

Our advice

Prepared for Local Government New Zealand
Prepared by Duncan Laing
Date 13 February 2018

PRIVILEGED AND CONFIDENTIAL

Ability to stop or limit the provision of services infrastructure and potential liability consequences

-
- Background**
1. You have asked us for our advice as to the ability of local authorities to limit or stop the provision of services and related infrastructure (**services**) in areas that might be affected by climate change natural hazards and risks.¹ You have also asked us to briefly comment on the potential legal challenges/liabilities that might flow from decisions to stop or limit services.
 2. We have assumed for the purposes of this advice that your reference to limiting or stopping services may in some cases involve ceasing to maintain services, physically removing them, or in the case of destruction or significant damage, deciding not to reinstate them.
 3. While the focus of this advice is on climate change related hazards and risks, much of the analysis which follows is likely to be of more general relevance to community assets vulnerable to natural hazards, putting aside any enhanced risks from climate change. In most instances, climate change can be regarded as simply an additional matter to factor into the policy and planning processes of a local authority.
 4. The specific issues raised for our advice are broadly relevant to decisions to fund and construct new infrastructure,² as well as to existing infrastructure. Out of necessity, our advice will involve a high level overview of the relevant issues, especially in relation to the liability consequences of decisions to limit or stop the provision of services.
 5. This advice does not:
 - cover the separate potential liabilities of a local authority as the *owner* of the land subject to natural hazards;³

1 These impacts include sea level rise (and consequential inundation, erosion and rising ground water levels), and extreme weather events causing slips and flooding.
2 The ability for a council to be able to limit or stop the provision of new works in the future because of climate change (or other factors) may influence a local authority's decision to carry out such works in the first instance.
3 This is particularly relevant to coastal protection works. A territorial authority will often have esplanade reserves or other land vested in it along the coastline.

-
- directly deal with potential regulatory and informational responses to climate change impacts;⁴ or
 - cover how the impacts of climate change should be assessed when making decisions about present or future services.
6. It is axiomatic 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 to 100 years. This is particularly important in terms of infrastructure that has a long life and/or is essentially “permanent”.
7. You have identified three key areas for our consideration:
- Flood and erosion protection works.
 - Roads and bridges.⁵
 - Three Waters Services.
8. We briefly describe the specific issues associated with these three areas below.

Flood and erosion protection works

9. These works include stop banks, groynes, coastal revetments/seawalls, and other flood protection works such as detention dams and ponds.
10. These works may often involve considerable capital expenditure and ongoing maintenance costs, and may ultimately require upgrading and/or increased maintenance, when they are located in areas that are becoming increasingly vulnerable to flooding and erosion impacted by climate change. They are also likely to be fairly permanent in nature and landowners may well have made land development decisions and obtained consents based on the existence of such infrastructure.⁶ To cease or limit such works in the future would have significant financial and other consequences for landowners and other members of the public.
11. Local authorities are likely to come under increased pressure both to maintain and upgrade existing works that may have a finite life and/or will be inadequate because of climate change, and to construct new works to deal with increased flooding and erosion impacts, as opposed to adopting policies and regulatory measures that impact on the economic interests of landowners. Such policies and measures may include managed retreat, maintaining an existing level of service that does not cater for climate change, or placing planning restrictions on new

4 This has been dealt with within other advice.

5 We will discuss roads and bridges together as bridges are normally on legal roads.

6 An example is a stop bank catering for a 100 year flood event that has enabled development beside it.

subdivision and development, and/or exercising relevant Building Act powers.

Roads and bridges

12. There is some cross over with the first area above, as roads are sometimes constructed along the margin of water bodies or the coast and can effectively act as protection works. Roads may also contain Three Waters Services and so there is some cross over with the third area below.
13. Roads and bridges can become unusable because of slips and wash-outs and these events are likely to be exacerbated by climate change. They may also become subject to increased flooding or erosion in particular circumstances.
14. It may ultimately become uneconomic for a local authority to reinstate such services especially if they only serve a relatively small number of properties. In other circumstances, a road or bridge may, in particular, be virtually impossible to reinstate on an existing alignment – at least at a cost that is within the financial resources of a local authority.

Three Waters Services

15. These services are important to the continued existence of urban and some semi-urban communities in particular, and this is implicitly recognised by the provisions in the Local Government Act 2002 (**LGA 02**) restricting the closure or limitation of such services. These provisions will be dealt with in more detail below.
16. Climate change could influence the delivery of wastewater, stormwater and water supply services in a variety of ways. Reduced rainfall or extreme rainfall events, increased temperatures, and sea level rise may all impact on the ongoing viability of these services in certain areas of a district or region.

Statutory Background

17. Before turning to an analysis of the specific legal principles relating to each of the categories outlined above, we propose to outline a number of statutory provisions in the LGA 02 that are likely to be common to any decision making process relating to stopping or limiting the relevant services.
18. Section 10 relates to the purpose of local government and is as follows:
 - (1) *The purpose of local government is-*
 - (a) *to enable democratic local decision-making and action by, and on behalf of, communities; and*
 - (b) *to meet the current and future needs of communities for good-quality local infrastructure,*

local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

- (2) In this Act, **good-quality**, in relation to local infrastructure, local public services, and performance of regulatory functions, means infrastructure, services, and performance that are-
- (a) efficient; and
 - (b) effective; and
 - (c) **appropriate to present and anticipated future circumstances.**

19. Paragraph (c) of the definition of “good quality” in section 10(2) expressly refers to “anticipated future circumstances”. In our view, climate change can be properly regarded as a “future circumstance”, and would in any event impact on efficiency and effectiveness under sections 10(2)(a) and 10(2)(b).

