



## Proactive Release

The following document has been proactively released by the Department of the Prime Minister and Cabinet, on behalf of Hon Mark Mitchell, Minister for Emergency Management and Recovery:

### **Government Response to Regulatory Review Committee recommendations on SWERLA OICs**

The following documents have been included in this release:

**Title of paper:** Government Response to the Report of the Regulations Review Committee on secondary legislation made under the Severe Weather Emergency Recovery Legislation Act 2023 (CAB-24-SUB-0406 refers)

**Title of minute:** Report of the Cabinet Legislation Committee: Period Ended 18 October 2024 (CAB-24-MIN-0406 refers)

**Title of minute:** Government Response to Regulatory Review Committee recommendations on SWERLA OICs (LEG-24-MIN-0208 refers)

~~[In Confidence]~~

Office of the Minister for Emergency Management and Recovery  
Chair, Cabinet Legislation Committee

## **Government Response to the Report of the Regulations Review Committee on secondary legislation made under the Severe Weather Emergency Recovery Legislation Act 2023**

### **Proposal**

- 1 This paper seeks approval of the Government's response to the Regulations Review Committee (the Committee) report on secondary legislation made under the Severe Weather Emergency Recovery Legislation Act 2023 (SWERLA).
- 2 The Committee's report raises several concerns with some Orders in Council (Orders) that remove appeal rights under the Resource Management Act 1991 (RMA) and one Order that extended prosecution time periods for breaches of the RMA. The proposed Government response broadly agrees with the recommendations in principle, but views the actions taken in the Orders as being authorised and justified in these circumstances. The proposed response disagrees with the recommendation that the time extension was unusual or unexpected use of powers.
- 3 The Committee does not recommend disallowing any of the Orders reviewed and its recommendations are made for the purpose of the Government noting its view and providing a response.

### **Background**

- 4 SWERLA was enacted to support recovery from the North Island Weather Events in 2023. SWERLA enables the Governor-General to make Orders to modify other statutes as listed in the schedule in the Act. Doing so provides relief from legislative requirements that are overly burdensome in the context of urgent works necessary for recovery.
- 5 Eighteen Orders have been enacted in this recovery, with a further Order (the Auckland Flood Resilience Works Order) yet to be enacted. Many of these modify or remove some appeal rights under the Resource Management Act 1991 (RMA) to provide a faster consenting process. This ensures certainty of timeframes and outcome for recovery projects, including for those that remove an intolerable risk to life from residential properties, such as flood mitigation works in the Hawke's Bay.

- 6 The Committee reviews Orders, as a part of its normal business<sup>1</sup>, and in accordance with section 8 of SWERLA, which requires that all draft Orders are provided to it.
- 7 As a part of these reviews, the Committee considered that four Orders<sup>2</sup> that removed appeal rights under the RMA, appeared to exclude the jurisdiction of the courts without explicit authorisation in SWERLA.<sup>3</sup> The Committee raised these concerns with the Minister for the Environment and Minister of Transport. Ministers Simmonds and Brown (in March and April respectively) responded to the Committee's concerns, stating that;
- 7.1 they do not consider that limiting appeal rights excludes the jurisdiction of the Court as judicial review rights remain unchanged;
- 7.2 limiting appeal rights within an Act specified in Schedule 2 is provided for by section 7 of the Act; and
- 7.3 the policy intent (to speed up RMA processes to enable faster recovery and safety for residents) justifies the limitation of appeal rights.

#### **Crown position on matters raised by the Committee on the four SWERLA Orders**

- 8 The Chief Executive Cyclone Recovery supported by the Cyclone Recovery Unit in the Department of Prime Minister and Cabinet, with input from the Crown Law Office, Ministry of Transport, Ministry for the Environment and the Parliamentary Counsel Office coordinated a Crown approach to the concerns raised on the limitation of appeal rights [DPMC-2023/24-1139], that confirmed:
- 8.1 Whether an Order limits appeal rights is determined on a case-by-case basis.
- 8.2 The limitation of appeal rights is within scope of section 7 of the Act and is therefore explicitly authorised by it.
- 8.3 That the policy intent to meaningfully speed up RMA processes to enable faster recovery and safety for residents is a justifiable rationale for the removal of appeal rights in the context of recovery from the North Island Weather Events. This is due to the complexity and severity of the effects of the weather events, the importance of reducing lengthy RMA processes that slow down recovery, and the need to provide safety and certainty to landowners and communities as soon as possible.

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<sup>1</sup> The Committee is empowered by Standing Order 326(1) to examine all secondary legislation. When the Committee examines secondary legislation, it considers whether it should be drawn to the special attention of the House on any of the grounds set out in Standing Order 327(2).

