

In Confidence

Office of the Minister for Building and Construction  
Chair, Cabinet Legislation Committee

## **Hurunui/Kaikōura Earthquakes Recovery (Unreinforced Masonry Buildings) Amendment Order 2018**

### **Proposal**

- 1 This paper seeks approval for the Hurunui/Kaikōura Earthquakes Recovery (Unreinforced Masonry Buildings) Amendment Order 2018 to be submitted to the Executive Council.

### **Executive Summary**

- 2 Following the Hurunui/Kaikōura earthquakes in November 2016, there is heightened earthquake risk in the areas that include Wellington City, Hutt City, and the Marlborough and Hurunui Districts. Unreinforced masonry (URM) buildings are known to perform poorly in earthquakes, with 39 people killed by falling URM in the 2011 Christchurch earthquake.
- 3 The Hurunui/Kaikōura Earthquakes Recovery (Unreinforced Masonry Buildings) Order 2017 (the Principal Order) allowed affected Councils to issue a notice before 29 March 2017 requiring building owners in Wellington, Lower Hutt, Hurunui and Marlborough to secure high-risk URM parapets and façades within 12 months.
- 4 - On 20 December 2017 the Cabinet Business Committee (having been authorised by Cabinet to have Power to Act) agreed to amend the Principal Order to extend the time to complete mandatory securing work before an offence is committed by six months [CBC-17-MIN-0093 refers]. The decision strikes a balance between the need to get securing work done during the current period of heightened earthquake risk, and the practical constraints that have delayed some projects, such as affordability and sector capacity.
- 5 - The Hurunui/Kaikōura Earthquakes Recovery (Unreinforced Masonry Buildings) Amendment Order 2018 (the Amendment Order) will give effect to this decision. I am satisfied that the statutory prerequisites for recommending the Amendment Order (set by the Hurunui/Kaikōura Earthquakes Recovery Act 2016) have been met. I approved changes during the drafting process to reflect consultation feedback, to clarify the ability to prosecute for non-compliance and to further define the steps that building owners must take to qualify for the extension.
- 6 A waiver of the 28-day rule is necessary to ensure the Amendment Order comes into force within one year of the date on which the first notice requiring securing work to be undertaken was issued. The first notice was issued on 10 March 2017.

## Policy

- 7 Falling URM parapets and façades present significant risks to life safety in an earthquake. Thirty-nine people were killed by falling URM in the 2011 Christchurch earthquake. These risks can be reduced by securing parapets and façades back to the main building structure.
- 8 The Principal Order was introduced in February 2017, in response to the heightened earthquake risk following the Hurunui/Kaikōura earthquakes in November 2016. It allowed affected Councils to issue a notice requiring building owners in Wellington, Lower Hutt, Hurunui and Marlborough to secure high-risk parapets and façades on busy thoroughfares within 12 months. All notices had to be issued by 29 March 2017. A total of 189 notices were issued requiring securing work to be done.
- 9 The \$4.5 million Unreinforced Masonry Buildings Securing Fund (URM Fund) supports building owners to secure their parapets and façades, by meeting half of the expected costs up to capped maxima.
- 10 Many of the building owners with notices report facing practical constraints (e.g. sector capacity and affordability) that mean they are unlikely to complete securing work by the March 2018 deadline. Some have work in progress, others are yet to begin.
- 11 While the level of risk of a significant earthquake has decreased since the Hurunui/Kaikōura Earthquakes Recovery (Unreinforced Masonry Buildings) Order 2017 was made, the heightened risk is nevertheless still present, and expected to continue for at least another six months. Securing work remains the most effective means of managing the continued life safety risks.
- 12 On 20 December 2017, Cabinet Business Committee (CBC) (having been authorised by Cabinet to have Power to Act), approved changes to the URM Fund<sup>1</sup> and Principal Order to better support building owners, further encourage compliance, and incentivise owners to continue work in progress [CBC-17-MIN-0093 refers].
- 13 CBC agreed to amend the Principal Order to extend the time for building owners to complete securing work by six months before an offence is committed. This decision strikes a balance between the need to get securing work done during the continued period of heightened earthquake risk, and the practical constraints that have delayed some projects. The six month extension is in line with the expected continued period of heightened earthquake risk, and is no longer than is reasonably necessary to complete work that is in progress.
- 14 To give effect to these decisions, an amendment to the Principal Order has been developed. I am satisfied that the prerequisites for recommending the Amendment Order, set by the Hurunui/Kaikōura Earthquakes Recovery Act 2016 (the Recovery Act), have been met.