20. Section 10 needs to be considered in conjunction with section 11 which in turn relates to the role of a local authority:

The role of a local authority is to-

- (a) give effect, in relation to its district or region, to the purpose of local government stated in section 10; and
- (b) perform the duties, and exercise the rights, conferred on it by or under this Act and any other enactment.

21. Section 11A makes more detailed provision for how a local authority performs its role and focuses on certain core services:

In performing its role, a local authority must have particular regard to the contribution that the following core services make to its communities:

- (a) **network infrastructure;**
- (b) *public transport services;*
- (c) *solid waste collection and disposal;*
- (d) **the avoidance or mitigation of natural hazards;**
- (e) *libraries, museums, reserves, and other recreational facilities and community amenities.*

22. It is noteworthy that “network infrastructure”⁷ is expressly mentioned as well as “the avoidance and mitigation of natural hazards”. This latter provision reinforces the importance to be attached to natural hazards, and particular regard must be had to these core services in performing the council’s role. This is in turn particularly relevant to any decision making process to cease or limit flooding or erosion protection works.

23. Section 12 contains what is known as the power of general competence. Sections 12(1) to 12(3) are as follows:

12 Status and powers

- (1) *A local authority is a body corporate with perpetual succession.*
- (2) *For the purposes of performing its role, a local authority has-*
 - (a) *full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and*
 - (b) *for the purposes of paragraph (a), full rights, powers, and privileges.*
- (3) *Subsection (2) is subject to this Act, any other enactment, and the general law.*

24. While the provision of roading infrastructure is still governed in part by the Local Government Act 1974 (**LGA 74**) and flood protection works in part by the Soil Conservation and Rivers Control Act 1941 (**SCRCA**), the *provision* of coastal protection works and Three Waters services are now essentially governed by the power of general competence.⁸

25. Section 13 is important as it relates sections 10 and 12(2) to other legislation:

Sections 10 and 12(2) apply to a local authority performing a function under another enactment to the extent that the application of those provisions is not inconsistent with the other enactment.

26. Finally, section 14 relates to principles relating to local authorities:

- (1) *In performing its role, a local authority must act in accordance with the following principles:*
 - (a) *a local authority should-*
 - (i) *conduct its business in an open, transparent, and democratically accountable manner; and*
 - (ii) *give effect to its identified priorities and desired outcomes in an efficient and effective manner:*
 - (b) *a local authority should make itself aware of, and should have regard to, the views of all of its communities; and*
 - (c) *when making a decision, a local authority should take account of-*
 - (i) *the diversity of the community, and the community's interests, within its district or region; and*

⁸ The continuing provision, closure, or transfer, of water services is however governed by sections 130 to 135 of the LGA 02. These provisions will be discussed below.

-
- (ii) **the interests of future as well as current communities; and**
 - (iii) *the likely impact of any decision on the interests referred to in subparagraph (1) and (ii):*
 - (d) *a local authority should provide opportunities for Māori to contribute to its decision-making processes;*
 - (e) *a local authority should actively seek to collaborate and co-operate with other local authorities and bodies to improve the effectiveness and efficiency with which it achieves its identified priorities and desired outcomes; and*
 - (f) *a local authority should undertake any commercial transactions in accordance with sound business practices; and*
 - (fa) *a local authority should periodically-*
 - (i) *assess the expected returns to the authority from investing in, or undertaking, a commercial activity; and*
 - (ii) *satisfy itself that the expected returns are likely to outweigh the risks inherent in the investment or activity; and*
 - (g) *a local authority should ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region, **including by planning effectively for the future management of its assets;** and*
 - (h) *in taking a sustainable development approach, a local authority should take into account-*
 - (i) *the social, economic, and cultural interests of people and communities; and*
 - (ii) *the need to maintain and enhance the quality of the environment; and*
 - (iii) *the reasonably foreseeable needs of future generations.*
- (2) *If any of these principles conflict in any particular case, the local authority should resolve the conflict in accordance with the principle in subsection 1(a)(i).*

27. Again the references in section 14(1)(c)(ii) to future communities and in section 14(1)(g) to planning effectively for the future management of assets, are important in terms of decision making involving climate change issues.
28. All Council decisions, whether made by the Council itself or under delegated authority, are subject to the decision-making requirements in sections 76 to 82 of the LGA 02. This includes any decision not to take any action.
29. There are two primary requirements. The first is section 77, which requires the Council to identify all reasonably practicable options for achieving its objective or addressing the matter under
-

consideration, and to then assess each of these options in terms of its advantages and disadvantages. Practically, this requirement is intended to ensure the Council has fully canvassed all the ways in which it might proceed, and that its decision is well-informed and reasoned.⁹