<sup>2</sup> The specific Orders referred to are the Waste Management Order, KiwiRail Order, Waka Kotahi Order, and the Hawke's Bay Flood Protection Order.

<sup>3</sup> This is set out in Standing Order 327(2)(e) as a ground for drawing secondary legislation to the special attention of the House.

8.4 It is up to the Committee to determine whether they consider the policy rationale in each Order justifies the limitation of appeal rights.

9 For the extension of time periods for prosecutions and their retrospective application in the Severe Weather Emergency Recovery (Resource Management—Time Extensions) Order 2023, officials consider that this was not an unusual use of the powers. This is because both the powers align with section 3(2)(b), in accordance with section 8(1)(a)(i) of the Act. The powers are further supported by section 7 of SWERLA. Further, this Order came into force just after the (now repealed) Natural and Built Environment Act 2023 (the NBA) and matched its prosecution timeframe of two years.

**The Regulations Review Committee findings, and comment on them**

10 The Committee has now taken the step of stating these concerns in a report to the House.

11 The table below lists the four recommendations, the proposed Government position, and a short comment on them.

	<b>Regulations Review Committee Recommendation</b>	<b>Proposed Government position</b>	<b>Comment</b>
1	Only make secondary legislation authorising the truncation of appeal rights in the future if the primary legislation explicitly authorises the exclusion of the jurisdiction of the courts, including for any future orders made under SWERLA.	Agree in principle	The Government considers that the truncation of appeal rights within an Act specified in Schedule 2 is within scope of section 7 of SWERLA and is therefore explicitly authorised by it. The Government will keep in mind this recommendation for future applications.
2	Only make secondary legislation excluding the jurisdiction of the courts in the rare circumstances that it is justified.	Agree in principle	The policy intent to meaningfully speed up RMA processes to enable faster recovery and safety for residents is a justifiable rationale for the removal of appeal rights in the context of recovery from the North Island Weather Events.
3	Uphold the current practice of not excluding judicial review.	Agree	The Government has not identified any recommended actions requiring a response. No Order has suggested excluding judicial review.
4	Note that the retrospective extension of the criminal limitation	Disagree	The Government is of the view that this was not an

<p>period in the Severe Weather Emergency Recovery (Resource Management—Time Extensions) Order 2023 was an unusual or unexpected use of powers conferred by the enactment under which it is made.</p>		<p>unusual use of the powers conferred by the enactment and it was not retrospective. The powers align with section 3(2)(b), in accordance with section 8(1)(a)(i) of SWERLA. The powers are further supported by section 7 of SWERLA. The time extension period applies prospectively</p>
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### Future emergency legislation

- 12 The Parliamentary Counsel Office (PCO) note that a feature of emergency legislation is broad enabling provisions to provide flexibility to address issues as they arise. They also note that truncating appeal rights has become a regular feature of emergency legislation (e.g. legislation for Kaikoura/Hurunui Earthquakes and North Island Weather Events) and therefore a provision that authorises this for the purpose of the response and recovery should be included in future emergency legislation rather than relying on a broad enabling power. This approach is consistent with the Legislation Guidelines 2021.
- 13 Officials and ministers may need to consider this approach when making future emergency legislation. PCO will work to update their emergency legislation templates.

### Timing of the Government response

- 14 The Government response must be presented to the House by 6 November 2024.

### Consultation

- 15 This paper has been consulted with the following agencies; Ministry for the Environment; Ministry of Transport; Parliamentary Counsel Office; Crown Law Office; Land Information New Zealand; Department of Internal Affairs; Department of Conservation; Ministry of Primary Industries; Ministry for Regulation; Department of Prime Minister and Cabinet (Policy Advisory Group).

### Financial implications

- 16 There are no financial implications from this paper.

### Publicity

- 17 The Government response will be presented to the House.

## Proactive Release

- 18 The Minister for Emergency Management and Recovery intends to release this paper proactively in whole or part within 30 business days of final decisions.

