

# Addendum to Regulatory Impact Statement

## Review of the legislative framework for recovery from emergencies – Compensation and liability

### Executive Summary

1. This addendum to the Regulatory Impact Statement (RIS) provides an analysis of options for amending the current compensation and liability sections in the Civil Defence Emergency Management Act (CDEM) 2002 (the Act).
2. The proposals outlined in this RIS follow Cabinet's agreement in June 2015 to amend the Act to improve recovery from small-to-medium scale emergencies. The original RIS is available at <http://www.civildefence.govt.nz/resources/review-of-the-legislative-framework-for-recovery-from-emergencies>.
3. Cabinet delegated power to act in respect of compensation and liability sections to the Ministers of Civil Defence, Finance, and Local Government due to the need for further consultation with stakeholders. Three policy options were subsequently identified.
4. The Act's compensation and liability sections need to be reviewed so that compensation is available if damage or loss is caused by CDEM officials during a Transition Notice period. This RIS identifies three possible options:
  - make no amendments
  - extend the status quo (our preferred option), or
  - create new provisions that make CDEM Groups and the Crown liable, and that exempt insurers.
5. The scope of this work is limited by the earlier Cabinet decisions about the proposed amendments to the Act; that is, options for amending the compensation and liability sections must complement and work with the proposed amendments to the Act. The scope of the review itself is limited by the focus on recovery from small-to-medium scale emergencies, rather than on all aspects of emergency management in relation to all scales of emergencies.
6. It is difficult to quantify the impact of options since the frequency of events leading to damage or loss is inherently difficult to predict, as is the magnitude of any impacts. There is little information about the frequency of damage or loss caused by civil defence emergency management (CDEM) officials, and apparently a very limited number of insurance claims relating to such damage or loss. We consider, in any case, that the impact will be minimal due to the very low number of claims for compensation for damage or loss caused during states of emergency.
7. Following research, consultation and analysis, we recommend extending the status quo; that is, we recommend extending the Act's current sections to cover Transition Notice periods. Ministers recently agreed to MCDEM's preferred option.

8. We also propose extending section 110 to provide protection from civil liability for people who carry out CDEM activities in good faith and with due care during a Transition Notice period.
9. Much of the analysis summarised in this RIS is supported by information provided by Civil Defence Emergency Management Groups (CDEM Groups), Local Government New Zealand, the Insurance Council of New Zealand, selected insurance providers and government agencies.

## Status quo and problem definition

### Proposed amendments to the Civil Defence Emergency Management Act 2002

10. The current Act does not adequately support recovery from emergencies. Following the end of a state of emergency, the Act provides no specific mandate to continue with, or transition from, the use of extraordinary powers and arrangements. Many activities that begin during the response may need to continue into the initial recovery phase for the purpose of stabilising recovery – including removing dangerous structures and excluding people from unsafe areas.
11. In June 2015, Cabinet agreed to policy proposals to enable more timely, focused and effective recovery from small-to-moderate scale emergencies. Key features are:
  - providing for recovery management throughout the recovery, including giving a mandate for Recovery Managers, and requiring high level preparatory recovery planning before emergencies, and
  - supporting a seamless transition of activities from the response into the initial recovery phase, immediately following an emergency.
12. In particular, Cabinet agreed to a Transition Notice mechanism, recognising that select powers may be needed to support a seamless transition from the response into recovery. The Act's existing emergency powers cease when a state of emergency is terminated or expires.
13. The powers available under a Transition Notice will allow authorised CDEM officials to use a defined subset of emergency powers, for the purpose of supporting the transition into recovery. This will ensure that what was achieved during the response is not destabilised, putting life and property back at risk and/or derailing an effective and timely recovery. Transition Notices, like declarations of states of emergency, are time limited and can be terminated at any time. They are intended to bridge the gap between response and recovery, but not to be in effect for the entirety of the recovery.
14. The powers will include the ability to:
  - carry out works; clear roads and other public places; and remove, dispose of, secure, or make safe dangerous structures and materials, and
  - enter onto premises (for example, to save lives, prevent injury, or to rescue and remove injured or endangered persons).

## **Current compensation and liability sections**

15. The Act currently provides for compensation for damage or loss caused by CDEM officials during states of emergency. It allows recovery of losses from private insurers, local authorities, and the Crown. Liability rests with insurers in the first instance, followed by local authorities or the Crown for any uninsured damage.
16. The Act prohibits insurers from exercising their equitable right of subrogation; that is, from recovering from local authorities or the Crown any amounts they have paid out to insured persons in relation to claims for damages.
17. In addition, the Act provides protection from liability for CDEM officials who carry out CDEM activities in good faith and with due care during a state of emergency.