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1 CBC agreed to refine the scope of the URM Fund to better support and incentivise building owners to undertake securing work, and redistribute the URM Fund underspend to better support owners of large/complex URM buildings who face higher costs. These decisions have been implemented.

- 15 In accordance with the Recovery Act, a draft of the Amendment Order has been reviewed by the Hurunui/Kaikōura Earthquakes Recovery Review Panel (the Review Panel) and the Regulations Review Committee. I have consulted appropriate stakeholders by providing them with an engagement document.
- 16 CBC authorised me to approve any changes on issues that arose during the drafting process, consistent with CBC's decisions. In response to feedback received from affected stakeholders and the Regulations Review Committee, I approved changes to further prescribe the steps a building owner must have taken to be eligible for the extension, and to clarify the intent and effect of the provisions. Minor wording changes were also made in response to feedback from the Review Panel.
- 17 The Amendment Order effectively provides an extension of six months to building owners who have taken reasonable steps towards complying with the notice, and completed the necessary work within the extended timeframe, by creating a new defence. This is to ensure the extension does not apply to those building owners who have made no effort to comply.

### **Decisions taken during the drafting process**

#### *Extension phrased as a defence, rather than deferment of the offence*

- 18 *[Information withheld consistent with s9(2)(h) of the Official Information Act 1982]*
- 19 *[Information withheld consistent with s9(2)(h) of the Official Information Act 1982]*
- 20 The Regulations Review Committee observed that the previous drafting of the Amendment Order *s 9(2)(h)* may mean that, although building owners would be given more time to complete securing work, prosecution for non-compliance within the extended timeframe could not be brought.
- 21 Enforcement is a fundamental component of ensuring building owners do in fact comply with the extended timeframe. My officials have worked with PCO and Crown Law to revise the wording of the Amendment Order to ensure that the affected Councils retain their power to take enforcement action against building owners who do not comply with the extended timeframe *[Information withheld consistent with s9(2)(h) of the Official Information Act 1982]*
- 22 The final draft Amendment Order addresses the Regulations Review Committee's concerns by phrasing the six-month 'extension' as a defence. This means that the original 12 month deadline for securing work remains in place for all building owners, but owners who have taken reasonable steps within that period, and complete the work within a further six months, have a defence against prosecution.

- 23 As a consequence of this change, a modification of section 378 of the Building Act 2004 is required. This is necessary to clarify that the affected Councils have a further six months to take enforcement action against building owners who do not comply with the extended timeframe.
- 24 I consider these changes are consistent with CBC's decisions, and respond to feedback received during consultation. I do not consider further consultation on the revised Amendment Order is necessary. The changes still achieve the intended outcome of providing more time for building owners who have taken reasonable steps to complete securing work, and address the Regulations Review Committee's concerns. My officials will work with the affected Councils to ensure the effect of the Amendment Order is clearly communicated to building owners.

*A definition of reasonable steps has been created*

- 25 Under the Amendment Order, a building owner is treated as having taken reasonable steps towards complying with a notice only if, within one year of the date on which the notice was issued:
- the design of the building work required under the notice has been, or is being, carried out or reviewed by a chartered professional engineer; and
  - a programme of work is available to the territorial authority for inspection showing the building work required under the notice will be completed before the date that is 18 months after the date on which the notice is issued.
- 26 This is consistent with, but more specific than, CBC's decisions. This definition incorporates feedback received from affected stakeholders. The first bullet point in paragraph 25 was included in the engagement document on the proposed Order, and was generally supported.
- 27 Wellington City Council, Hutt City Council and Local Government New Zealand (LGNZ) submitted that the Amendment Order should require greater assurance that securing work will be completed within the six-month extension. In response, I have included an additional 'step' (the second bullet point in paragraph 25), that building owners must have a programme of work to show that the necessary securing work will be completed within the extended timeframe.
- 28 My officials have discussed this amendment with the Property Council New Zealand, as a representative of building owners, and they advise me the Property Council is comfortable with this addition.