30. The second, in section 78, is that the Council must consider the views and preferences of interested or affected persons in the course of its decision-making. This requires the Council to identify those persons who are interested or affected by a decision and what their views are, and to then take those views into account. One way of identifying views and preferences is through some form of consultation or engagement, but section 78 makes clear that it does not necessarily require this.
31. In deciding whether engagement or consultation might be appropriate, the Council should consider its Significance and Engagement Policy.¹⁰ Where the Council does choose to undertake some form of consultation, it will need to comply with the consultation principles set out in section 82.
32. Section 79 contains an important proviso to the requirements in sections 77 and 78. It provides that the Council has discretion about how to comply with these requirements in any particular case, but states that compliance should be largely in proportion to the level of significance¹¹ of the matter concerned. So the more significant a matter is, the more rigorous the Council's assessment under section 77 should be, and the more likely it is that the Council will carry out some form of engagement or consultation under section 78.
33. Other decision-making requirements in the LGA 02 include the need to identify any decisions that are significantly inconsistent with any Council policy or plan (section 80), and to provide opportunities for Māori to contribute to decision-making (section 81).
34. A local authority's decision making processes must be seen in the context of the other provisions in subpart 1 of Part 6 relating to the Long-term Plan (**LTP**), the Annual Plan, and in subpart 3 relating to financial management. It is beyond the scope of this advice to deal comprehensively with these provisions, but we note the following:
 - (a) Section 97(1)(a) relating to a decision to alter significantly the intended level of service provision for any *significant activity* (including a decision to

9 Rigorous compliance with these requirements will be of considerable importance if a local authority is contemplating closing down or even limiting a particular service.

10 The Council should also determine whether there is any particular legislative obligation to consult, whether in the LGA 02 or other local government legislation.

11 Significance is determined on a case-by-case basis, in accordance with the Council's Significance and Engagement Policy.

commence or cease such activity) may need to be complied with in relation to any proposal to limit or cease the provision of services, and if so, it has the consequence that the proposal and decision must be in a consultation document for a LTP and then the LTP itself.

- (b) A financial strategy under section 101A must include a statement of factors relating to the expected capital expenditure on network infrastructure, flood protection, and flood control works, that is required to *maintain existing levels of service*. Climate change impacts may result in a reduced level of service without additional expenditure being incurred.
- (c) Under section 101B, a infrastructure strategy must outline how the local authority intends to manage its infrastructure assets taking into account the need to provide for the resilience of infrastructure assets by identifying and managing risks associated with natural hazards and by making appropriate financial provision for those risks. The risks associated with natural hazards would include established climate change impacts.
-

Questions

- (a) What ability does a local authority have to limit or stop the provision of services/infrastructure in areas that might be affected by climate change natural hazards/risks? You have identified three key areas for our consideration, and we will answer these separately:

Question 1: Flood and erosion protection works.

Question 2: Roads and bridges.¹²

Question 3: Three Waters Services.

- (b) Question 4: What legal challenges and liabilities may be involved if a local authority was to stop or limit the provision of services in circumstances where they were adapting to potential futuristic risks (as opposed to dealing with a risk or hazard event that has already arisen or occurred)?
-

Short Answers

Question 1:

35. While decision-making about constructing coastal protection works and ceasing to support such works should be considered to be essentially discretionary in nature, there may be a duty on a local authority to at least properly consider whether the power should be exercised, or cease to be exercised.
36. In summary, if a local authority can show that it has turned its mind to climate change issues in the way outlined below, we
-

12 We will discuss roads and bridges together as bridges are normally on legal road.

consider it is likely to be able to more readily defend a decision either not to continue supporting coastal protection works in any particular case, or to simply maintain an existing level of service in the knowledge that the works will ultimately become inadequate for their purpose.

37. More generally, most of the decision making factors outlined above in relation to coastal protection works will also apply to flood and erosion protection works under the SCRCA. However, Section 148(2) of the SCRCA may however influence a Regional Council's decision-making in terms of stopping or limiting the provisions of such works.
38. Finally, in terms of other flood and erosion control works,¹³ such works may be undertaken by local authorities under the general power of competence as opposed to the SCRCA. Again, most of the decision making factors discussed in relation to coastal protection works will equally apply in this situation.

Question 2:

39. In our view, in conferring a power to repair roads, section 319(a) of the Local Government Act 1974 (**LGA 74**) does contemplate that a local authority may decide not to continue to repair a specific road. However, the local authority must fulfil its public law responsibilities in making any decision of this nature.
40. In particular, we consider 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 such circumstances, there would effectively be a public law duty to act, notwithstanding that section 319(a) is expressed to be empowering only.
41. However, in the absence of any procedural impropriety, or a clear breach of established administrative law principles, a decision of a local authority not to undertake repair or remedial works on a public road or bridge because of climate change impacts could well survive challenge.

Question 3:

42. It would seem reasonably clear that reading sections 130 and 131 of the LGA 02 together, a local government organisation can only close down an individual water service if the strict requirements of section 131(2) are met.
43. We consider however that 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 could

13 For instance where undertaken by territorial authorities.

possibly be argued that a *reduction* in the level of service could amount to an effective “close down” of the service, but we doubt that this argument is likely to prevail except perhaps in an extreme situation.

Question 4:

44. A local authority’s public and private law responsibilities are distinct. A person who is affected by the breach of a public law obligation can bring judicial review proceedings seeking to have a decision quashed or revisited.
45. It is possible, if not likely, that decisions to stop or limit the provision of infrastructure services because of climate change (or other impacts) will be challenged in the future in reliance on established administration law grounds because of the financial and other implications for people and communities. A decision to stop or limit a service in breach of a statutory provision such as sections 130 and 131 of the LGA 02 would also be amenable to judicial review.
46. If, however, a decision is made in a robust manner in compliance with a local authority’s statutory decision making responsibilities and other relevant factors, this will assist in successfully resisting such proceedings.
47. In order to claim monetary compensation, the person must bring a private law action for damages in tort. Such an action would usually be brought in the common law tort of negligence but other causes of action such as nuisance, breach of statutory duty, and misfeasance in public office may also potentially apply.
48. While we make some general comments below about claims for damages, it is beyond the scope of this advice to cover in any detail the precise nature of common law liability that could arise from climate change related decisions about such services.