## **The need for compensation for damage or loss caused during a Transition Notice period**

18. By exercising the powers available to them during a Transition Notice period, CDEM officials may cause damage or loss. For instance, they may damage private property or make decisions that result in loss to an individual (for example, by urgently removing structures to access an unstable area).
19. Such damage or loss would usually be justified on the basis that it has resulted from acts or omissions considered necessary or desirable to ensure a timely and effective recovery immediately after an emergency. However, in the interest of fairness, compensation for the resulting damage or loss should be available.

## **Objectives**

20. The main reason for amending the Act's current compensation and liability sections is to provide for compensation for damage or loss caused by CDEM officials during a Transition Notice period.
21. The amendments should:
  - be consistent with the other compensation and liability sections
  - avoid incentivising local authorities to take an overly cautious and limited approach to CDEM activities during a Transition Notice period, due to possible increased financial exposure
  - minimise any cost to the Crown, local authorities, and insurers, and
  - be easily understood and applied.

## **Options and impact analysis**

22. We consider that there are three possible options, two of which are regulatory in nature.

### **Option 1: No amendments**

23. Option 1 is to leave the compensation and liability provision unchanged (ie, they would apply to states of emergency but not to Transition Notice periods). This would mean that:
- people who suffer damage or loss resulting from CDEM activities during a Transition Notice period may not be covered under their insurance contracts
  - insurers would be able to recover losses from local authorities and the Crown, if they do cover damage or loss resulting from CDEM activities during a Transition Notice period
  - local authorities and the Crown would be liable for damage or loss resulting from CDEM activities during a Transition Notice period, and
  - people carrying out CDEM activities during a Transition Notice period would be liable for resulting damage or loss.
24. We do not recommend this option as it carries a number of risks. Firstly, it would create significant differences between the regimes applying to states of emergency and Transition Notices, thereby creating confusion and ambiguity in application, leading to legal complexity and administrative burden.
25. Secondly, it would significantly disadvantage individuals who suffer damage or loss during a Transition Notice period, compared to individuals who suffer damage or loss during a state of emergency.
26. Thirdly, it could result in local authorities taking an overly cautious and limited approach to CDEM activities during a Transition Notice period. This may limit the extent to which the aim of improving recovery from small-to-medium scale emergencies can be achieved.

### **Option 2: Extend the current sections (our preferred option)**

27. This option would extend the compensation and liability sections that apply during a state of emergency to Transition Notice periods. It would mirror the scheme and effect of the existing provisions. We recommend Option 2 for a number of reasons, discussed below.
28. Firstly, Option 2 would ensure consistency within the Act in terms of the regimes applying to states of emergency and Transition Notice periods. Implicit in Option 2 is also the recognition that there is no real reason to take a different approach. This would be a simple option to administer.
29. Secondly, extending the current protection from civil liability to cover Transition Notice periods would minimise the cost to the Crown and local authorities.
30. Option 2 also avoids incentivising the Crown and local authorities to take a cautious and limited approach to CDEM activities because of fear of financial exposure, while ensuring protection from liability is excluded for acts and omissions constituting bad faith or negligence. One of the key objectives of the amendments to the Act is to

ensure a seamless transition from emergency response to recovery. It is therefore desirable to ensure that officials take a consistent approach to their duties throughout both response and recovery.

31. The main disadvantage to Option 2 is that it has the effect of denying insurers subrogation rights for a greater period of time. It may theoretically increase the liability of the Crown, local authorities and insurers because compensation provisions could apply for longer periods of time, particularly where Transition Notices are issued after states of emergency. We consider, however, that any impact will be minimal because there have been very few historical claims for compensation for damage or loss caused during states of emergency. The range of powers available during a Transition Notice period will be more limited than during a state of emergency.