**The effect of the Amendment Order on existing legislation**

- 29 The Amendment Order amends clause 10 of the Principal Order, which provides that the offence provision in section 128A of the Building Act 2004 will apply if a person fails to comply with a notice that requires work to be done. The effect of the amendment is that a building owner has a defence if they have taken reasonable steps towards complying with a notice issued by the territorial authority within one year of the date the notice was issued, and that they have completed the work required under the notice within a further six months.

- 30 The Amendment Order also modifies section 378 of the Building Act, which relates to the time limit for filing charging documents. The modification is that the limitation period is extended by a further six months for a building owner who has taken reasonable steps towards complying with a notice issued by the territorial authority within one year of the date the notice was issued. This modification is needed so that the six-month extension of time to complete the work does not use up the existing limitation period.
- 31 Councils continue to retain existing powers under the Building Act 2004 to manage public safety risks (such as restricting access).

### **Timing and 28-day rule**

- 32 A waiver of the 28-day rule is sought so that the Amendment Order comes into force on 9 March 2018.
- 33 A waiver of the 28-day rule is necessary to ensure the Amendment Order comes into force within one year of the date on which the first notice requiring securing work to be undertaken was issued. The first notice was issued on 10 March 2017.

### **Compliance**

- 34 The Amendment Order complies with:
- 34.1. the principles of the Treaty of Waitangi;
  - 34.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
  - 34.3. the principles and guidelines set out in the Privacy Act 1993;
  - 34.4. relevant international standards and obligations;
  - 34.5. the *LAC Guidelines on the Process and Content of Legislation* (2014 edition), which are maintained by the Legislation Design and Advisory Committee.

### *Statutory prerequisites have been met*

- 35 Statutory prerequisites must be met before an Order in Council can be recommended to be made under section 7 of the Recovery Act.
- 36 I am satisfied that the statutory requirements of sections 8 and 9 of the Recovery Act have been met. The Amendment Order is necessary and desirable for the purpose of the Recovery Act, the extent of the Order is not broader than is reasonably necessary to address the matters that gave rise to the Order, and the Order does not breach any of the restrictions in section 11 of the Recovery Act.
- 37 I have had regard to the comments of the Regulations Review Committee on the draft Amendment Order and my statement of reasons. A summary of comments received and my response is set out in paragraphs 20 to 24.

- 38 The Review Panel has reviewed the draft Order, as required by section 8(1)(b) of the Recovery Act. The Review Panel is of the view that the draft Order is necessary, expedient and meets the purpose of the Recovery Act. Some members of the Review Panel thought the word “only” should be inserted into the definition of reasonable steps in clause 4(4) between the words “notice” and “if”, to provide greater clarity. I have had regard to, and agree with the suggestion. It has been included in the draft Amendment Order.
- 39 I invited LGNZ, Property Council New Zealand, Wellington Chamber of Commerce, Jackson Street Programme, Inner City Wellington, Wellington City Council, Hurunui District Council, Hutt City Council, Marlborough District Council, and affected building owners to comment on the proposal. A summary of the comments received and my response is set out in paragraphs 44 to 51.

### **Regulations Review Committee**

- 40 I do not consider that there are grounds for the Regulations Review Committee to draw the Amendment Order to the attention of the House under Standing Order 319.

### **Certification by Parliamentary Counsel**

- 41 The Amendment Order has been certified by the Parliamentary Counsel Office (PCO) *[Information withheld consistent with s9(2)(h) of the Official Information Act]*, provided that the statutory prerequisites in the Recovery Act have been met, and subject to the qualification that a waiver of the 28-day rule will be required.

### **Impact analysis**

- 42 Regulatory Impact Analysis requirements apply to the regulatory proposals in this paper. The Regulatory Quality Team has determined that a Regulatory Impact Assessment (RIA) is not required because there are minor marginal impacts over and above the requirements in the Principal Order. As a RIA was not prepared for the Principal Order, it will be particularly important to undertake a post-implementation review.