Our reasons

Question 1: Can a local authority cease or limit the provision of flood and erosion protection works?

49. We have divided our discussion of this issue into a number of separate topics – coastal erosion works, stop banks and other defences covered by the SCRCA, and other forms of protection not subject to specific statutory provision (other than the power of general competence).

Coastal protection works

50. There is no express statutory duty under the LGA 02 on a Council to protect properties from the encroachment of the sea. Such a statutory duty is also absent from the Resource Management Act (**RMA**). Further, there is no legislation in New Zealand equivalent to the Coast Protection Act 1949 (United Kingdom), which provides for compensation for damage to interests in land resulting from provision of, or failure to provide, coastal protection works.¹⁴
51. However, territorial authorities previously had, under section 469 of the LGA 74, a specific power (as opposed to an express duty) to undertake coastal works. It would seem that a similar power can also be exercised in reliance upon the general power of competence conferred by section 12 of the LGA 02, subject of course to the Council (inter alia) acting in accordance with the purpose, role, and principles of local authorities and the procedural requirements in Part 6 subpart 1.
52. The question as to whether a Council had any legal responsibility founded in a duty of care to protect its ratepayers from coastal erosion was considered in passing in *Bosworth v Rodney County Council*.¹⁵
53. His Honour said at page 63 of the unreported judgment:
- It must today be a moot point, depending on the statutory setting, whether a local authority in New Zealand could be under a duty of care to its ratepayers to protect them from being inundated by the sea. The decision will ultimately hinge on the correct interpretation of the Local Government Act, any other legislation having a bearing on coastal protection, and the parallel implications of the common law.*
54. The High Court then referred to section 469 of the LGA 74 which at the time, and until 1 July 2003 (when the relevant provisions of the LGA 02 came into force), provided as follows:
- The Council **may** construct and maintain within or outside the district any works or do anything necessary to prevent damage to any property inside the district or to the property inside the district or to the property of the Council outside the district from floods of rivers or stream, **or from encroachment of the sea.***
[Emphasis added]
55. Although this provision did not contain an express duty, it did raise the question of whether a local authority could be held by the courts to be under an *implied* duty to construct coastal

14 See section 4 of the Coastal Protection Act 1949 and the discussion in *Falkner v Gisborne District Council* [1995] 3 NZLR 622.

15 A350/81, Chilwell J, 24 February 1983.

protection works, or alternatively in particular circumstances there was an implied obligation to *consider* whether or not to exercise its discretion to continue to maintain such works, or alternatively to cease or limit those works.

56. In the *Bosworth* case, where there was a road vested in the Council and was at risk from coastal erosion, the Court referred to a series of factors which might influence whether a duty of care might exist in the first instance.¹⁶ Some of the matters referred to at page 62 of the decision appear to be more relevant to the question of *breach* of duty of care, but importantly the Court said:

The policy matters which must be considered by a local authority before committing itself to large expenditure could militate against the existence of a common law duty of care parallel with the statutory powers in the Local Government Act.

57. We will separately deal with potential common law liability when responding to Question 4, but a number of observations of the Court are in our view still relevant to the lawful exercise of the power of general competence to construct or continue to maintain coastal protection works.

58. In particular, the Court in *Bosworth* returned to the question of the discretion vested in Council by section 469 at page 65.

A council is answerable to its ratepayers in resolving the question. A Council may have to decide which of several competing projects is to get priority for funding. On the evidence before me, but not before the Tribunal, it is open to infer that the Council has in this case already exercised its discretion under the Local Government Act in considering whether to exercise the power to construct coastal protection works. It has investigated the feasibility of protection works and reached the conclusion not to proceed – in the short term at least. If it has responsibly exercised the power vested in it, albeit indirectly adversely affecting the sea frontagers, it does not follow that it has breached any duty of care to them or, for that matter, whether a duty was owed in the first place. The Council is under no absolute duty under the statute, especially in the light of the necessity for Ministerial approval.

59. As already mentioned, the general observations contained in the *Bosworth* case are still of some relevance although the legislative regime has changed and the focus is on a common law duty of care. If anything however, the repeal of section 469 tends to *lessen* the potential scope for the assertion of any implied public law or common law duty on the part of a territorial authority to

16 Quite separate liability issues may arise out of the Council's ownership of land adjoining the coast whether road, reserve or fee simple land vested in the Council. These issues are not discussed in this advice.

undertake or continue maintaining coastal protection work and/or the ability to assert that there has been a breach of any such duty by the territorial authority.

