from each iwi in their area. However, other groups report that multi iwi representation is proving difficult to achieve in practice.
203. Iwi and Māori representation on CEGs could be strengthened and expanded under the CDEM Act as currently drafted. However, confirming iwi representation on CEGs via primary legislation will underline the strength of the government’s commitment to achieving greater recognition and involvement in the work of emergency management. This proposal also reconfirms the Government’s previous commitment to coverage across Aotearoa New Zealand [GOV-20-MIN-0035].
204. Legislating for formal iwi and Māori representation on JCs and CEGs satisfies the requirements of the Treaty:
 - Kāwanatanga – provides for direct participation in the regulation of iwi and Māori governance and operational activities.
 - Rangatiratanga – legislative provision for representation enables iwi and Māori to exercise a degree of autonomy and to determine how they will contribute to emergency management.
 - Oritetanga – ensures equity by enabling iwi & Māori to participate in emergency management on the basis of equality with other CDEM Group members

- Partnership – establishes a direct relationship with CDEM Groups based on the participants acting reasonably, honourably and in good faith.

Proposal Two – providing for an iwi and Māori function in the functions of CDEM Groups in the Bill

205. NEMA proposes that the EM Bill include a provision similar to section 17 with a requirement for all CDEM Group members to:
- identify the needs of iwi and Māori within their CDEM region
 - develop plans to address these needs
 - identify the contributions iwi and Māori can make to managing an emergency event
 - communicate this information to the wider CDEM Group, their communities and others as required.
206. In addition, it is proposed that JCs be required to have systems and processes to ensure that it has the capability and capacity to engage with Māori and to understand perspectives of Māori.
207. There is a precedent for this approach in sections 12, 18 and 19 of the Taumata Arowai—the Water Services Regulator Act 2020:
- Section 12 requires that the Board of Taumata Arowai include members with knowledge, experience and capability in relation to the Treaty and its principles, Māori perspectives and tikanga Māori.
 - Section 18 mandates partnering and engaging early with Māori to give effect to Te Mana o te Wai and to enable the exercise of mātauranga Māori, tikanga Māori and kaitiakitanga.
 - Section 19 requires the Board to maintain systems and processes to uphold the Treaty and its principles, engage effectively with Māori and understand Māori perspectives.
208. Legislating for a formal iwi and Māori function in JC descriptions is consistent with the principles of the Treaty:
- Kāwanatanga – providing for a formal function makes iwi and Māori interests part of the core business of Groups which, when combined with effective representation, enables iwi & Māori to participate directly in the determination and regulation of their contributions to emergency management.
 - Rangatiratanga – the requirement to engage ‘meaningfully’ gives iwi and Māori a firm basis for exercising a measure of control over how iwi and Māori interests are dealt with and how iwi and Māori will contribute to emergency management within their rohe.

Proposal Three – inclusion of iwi and Māori roles and responsibilities in the National CDEM Plan

209. Part 5 of the CDEM Plan sets out the roles and responsibilities of various entities who have a role in emergency management. Despite the contribution iwi and Māori make to emergency management, specific roles and responsibilities are not assigned to iwi and Māori entities on the same basis as for example the Police and fire services.

210. To address this, NEMA proposes an additional section be included outlining specific roles and responsibilities of iwi and Māori, ensuring that they are enabled to participate in all levels of the emergency management system.
211. Specifying iwi and Māori roles and responsibilities in the National CDEM Plan would provide for active participation in emergency management operations. This will contribute to the overarching policy goal of ensuring that iwi and Māori are able to participate in all levels of the emergency management system.

Proposal Four – mandatory consultation of iwi and Māori in the development of CDEM Group Plans and strategies

212. NEMA proposes introducing (via the EM Bill) requirements to collaborate, notify, consult and coordinate with iwi and Māori.
213. There are specific expectations on local authorities in the Local Government Act to make themselves aware of, and have regard to, the views of all communities and to provide opportunities for iwi and Māori to contribute to decision-making processes. There is no reason why these obligations do not apply to CDEM Group planning and strategy documents.
214. Many iwi are recognised as whenua in their rohe and are developing relationships with regional and local councils. Most CDEM Groups already work with iwi and Māori to ensure their views and Mātauranga Māori (knowledge) are reflected in emergency management planning and implementation across the 4Rs. However, the nature and extent of this input varies, and many Group Plans do not show evidence of engagement with iwi and Māori. The current non-legislative discretionary framework is therefore not achieving the policy goal of consistent involvement of iwi and Māori at all levels of the emergency management system.
215. A legislative solution is a practical expression of the principle of partnership in that mandatory participation establishes a direct relationship and requires the parties to work cooperatively to produce the plans. In providing for the mandatory consultation of iwi and Māori in the development of plans and strategies, the Crown would be moving towards satisfying the obligation of active protection of iwi and Māori interests under the Treaty.
216. Such a solution would also be consistent with the principle of oritetanga as a formal role ensures equality for iwi and Māori in the various planning processes on the same basis as other Group members.