### **Publicity**

- 43 I announced the intent of the Amendment Order on 21 December 2017. I propose to announce the details of the amendments once the Amendment Order has been signed by the Governor-General, to provide time for affected Councils and building owners to prepare.

### **Consultation**

#### *Statutory consultation on the Order*

- 44 - I received comments from the Regulations Review Committee on a draft of the Amendment Order and a draft of my statement of reasons for recommending the Amendment Order, as noted in paragraph 37. As outlined in paragraphs 20 to 24, I have had regard to the concerns raised by the Regulations Review Committee and the Amendment Order has been amended accordingly.

- 45 Thirteen submissions were received on an engagement document outlining the proposals for the Amendment Order:
- Six submissions were received from building owners.
  - Three submissions were received from councils (Wellington City Council, Hutt City Council and Hurunui District Council). A submission was received from LGNZ.
  - Submissions were also received from the Property Council New Zealand, the Wellington Chamber of Commerce and Inner City Wellington.
- 46 The comments I have received are broadly supportive of the Amendment Order and the six-month extension to complete mandatory securing work.
- 47 The key areas of concern expressed by stakeholders were in relation to what constitutes the reasonable steps that an owner must have taken to comply with a notice for the time to be extended before an offence is committed. The proposal in the engagement document treated an owner as having taken reasonable steps if the design of the building work has been, or is being, carried out or reviewed by a chartered professional engineer.
- Councils and LGNZ were broadly supportive of the six-month time extension before an offence is committed for owners that have taken reasonable steps to comply. Wellington City Council requested the addition of engineering assessments to the definition of reasonable steps so they have a record of this work. Wellington City Council, Hutt City Council and LGNZ also submitted about the need to provide additional assurance that securing work will be completed within the six month extension, and suggested various methods for achieving this, including by requiring building owners to provide work programmes and detailed timelines. The Hutt City Council also submitted that there should be consideration of demolition as an alternative pathway for taking reasonable steps.
  - The Property Council and the Wellington Chamber of Commerce supported the time extension for owners who have taken reasonable steps to comply. The Property Council also proposed a ‘stop the clock’ provision while an application to demolish a building is being processed and a time extension on a case-by-case basis for buildings undergoing wider safety works. The Wellington Chamber of Commerce supported the Property Council’s proposals.
  - Inner City Wellington (ICW) supported the time extension for property owners who have taken reasonable steps. ICW submitted that there needed to be greater flexibility on what reasonable steps are in practice or additional clarity (including that it needs to include where there is evidence that the owner has attempted to engage a suitably priced engineer to start the process). ICW also submitted that offence provisions need to be applied consistently.
  - Building owners were broadly supportive of the time extension where owners have taken reasonable steps. One building owner submitted that timing flexibility beyond the additional six months is required for owners acting in good faith. The same building owner also suggested that architects, builders or other advisers could fill a similar role to engineers in relation to demonstrating reasonable steps.

- 48 I have had regard to the concerns raised by stakeholders on the engagement document.
- 49 Paragraph 25 outlines an addition to the Amendment Order in response to concern of the Councils and LGNZ about providing additional assurance that work will be completed within the 18 month period. I have not included a further requirement for building owners to provide an engineering assessment to Councils, as it may undermine the original policy decision to exempt securing work from building consents to ensure an efficient process. Proposals in the Amendment Order provide sufficient evidence of reasonable steps to comply with a notice.
- 50 Demolition of a building does not fall within the definition of securing work in the Principal Order, so it cannot be included as an alternative pathway for reasonable steps. However, Councils have discretion about whether to enforce notices in this instance where the danger posed by the building has been removed by other methods.
- 51 CBC's decision to provide a six month extension strikes a balance between the need to get securing work done during the continued period of heightened earthquake risk, and the practical constraints that have delayed some projects. Therefore I consider an extension beyond the six month period would place too much weight on the concerns of building owners against wider concerns for public safety.

#### *Consultation on policy development and draft Amendment Order*

- 52 The following agencies have been consulted in the course of developing the policy and draft Amendment Order: the Department of the Prime Minister and Cabinet (Ministry for Civil Defence & Emergency Management and Policy Advisory Group), Ministry for the Environment, Ministry for Culture and Heritage, Department of Internal Affairs, the Ministry of Justice and the Treasury.