60. As is evident from the *Bosworth* case however, an important factor is for the local authority to have addressed the issue through a robust decision making process especially where the issue is “live” whether because it has been raised by landowners or otherwise.
61. This reflects the general principle adopted by the courts, even if there is only a permissive statutory power, there may be a duty to at least properly consider in appropriate circumstances whether the power should be exercised, and the failure or refusal to do so may be able to be challenged in judicial review proceedings.¹⁷
62. We therefore tend to the view that decision-making about constructing coastal protection works or ceasing to support such works should be considered as of an essentially discretionary nature (as explained above), but should be taken against a background of the following factors amongst others:
- (a) the statutory context of the LGA 02 including the purpose of local government, the role of a local authority, the express statutory powers (if any) expressly relating to the particular works, and the principles in section 14;
 - (b) demonstrable compliance with the statutory decision making processes in the LGA 02 including provision where necessary or appropriate in the LTP and annual plan, including the carrying out of robust consultation/engagement processes;
 - (c) the ability to obtain resource consents for such works having regard to the provisions of the RMA, the New Zealand Coastal Policy Statement, the Regional Policy Statement and any applicable powers of a regional (and if relevant) District Plan;
 - (d) the extent to which the ability to obtain RMA consents may be impacted by the protected customary rights and customary marine title provisions in the Marine and Coastal Area (Takutai Moana) Act 2014.
 - (e) robust analysis of the relevant coastal processes, a best practice assessment of the impact of climate change, efficiency and effectiveness of upgrading or continuing

17 See Joseph, *Constitutional and Administrative Law in New Zealand*, 4th ed at 22.7 (pages 894 to 896), and *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

existing coastal works and a full cost benefit/options analysis;

- (f) ensuring a good alignment with policy statements and plans under the RMA and any non-statutory policy documents;
- (g) a strategy for managing the consequences of ceasing to maintain or support existing coastal works if a decision to do so was made.

63. In summary, if a local authority can show that it has turned its mind to the issues in the way outlined, we consider it is likely to be able to more readily defend a decision either not to continue supporting coastal protection works in any particular case, or to simply maintain an existing level of service in the knowledge that the works will become inadequate for their purpose in due course. As already mentioned, there are quite separate common law liability issues arising out of this situation.

Flood and Erosion Protection Works subject to the SCRCA

64. Regional Councils are the successors of Catchment Boards and Drainage Boards¹⁸ and as such have the powers conferred on Catchment Boards under section 126 (General Powers of Catchment Boards) and section 133 (Maintenance and improvement of water courses and defences against water etc) of the SCRCA. A regional council could not rely on the power of general competence in section 12(2) of the LGA 02 when to do so would be contrary to the provision of the SCRCA.¹⁹

65. While we will discuss section 148 of the SCRCA further under question 4, it may have some relevance to the initial issue as to the ability of a *regional council* to realistically decide not to continue to maintain existing flood protection works.

66. Section 148 is as follows:

- (1) *No Board shall be liable for injury to any land or other property caused **without negligence** of the Board by the accidental overflowing of any watercourse, or by the sudden breaking of any bank, dam, sluice, or reservoir made or maintained by the Board.*
- (2) *If the owner or occupier of any land or other property gives notice in writing to any Board warning it that any dam, sluice, or reservoir made or maintained by the Board is weak, and requiring it to strengthen or repair the same, and the Board within a reasonable time after the delivery of the notice fails to take proper and reasonable precautions efficiently to strengthen or*

18 See *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* [2012] 1 NZLR 120 at [105], [106] and [224].

19 The powers under the 1941 Act do not apply to territorial authorities.

repair the dam, sluice, or reservoir, then the amount of any damages sustained through that failure shall be made good by the Board.

67. Section 148(2) creates an express form of statutory liability. While it does not appear to extend to upgrading works of a kind that might be necessary to meet climate change impacts, it refers to works “made or maintained” by a Board/Regional Council.
68. It is certainly arguable that flood protection works no longer maintained by a Regional Council are still capable of falling within section 148 on the basis that they are *made* by that Council. This factor may well influence a Regional Council’s decision making in terms of stopping or limiting the provision of flood protection works.
69. More generally, most of the decision making factors outlined above in relation to coastal protection works will also apply to flood and erosion protection works under the SCRCA.

Other flood control and erosion protection works

70. Such works may be undertaken by local authorities under the general power of competence as opposed to the SCRCA. Again, most of the decision making factors discussed in relation to coastal protection works will equally apply in this situation.

Question 2: 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?

-
71. The statutory position in relation to local authority ownership and control of roads is set out in Part 21 of the LGA 74. This part of the LGA 74 is still in force because it was specifically excluded from the repeals provided for in the LGA 2002.
 72. "Road" is defined in section 315. Sections 316, 317, and 319 confer a number of powers on a local authority over roads vested in the local authority.²⁰ Section 319 gives a local authority power to do certain things in respect of roads. In particular, section 319(a) of the LGA 74 empowers the local authority *"to construct, upgrade and repair all roads with such materials and in such manner as the Council thinks fit"*. The section confers a power to repair any road, rather than an express duty to so.
 73. Other statutory duties also apply, such as section 353 of the LGA 74 (general safety provisions as to roads) whereby a local authority *"shall take all sufficient precautions for the general safety of the public and traffic and workmen employed on or near any road"*.
-

20 "Road" is defined in section 315(1) of the LGA 74 as including bridges.

