

# 1

**Provision  
of services  
infrastructure in  
areas affected by  
climate change**

## Disclaimer

Local Government New Zealand and the individuals associated with the production of this guidance material give no warranties of any kind concerning the accuracy or completeness of the contents of this document, and accept no responsibility for any actions taken based on, or reliance placed on the contents of this document and exclude to the full extent permitted by law liability for any loss, damage or expense, direct or indirect, and however caused, whether through negligence or otherwise, resulting from any person or organisation's use of, or reliance on, the contents of this document. The contents of this document are guidance materials only and should not be treated as a substitute for independent legal advice.

## Provision of services infrastructure in areas affected by climate change

This guidance document provides a brief overview of Simpson Grierson's legal opinion on councils' ability to stop or limit the provision of services infrastructure and potential liability consequences, available at [www.lgnz.co.nz/climate-change-project](http://www.lgnz.co.nz/climate-change-project).

Note that this guidance document is not comprehensive, and should not be treated as a substitute for review of the detailed legal opinion or independent legal advice.

### What does this legal opinion consider?

The legal opinion considers the ability of local authorities to limit or stop the provision of services and related infrastructure in areas that are, or might be, affected by climate change natural hazards and risks.

The opinion considers the following services and related infrastructure:

- Flood and erosion protection works;
- Roads and bridges; and
- Three waters services.

For the purposes of the opinion, climate change natural hazards and risks include sea level rise (and consequential inundation, erosion and rising ground water levels) and extreme weather events causing slips and flooding.

For the purposes of the advice, limiting or stopping services may in some cases involve ceasing to maintain services, physically removing them or deciding not to reinstate services that are destroyed or significantly damaged.

## Flood and erosion protection works

Question: Can a local authority cease or limit the provision of flood and erosion protection works?

Short answer:

Decision-making about constructing or ceasing to support, or limiting support for, flood and erosion protection works should be considered as being of an essentially discretionary nature. However, a local authority should ensure that it fulfils its public law responsibilities when making a decision of this nature.

### What public law responsibilities should a local authority fulfil when making a decision to cease supporting flood and erosion protection works?

- A local authority must properly consider whether it should cease to support or limit support for flood and erosion protection works.
- A local authority should take into account all relevant matters when making a decision to cease supporting or limiting support for flood and erosion protection works. Some relevant matters that should be taken into account are set out in the attached legal opinion, and councils should seek specific legal advice. If a local authority can show it has turned its mind to those issues, it is more likely to be able to defend a decision to cease supporting flood and erosion protection works.
- Local authorities should have in place strategies for managing the consequences of ceasing to maintain or support, or limiting support for, flood or erosion protection works if such a decision is made.

## Roads and bridges

Question: Can a territorial authority cease maintaining or repairing roads because of climate change impacts so that they are no longer available for vehicular access and/or pedestrian traffic?

Short answer:

A local authority has no statutory obligation to repair roads. As such, a local authority has discretion to decide not to undertake repair or

remedial works on a public road or bridge because of climate change impacts. However, a council should ensure that it fulfils its public law responsibilities when making a decision of this nature.

#### **What public law responsibilities should a council fulfil when making a decision not to undertake repair or remedial works on a road or bridge?**

- Although the power to repair roads and bridges is discretionary, a local authority should properly consider whether or not to exercise that power.
- A local authority should not adopt a blanket policy not to maintain any roads.
- A local authority should be able to demonstrate that it has taken all relevant matters into consideration when deciding whether to repair a road or bridge, and has not taken any irrelevant considerations into account. Local authorities should seek legal advice on the relevant matters that should be factored into their decision making.
- There may be instances where a decision not to repair a road might be characterised by a Court as so unreasonable that no reasonable local authority could decide not to repair the road. In those circumstances, there would effectively be a public law duty on the council to repair the road.

## **Three waters services**

Question: Does a local authority have power to limit or stop provision of three waters services?

Short answer:

The Local Government Act 2002 (LGA) places strict limitations on councils' ability to stop or limit the provision of three waters services.

#### **What requirements must be met before a water service can be closed down?**

Section 131 sets out the strict requirements that a local government organisation must meet before a water service can be closed down.

If one or more of the requirements is not met, a council may not close down the water service.

#### **Can a local government organisation make changes to the way it delivers water services?**

There are good arguments for the view that a local government organisation has power to make changes to the way it delivers water services from time to time.

It may be possible to argue that a reduction in the level of service in a particular case could amount to an effective "close down" of the service. However, this argument is only likely to prevail in extreme situations.

< Local authorities must take a long-term view when making decisions about the development of new infrastructure. >

## **General comments**

- When making decisions of the nature outlined in this summary document, a local authority should ensure that its decision making complies with the general requirements under the Local Government Act, including the obligation to carry out robust engagement and consultation.
- A person who is affected by a local authority's breach of a public law obligation can bring judicial review proceedings seeking to have the relevant decision quashed or revisited. If a decision is made in a robust manner, in compliance with a local authority's statutory decision making responsibilities and administrative law principles, this will assist in successfully resisting such proceedings.
- It is clear that local authorities need to plan for climate change both at a regulatory and policy level, as well as in terms of actual provision of infrastructure that will need to accommodate climate change over at least the next 50 – 100 years. Local authorities must take a long-term view when making decisions about the development of new infrastructure, and should consider how they can build resilience into that infrastructure, so as to minimise the likelihood of it being adversely affected by climate change risks and hazards in the future. This is particularly important in terms of infrastructure that has a long life and/or is essentially permanent.