#### **Recommendations**

The Minister for Building and Construction recommends that the Cabinet Legislation Committee:

- 1 **note** that on 20 December 2017 the Cabinet Business Committee (having been authorised by Cabinet to have Power to Act) agreed to amend the Hurunui/Kaikōura Earthquakes Recovery (Unreinforced Masonry Buildings) Order 2017 to extend the time to complete mandatory securing work before an offence is committed by six months [CBC-17-MIN-0093 refers];
- 2 **note** that Cabinet Business Committee authorised the Minister for Building and Construction to approve changes consistent with its decisions on any issues that arise during the drafting process [CBC-17-MIN-0093 refers];
- 3 **note** the following changes were approved during drafting:
  - 3.1. the six-month extension for building owners who have taken reasonable steps to complete mandatory URM securing work is phrased as a 'defence' to failing to comply with the securing requirement;
  - 3.2. the extension is only available to a person who has taken reasonable steps to comply with the notice to complete securing work within one year of the date on which the notice is issued;



- 3.3. a person is treated as having taken reasonable steps towards complying with a notice only if:
  - 3.3.1. the design of the building work required under the notice has been, or is being, carried out or reviewed by a chartered professional engineer; and
  - 3.3.2. a programme of work is available to the territorial authority for inspection showing the building work required under the notice will be completed before the date that is 18 months after the date on which the notice is issued;
- 3.4. section 378 of the Building Act 2004 is modified to clarify that the affected Councils have a further six months to take enforcement action against building owners who do not comply with the extended timeframe;
- 4 **note** that the changes in paragraph 3 above are consistent with the Cabinet Business Committee's decisions referred to in paragraph 1 above;
- 5 **note** that sections 8 and 9 of the Hurunui/Kaikōura Earthquakes Recovery Act 2016 (the Recovery Act) require that the Minister for Building and Construction:
  - 5.1. be satisfied that the Amendment Order is necessary and desirable for the purpose of the Recovery Act, the extent of the Amendment Order is not broader than is reasonably necessary to address the matters that gave rise to the Amendment Order, and the Amendment Order does not breach section 11 of the Recovery Act
  - 5.2. provide a draft of the Amendment Order to the Hurunui/Kaikōura Earthquakes Recovery Review Panel and the Regulations Review Committee, along with a draft of the Minister's statement of reasons for recommending the making of the Amendment Order
  - 5.3. have regard to the Review Panel's recommendations and the comments of the Regulations Review Committee on the draft Amendment Order;
- 6 **note** that, as required by section 9 of the Recovery Act, the Minister for Building and Construction has engaged with Local Government New Zealand, Property Council New Zealand, Wellington Chamber of Commerce, Jackson Street Programme, Inner City Wellington, Wellington City Council, Hurunui District Council, Hutt City Council, Marlborough District Council, and affected building owners, and had regard to comments received;
- 7 **note** the advice of the Minister for Building and Construction that the statutory requirements of the Recovery Act have been met;
- 8 **note** that, in accordance with section 8(3) of the Recovery Act, the Minister for Building and Construction does not consider that it would be appropriate to repeat the engagement process given the differences between the drafts of the Amendment Order;
- 9 **authorise** the submission to the Executive Council of the Hurunui/Kaikōura Earthquakes Recovery (Unreinforced Masonry Buildings) Amendment Order 2018;

- 10** **note** that a waiver of the 28-day rule is sought:
- 10.1. so that the Amendment Order can come into force on 9 March 2018
  - 10.2. on the grounds that it is necessary to ensure the Amendment Order comes into force within one year of the date on which the first notice requiring securing work to be undertaken was issued;
- 11** **agree** to waive the 28-day rule so that the Amendment Order can come into force on 9 March 2018;
- 12** **note** that the Minister for Building and Construction intends to announce the details of the amendments once the Amendment Order has been signed by the Governor-General, to provide time for affected Councils and building owners to prepare.

Authorised for lodgement

Hon Jenny Salesa

Minister for Building and Construction