-
74. Although section 353 corresponds more or less with the common law of misfeasance, where, in the course of carrying out repairs a local authority may be liable for negligence (see discussion further below), there is *no* statutory obligation under section 353 upon a local authority to repair the road.
75. Nonetheless, in deciding whether or not to exercise its power to repair or maintain, a local authority must make its decision in accordance with established administrative law principles. Accordingly, a local authority must take into account relevant considerations and not take into account irrelevant considerations, and its decision should not be irrational in that it is unreasonable.
76. As already indicated in relation to flood and erosion protection works, while the power to repair roads is discretionary, a local authority may be under an obligation to consider whether or not to exercise such a power. Further, a local authority could not adopt a blanket policy not to maintain any roads.²¹
77. We note that in *Stowell v Geraldine County Council*²² a ratepayer brought an action for mandamus against Geraldine County Council seeking to compel the County to rebuild a bridge to the same standard as it had been when originally constructed after it had fallen into disrepair. The Court held that, notwithstanding the County only had a power (and not an express duty) to maintain roads, a local authority could in certain circumstances be compelled to keep a road in good repair so that it is reasonably safe for the traffic for which it is intended.
78. However, there is a subsequent New Zealand decision contrary to that in the *Stowell* case. In *Tuapeka County Council v Johns*,²³ the Court followed a decision of the Privy Council in *Municipal Council of Sydney v Bourke*.²⁴ Williams J noted that the Privy Council had considered a statute which conferred a power but did not impose a duty to maintain roads. Williams J concluded that the *Bourke* case was authority for the proposition that a local authority could not be compelled to maintain a road where the relevant statutory provision is empowering only.
79. Moreover, although the Court in the *Stowell* case had held that there may be a duty to repair, the Court was also of the view that a local authority still had a discretion as to how to fulfil that duty. Denniston J said at page 737-8:

"I have already held that it is a legal right of the public to have, from any public body entrusted with and undertaking the control and management of a road, such road kept in

21 See the earlier discussion relating to the exercise of statutory powers at paragraph 47 above.
22 (1890) 8 NZLR 720.
23 (1913) 32 NZLR 618.
24 [1895] AC 433.

such a state as to insure that it shall be reasonably safe for the traffic it is intended for. I do not find any authority to say that, subject to that limitation, such public body deprived of a discretion as to how far and when the facilities for traffic on any road are to be adapted to the existing conditions on that road of population and traffic, even if such adaptation involves a reduction and diminution in the previously-existing convenience and efficiency of the road.”

80. In our view, in conferring a power to repair roads, section 319(a) of the LGA does contemplate that a local authority may decide not to repair a specific road. However, the local authority must fulfil its public law responsibilities in making any decision.
81. In particular, we consider 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 such circumstances, there would effectively be a public law duty to act, notwithstanding that section 319(a) is expressed to be empowering only.
82. In summary, in the absence of any procedural impropriety, or a clear breach of established administrative law principles, a decision of a local authority not to undertake repair or carry out remedial works on a particular public road or bridge because of climate change impacts could well survive challenge.

Question 3: Does a local authority have power to limit or stop provision of Three Waters Services?

83. In order to deal with this question, it is necessary to review the provision of sections 130 to 134 of the LGA 02.²⁵
84. Section 130 is as follows:
- (1) *This subpart applies to a local government organisation that provides water services to communities within its district or region-*
 - (a) *at the commencement of this section;*
 - (b) *at any time after the commencement of this section.*
 - (2) **A local government organisation to which this section applies must continue to provide water services and maintain its capacity to meet its obligations under this subpart.**
 - (3) *In order to fulfil the obligations under this subpart, a local government organisation must-*
 - (a) *not use assets of its water services as security for any purpose:*

25 Sections 125 and 126 relate to the requirement to assess water services and other sanitary services from time to time from a public health perspective.

-
- (b) *not divest its ownership or other interest in a water service except to another local government organisation;*
 - (c) *not lose control of, sell, or otherwise dispose of, the significant infrastructure necessary for providing water services in its region or district, unless, in doing so, it retains its capacity to meet its obligations;*
 - (d) *not, in relation to a property to which it supplies water,-*
 - (i) *restrict the water supply unless section 193 applies; or*
 - (ii) *stop the water supply unless section 69S of the Health Act 1956 applies.*
- (4) *This section-*
- (a) *does not prevent a local government organisation from transferring a water service to another local government organisation; and*
 - (b) *does not override sections 131 to 137.*
85. "Water services" are defined in section 124 as meaning water supply and wastewater services. "Wastewater services" in turn means "sewerage, treatment and disposal of sewerage, and stormwater drainage".²⁶
86. By virtue of section 130(1), subpart 2 will apply to both water services provided by a local government organisation²⁷ both at the commencement of the section or which are started at any time after the commencement of the section.
87. The key provision is section 130(2) which requires a local government organisation to continue to provide water services and to maintain its capacity to meet its obligations under subpart 2. A number of interpretation issues arise under section 130(2) including the following:
- (a) Does section 130(2) allow a local government organisation to close down a specific water service within a district or region; and
 - (b) Could a local government organisation reduce a level of service or otherwise limit the provision of a particular service?
88. Turning to the first issue, while section 130(2) might in isolation be capable of being interpreted as leaving some flexibility in terms of whether to continue supporting a particular service, this interpretation does not appear to be available when section 130 is considered together with section 131. This latter section contains a limited power to close down or transfer a water service.
-