**Option 3: New sections that make CDEM Groups and the Crown liable for damage or loss, and that exempt insurers**

32. This option would make local authorities and the Crown liable for damage or loss caused by CDEM officials during a Transition Notice period. Insurers would be exempt from liability but could decide to offer coverage and therefore compensation to policyholders.
33. In theory, this option would extend the liability of local authorities and the Crown; it would mean that insurers could claim for amounts paid out in relation to damage or loss caused by CDEM officials during a Transition Notice period. The lack of claims thus far, however, indicates that any real impact is likely to be minimal.
34. Option 3 could be justified on the basis that, as there have been no claims, the financial risk of requiring the 'first loss' to be covered by insurers has not been realised. This option would avoid denying insurers their subrogation rights in relation to loss or damage caused during a Transition Notice period.
35. Despite these advantages, we do not recommend Option 3 for a number of reasons. Firstly, it is likely to incentivise local authorities to take a more cautious and limited approach to their CDEM activities during a Transition Notice period. Again, this would likely impact on the overall aim of ensuring seamless transition from emergency response to recovery, and improving recovery from small-to-medium scale emergencies. While local authorities may be able to insure for this risk, consultation indicated that there is a lot of variability in the uptake of insurance by local authorities.
36. Secondly, Option 3 may incentivise CDEM Groups to prolong a declaration of a state of emergency in order to avoid liability for damage caused by CDEM officials. One of the goals of the amendments is to discourage unnecessarily long of states of emergency.
37. Thirdly, Option 3 would create conflicting approaches to compensation for damage or loss within the Act. This would likely create complexity and ambiguity in application, and may lead to confusion. Furthermore, we do not consider that there is a justified reason for differentiating between damage caused during a state of emergency and damage caused during a Transition Notice period.

38. Conflicting approaches within the Act could be avoided by amending the Act's current sections so that they take the same approach as Option 3; however, such a change would be outside the scope of this work.

## **Liability**

39. Section 110 of the Act provides protection from liability for people who carry out CDEM activities in good faith and with due care during a state of emergency. We recommend extending the effect of section 110 to cover Transition Notice periods, regardless of which option is agreed.

## **Consultation<sup>1</sup>**

40. MCDEM consulted with CDEM Groups, Local Government New Zealand, the Insurance Council of New Zealand (the ICNZ), and government agencies about options for compensation and liability during a Transition Notice period. We asked the first three stakeholders for information on:

- any claims for compensation that have been made
- the potential for CDEM activities to result in damage or loss during a Transition Notice period, and
- if local authorities had insurance (or could obtain it) for liability for damage or loss caused by CDEM officials.

41. Three CDEM Groups responded to our consultation. One Group reported that there might be greater potential for loss or damage, but not substantially more. The only emergency identified by Groups from which compensation arose was the Christchurch earthquakes, which fall outside the scope of this review due to the scale of the emergency.

42. Feedback from some other stakeholders noted that because the existing provisions for compensation had not been used (other than in relation to a few from the Christchurch earthquakes), extending them to cover Transition Notice periods would be unlikely to substantially increase liability.

43. We also consulted the Department of Internal Affairs, the Treasury and the Earthquake Commission (EQC).

44. It is likely that the Earthquake Commission Act 1993 (the EQC Act) reforms will have more relevance to Phase Two of these reforms, which will deal with large scale events. As the EQC Act reform progresses, MCDEM will continue working with Treasury, EQC, and the Department of Internal Affairs to clarify the relationship between Stage Two of our review, the existing sections for compensation, and potential EQC Act reforms.

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<sup>1</sup> Erratum (25 November 2015): A previous version of this document, published on 11 November 2015, stated that the ICNZ had no preference in terms of Options 2 or 3. This was incorrect – the ICNZ and its members were not specifically consulted on Options 2 or 3..

## Conclusions and recommendations

45. We recommend Option 2; that is, we recommend amending the Act to extend the compensation and liability sections that apply during a state of emergency, to apply to a Transition Notice period. This option would mirror the scheme and effect of the existing provisions.
46. We consider that Option 2 provides the greatest benefits with relatively few costs. It is the simplest option to administer, is consistent with the existing compensation regime in the Act, and, based on experience to date, will not significantly affect stakeholders.

## Implementation plan

47. The proposals will be implemented through the passage of the Civil Defence Emergency Management Amendment Bill 2015. The Bill is expected to be introduced in November 2015.
48. The Bill will come into force 180 days after the day it receives Royal assent. During this period, MCDEM will amend the National Civil Defence Emergency Management Plan. These amendments will ensure consistency with amendments to the Act, as well as the amended Act's functionality.
49. MCDEM will also use this lead-in time to ensure that CDEM Groups, local authorities and government agencies are aware of, and prepared for, the changes.
50. A number of non-regulatory tools will be used to support implementation of the Bill. These include revision of the 'Recovery Management' Director's Guideline and 'Focus on Recovery' Information Series.
51. We do not anticipate any enforcement issues in terms of compliance with compensation and liability sections relating to damage or loss caused by CDEM officials during a Transition Notice period.

## Monitoring, evaluation and review

52. Monitoring, evaluation and review will occur through informal means. We will work closely with CDEM Groups; as part of this engagement, we will monitor any significant damage or loss resulting from CDEM activities during a Transition Notice period, as well as any impact on the Crown, local authorities or insurers.