## Recommendations

- 1 The Minister for Emergency Management and Recovery recommends that the Cabinet Legislation Committee:
- 1.1 **note** that on 13 August the Regulations Review Committee presented its report to the House entitled “Briefing on retrospective change of limitation periods and the truncating of appeal rights in secondary legislation in response to an emergency event”;
  - 1.2 **note** that the Regulations Review Committee provided recommendations listed below;
    - 1.2.1 Only make secondary legislation authorising the truncation of appeal rights in the future if the primary legislation explicitly authorises the exclusion of the jurisdiction of the courts, including for any future orders made under the Severe Weather Emergency Recovery Legislation Act.
    - 1.2.2 Only make secondary legislation excluding the jurisdiction of the courts in the rare circumstances that it is justified.
    - 1.2.3 Uphold the current practice of not excluding judicial review.
    - 1.2.4 Note that the retrospective extension of the criminal limitation period in the Severe Weather Emergency Recovery (Resource Management—Time Extensions) Order 2023 was an unusual or unexpected use of powers conferred by the enactment under which it is made.
  - 1.3 **note** the submission of the Minister for Emergency Management and Recovery and in particular his/her advice that the Government agree in principle with the Committee’s two recommendations relating to secondary legislation that removes appeal rights, agree with the recommendation to maintain judicial review, and disagree that the extension of the criminal limitation period in the Severe Weather Emergency Recovery (Resource Management—Time Extensions) Order 2023 was an unusual or unexpected use of powers;
  - 1.4 **agree** the government response attached to this paper, to the Report of the Regulations Review Committee entitled “Briefing on retrospective change of limitation periods and the truncating of appeal rights in secondary legislation in response to an emergency event”;

- 1.5 **invite** the Minister for Emergency Management and Recovery to present the government response to the House in accordance with Standing Order 256;
- 1.6 **note** that the government response must be presented to the House by 6 November;

Authorised for lodgement

Hon Mark Mitchell

Minister for Emergency Management and Recovery

*\*The attachment referenced in this paper, 'Briefing on retrospective change of limitation periods and the truncating of appeal rights in secondary legislation in response to an emergency event,' is publicly available on the Parliament website here: <https://bills.parliament.nz/v/4/4e9de552-e166-4129-8463-08dcf21e573c>*

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# Cabinet

## Minute of Decision

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*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

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### Report of the Cabinet Legislation Committee: Period Ended 18 October 2024

On 21 October 2024, Cabinet made the following decisions on the work of the Cabinet Legislation Committee for the period ended 18 October 2024:

Out of scope



LEG-24-MIN-0208

**Government Response to Regulatory Review  
Committee Recommendations on SWERLA OICs**  
Portfolio: Emergency Management and Recovery


CONFIRMED

Out of scope





Out of scope



Rachel Hayward  
Secretary of the Cabinet

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# Cabinet Legislation Committee

## Minute of Decision

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### Government Response to Regulatory Review Committee recommendations on SWERLA OICs

**Portfolio**                      **Emergency Management and Recovery**

On 17 October 2024, the Cabinet Legislation Committee:

- 1        **noted** that on 13 August 2024, the Regulations Review Committee presented its report to the House entitled “Briefing on retrospective change of limitation periods and the truncating of appeal rights in secondary legislation in response to an emergency event” (the Report);
- 2        **noted** that the Report recommended that the Government:
  - 2.1        only make secondary legislation authorising the truncation of appeal rights in the future if the primary legislation explicitly authorises the exclusion of the jurisdiction of the courts, including for any future orders made under the Severe Weather Emergency Recovery Legislation Act 2023;
  - 2.2        only make secondary legislation excluding the jurisdiction of the courts in the rare circumstances that it is justified;
  - 2.3        uphold the current practice of not excluding judicial review;
  - 2.4        note that the retrospective extension of the criminal limitation period in the Severe Weather Emergency Recovery (Resource Management—Time Extensions) Order 2023 was an unusual or unexpected use of powers conferred by the enactment under which it is made;
- 3        **noted** the submission of the Minister for Emergency Management and Recovery and in particular his advice that the Government agree in principle with the Committee’s two recommendations relating to secondary legislation that removes appeal rights, agree with the recommendation to maintain judicial review, and disagree that the extension of the criminal limitation period in the Severe Weather Emergency Recovery (Resource Management—Time Extensions) Order 2023 was an unusual or unexpected use of powers;
- 4        **approved** the Government response, attached to the paper under LEG-24-SUB-0208, to the Report;
- 5        **invited** the Minister for Emergency Management and Recovery to present the Government response to the House in accordance with Standing Order 256;

6 **noted** that the Government response must be presented to the House by 6 November 2024.

Tom Kelly  
Committee Secretary

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**Present:**

Rt Hon Winston Peters  
Hon Chris Bishop (Chair)  
Hon Dr Shane Reti  
Hon Simeon Brown  
Hon Brooke van Velden  
Hon Paul Goldsmith  
Hon Mark Mitchell  
Hon Tama Potaka  
Hon Casey Costello  
Hon Nicole McKee  
Hon Penny Simmonds  
Hon Andrew Bayly  
Hon Scott Simpson, MP  
Jamie Arbuckle, MP  
Todd Stephenson, MP

**Officials present from:**

Officials Committee for LEG  
Leader of the House's Office

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