26 Section 124.
27 As defined in section 124.

-
89. The limitations are set out in section 131(2) and apart from procedural requirements (consultation, publicly available information and a referendum), the key requirement is that there must be 200 or fewer persons to which the water service is delivered and who are ordinary resident in the district, region or other subdivision.
90. It would seem reasonably clear therefore that reading sections 130 and 131 together, a local government organisation can only close down an individual water service if the requirements of section 131(2) are met.
91. Turning to the second issue, we consider that 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 could possibly be argued that a *reduction* in the level of service could amount to an effective “close down” of the service, but we doubt that this argument is likely to prevail except perhaps in an extreme situation.
92. More importantly, section 130 does not appear to require that existing services *must* be upgraded to deal with climate change (or other) impacts but consistent with what we have discussed previously, it is preferable that deliberate decisions are made about this where necessary, especially having regard to the requirements of the financial strategy and infrastructure strategy.
93. A key issue that may in the future have to be faced by local government organisations relates to what ongoing obligations they might have if a specific existing service becomes physically or financially impossible to continue to maintain because of climate change.
94. If an organisation were to make a definitive decision to close down a water service, this would then run contrary to section 131, but in the absence of such a decision, does an organisation have to provide a replacement service (whether at the same level of service or otherwise) to meet its obligations under section 130(2)?
95. The answer to this question involves a number of complex interpretation and fact specific issues that are beyond the scope of this advice, but it does raise an important issue for the future planning of new water services and the maintenance of existing services, especially given the potential financial environment and social consequences of ceasing to provide such services.
96. Finally, we should mention in passing section 193 of the LGA 02 which allows a local government organisation to restrict a water supply under certain specific circumstances. However this provision is unlikely to be useful to the challenges from climate change.
-

Question 4: What liabilities may be involved if a local authority was to stop or limit the provision of services in circumstances where they were adapting to potential futuristic risks (as opposed to dealing with a risk or hazard event that has already risen or occurred)?

97. A local authority's public and private law responsibilities are distinct. A person who is affected by the breach of a public law obligation can bring judicial review proceedings seeking to have a decision quashed or reinstated. The grounds for judicial review include having regard to irrelevant considerations, failing to have regard to relevant considerations, and unreasonableness (irrationality).
98. It is possible, if not likely, that decisions to stop or limit the provision of infrastructure services because of climate change (or other impacts) will be challenged in the future on established administration law grounds because of the financial and other implications for people and communities.
99. A decision to stop or limit a service in breach of a statutory provision²⁸ could also be challenged in such proceedings. Leaving aside this situation however, as already mentioned, if a decision has been made in a robust manner in compliance with the local authority's statutory decision making responsibilities and other relevant factors, this will assist in successfully resisting such proceedings.
100. In order to claim monetary compensation, the person must bring a private law action for damages in tort. Such an action would usually be brought in the common law tort of negligence but other causes of action such as nuisance, breach of statutory duty, and misfeasance in public office may also potentially apply.
101. As noted by Professor Stephen Todd in a recent paper:²⁹
- Private law claims for damages in tort are frequently brought against public bodies which either negligently perform or fail to perform a statutory duty or negligently exercise or fail to exercise a statutory power. The duty is founded on the common law, either by way of an action for breach of statutory duty or by way of an action for negligence.*
102. Professor Todd goes on to discuss actions for breach of statutory duty. He says:
- The court must look at the provisions and structure of the statute and ask whether an intention can be gathered to create a private law remedy. However, inferring the requisite parliamentary intent from a statute which says*

28 Such as sections 130 and 131 of the LGA 02.

29 *A framework for Public Body Liability in Negligence*, NZLS Intensive, Liability of Local Authorities May 2017, at page 23.

*nothing about civil liability tends to be an uncertain and unpredictable exercise, and it has been commented that the construction explanation has contributed to the degeneration of this branch of the law into one of the least principled in the books. The possibility exists, but no more will be said about it here.*³⁰

103. Turning to liability of negligence, there is at least some authoritative case law for incorporating public law principles into the question of the duty of care owed by public bodies, but the better view appears to be that common law concepts of negligence and public concepts of validity (and rationality) and within the boundary of discretion should be kept distinct.³¹

104. Professor Todd concludes:

*So a duty on the part of public bodies to take care should be founded on ordinary principles of tort liability. Questions as to whether a public body has acted rationally or within the ambit of discretion are better seen as relevant in determining whether the authority is in breach of a duty independently held to exist.*³²

105. It is beyond the scope of this advice to set out in detail the basis for common liability that could arise from decisions to stop or limit services or to fail to address the impact of climate change on the effectiveness of infrastructure assets and services, but we do make some specific comments below in relation to the three specific topic areas subject to this advice.

106. We intend to consider the three different categories of assets separately.

Flood and erosion protection works

107. We have already referred to section 148 of the SCRCA which could potentially involve statutory claims against a Regional Council if it were to decide to stop or limit maintenance of a flood or erosion protection work such as a stop bank. Further, and irrespective of section 148, it is less than clear whether a decision to cease maintenance of existing works because of climate change impacts would necessarily protect a regional council (or territorial authority) from a negligence claim for failing to maintain an existing asset of this nature. A similar comment may be made in relation to coastal protection works.

Roads and Bridges

108. The two main areas of potential claims are physical loss or damage caused by the disrepair of a road, and claims for

30 His footnotes have been omitted.

31 Todd, above at pages 23-24.

32 Todd above at page 24.

economic loss, if for instance, property owners and others are deprived of access to particular properties because road and bridges have become impassable and the local authority has decided not to or is unable to reinstate them. It is not intended to discuss these categories of claim any further as they again involve quite complex and particularly specific considerations as to whether a duty of care could be owed in such circumstances and whether such a duty of care is breached.

109. However, on the basis that the non-feasance rule may still be the law in New Zealand, it would provide a potential defence to claims of the kind outlined above. The rule is described in more detail below.