Proposal Five – Permanent Legislative Authority to reimburse iwi and Māori

217. Iwi and Māori carry out vital work in ensuring the welfare of their people, and those in the communities surrounding them. In doing so, iwi and Māori entities often incur similar costs as local authorities but are unable to access reimbursements directly from Government. Instead, they are required to lodge claims with local authorities, who in turn request the reimbursement from the government. This unnecessarily increases the burden of administration and reduces the security and confidence of iwi to continue performing essential activities in an emergency.

218. NEMA proposes introducing via the EM Bill a Permanent Legislative Authority for the Crown to directly reimburse iwi and Māori for the costs incurred while caring for affected people in the course of an emergency event.
219. A PLA creates an enduring appropriation that does not lapse or require reconfirmation by Parliament on an annual basis. In general, permanent appropriations are disapproved of as reducing Parliament's annual control of public expenditure. However, a PLA can provide a certain level of assurance to iwi and Māori who have incurred eligible emergency management-related costs that these will be automatically reimbursed. This directly addresses any cost disincentive for iwi and Māori regarding the provision of services in an emergency event.
220. This approach is consistent with the principle of oritetanga, which requires the Crown to provide for and properly resource kaupapa Māori responses to emergency events. Proper resourcing enables iwi and Māori to choose between mainstream services or services developed for and by Māori. Supporting iwi and Māori to design and deliver interventions that are effective for them is essential for the Crown to meet its obligation under the Treaty to promote equitable outcomes for Māori as citizens.
221. Ensuring that iwi and Māori have the ability to choose between mainstream services or services developed for and by Māori will also enhance progress towards the achievement of greater autonomy and self-determination (rangatiratanga) for iwi and Māori in the emergency management sector,
222. The appropriation for the amended PLA will remain the same. The proposals amend only who can be directly reimbursed under the PLA. That is, this proposal will be cost neutral.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Iwi and Māori representation in CDEM Groups	Te Kawa Mataaho has advised that CEG and JCs are Group 4 bodies under the Cabinet Fees Framework.	Total annual costs to government: <ul style="list-style-type: none"> • \$109,440 (for the minimum level 4 payment), to • \$227,520 (for the maximum level 3 payment). 	Medium
Total monetised costs		Up to \$227,520	Medium
Non-monetised costs			

Additional benefits of the preferred option compared to taking no action

Better outcomes for iwi and Māori beyond emergency management	<ul style="list-style-type: none"> • the mana afforded by recognition of iwi/Māori as Treaty partners of the Crown, • inclusion in decision-making and policy development at a local and national level; a • influence in critical issues such as building community resilience • acknowledging the disproportionate impact of emergencies on Māori communities, • reinforcing the contribution of Mātauranga Māori and promoting Māori language, • providing an additional source of mutual learning opportunities 	Not monetised	Medium
Total monetised benefits		Not monetised	Medium
Non-monetised benefits		Medium	Medium

Section 3: Delivering an option

How will the new arrangements be implemented?

223. A plan for implementing the proposals will developed in consultation with iwi and Māori.

224. This approach recognises:

- the variable capacity of iwi and Māori to contribute to the emergency management system, and
- that only iwi and Māori can determine the extent of their contributions to emergency management.

How will the new arrangements be monitored, evaluated, and reviewed?

225. NEMA has focused on building strong relationships with iwi and Māori to facilitate engagement regarding recognition and recognition. This includes building a relationship with the National Iwi Chairs Forum and the Ministerial Advisory Committee on Emergency Management. Through regular hui with these and other iwi and Māori groups, NEMA will monitor implementation of the proposals and the extent to which they meet the requirements of the Treaty as originally intended.

226. Evaluation and review will be based on the same criteria informed by the Treaty.