Nonfeasance rule

110. The courts in New Zealand have in the past held that proceedings cannot be brought against a local authority (as the roading authority) for failure to maintain and repair a road even though a statute gives the Council the power to repair it. This is known as the "nonfeasance" rule.
111. The opposite of nonfeasance is misfeasance. A roading authority could be liable for misfeasance if it decides to reconstruct or repair a road (e.g. digging holes in a road, inadequate repairs etc) but it is immune so long as it adopts a merely passive role.³³
112. In *Tuapeka County Council v Johns* (1912) 32 NZLR 618, the New Zealand Supreme (now High) Court concluded that a local authority could not be compelled to maintain a road where the relevant statutory provision is empowering only. It relied on the Privy Council decision in the Australian case of *Municipal Council of Sydney v Bourke*.³⁴ In *Bourke*, the claim was based on an allegation that the Council's negligence in allowing a road to fall into disrepair had resulted in the driver of a cart being killed. The case was decided in favour of the Council on the basis of the nonfeasance rule.
113. *Hocking v Attorney-General* (above) is the leading case on the nonfeasance and misfeasance rules in New Zealand. In *Hocking*, Turner J restated the nonfeasance rule at page 532:

... while a road authority is immune from liability to users of the highway who are injured as a result of the unsafe or dangerous state of the highway so long as it adopts a merely passive role, once it decides to reconstruct or repair a road, then it is obliged, like anyone else, to exercise reasonable care in the performance of its self-imposed task.

33 *Hocking v Attorney-General* [1963] 513 at 532.
34 [1895] AC 433.

-
114. The rule of nonfeasance is subject to two main exceptions:
- (a) a roading authority will still be liable for breaching any other duty imposed by statute (for which a breach gives rise to a private right of action); and
 - (b) it is also a requirement that the disrepair causing the injury be of the road itself, and not of some artificial structure placed on or in the road for some other purpose.
115. There has been criticism of the nonfeasance rule, but there have been no New Zealand cases specifically overturning the rule. The Court of Appeal in *Hocking*, while stating it was the law, seemed to view its continued existence with some doubt. The Court stated that the rule is "*somewhat anomalous and certainly archaic*" but did not overturn the rule. The rule was still found to be applicable to New Zealand in *Mee v DWD Hotels & Ors (No 1)*.³⁵
116. The nonfeasance rule has been abolished in Australia. In *Brodie v Singleton Shire Council*,³⁶ a majority of the High Court of Australia found that it was no longer applicable law for Australia. However, there were three dissenting Judges who considered that, if the nonfeasance rule was to be abolished, it should be done by legislation, not by the Courts. Interestingly, a number of the Australian State Parliaments have since enacted legislation restoring the nonfeasance rule.
117. In *Almeda v Attorney General for Gibraltar*,³⁷ the Privy Council was asked to follow *Brodie* and overrule earlier decisions upholding the nonfeasance rule for Gibraltar. Referring to both the *Brodie* case and later Australian State Legislation, the Privy Council considered that "*this experience suggest to their Lordships that in Gibraltar, just as in England, an abrogation or modification of the rule is best left to the legislature, which can, if so advised, draft a suitable provision to balance the interests of victims, on the one hand, and of the ...highway authority, on the other*".³⁸
118. However, there has been continuing criticism of the rule and *The Law of Torts in New Zealand* refers to the nonfeasance rule and states that the rule:
- ...almost certainly would not be applied by the courts today.³⁹

35 Unreported, Supreme Court Wellington, Beattie J, 21 December 1973.
36 (2001) 206 CLR 512.
37 [2003] UKPC 81.
38 At 19.
39 Todd, above n 268, at 192-193.

-
119. In the case of *Greenfield v Rodney District Council*,⁴⁰ the Council submitted that it could not be liable for non-repair (nonfeasance) of a road, but the court considered that because the elements of the cause of action concerned the making of the batters and the resulting damage to the neighbouring property, the nonfeasance rule was not relevant, and that liability rests with the person who makes the excavation.⁴¹ Accordingly, it was not necessary to decide whether the nonfeasance rule remained part of the law of New Zealand.
120. In England, the nonfeasance rule has been overtaken by specific roading legislation, which now places a duty on the roading authorities to maintain highways. However, there have been some cases where the courts have approached the liability of local authorities for actions in relation to roads, on a slightly different basis.
121. In *Stovin v Wise*,⁴² the House of Lords rejected a claim that a local council owed a duty of care to remove a knoll which prevented turning traffic seeing other traffic. In the *Stovin* case, it was held⁴³ that the minimum preconditions for basing a duty of care upon the existence of a statutory power relating to roads (such as that in s 319(1)(a) of the LGA 74), in respect of an omission to exercise the power, were:
- that in the circumstances it would have been irrational or unreasonable for the local authority not to have exercised the power (in that no reasonable statutory authority would not have exercised the power); and
 - the statutory policy requires the payment of compensation to those who suffered damage due to failure to exercise the statutory power.
122. In *Stovin v Wise*, the House of Lords seems to have imported public law principles of unreasonableness into a private law test for the purpose of determining liability between the council and road users.⁴⁴
123. The *Stovin* case has been followed in more recent cases in England (for example, see *Gorringe v Calderdale MBC*)⁴⁵ and no case in that jurisdiction appears to have expressly overruled *Stovin v Wise*. However, the New Zealand Court of Appeal has considered and rejected *Stovin* in the context of leaky buildings, rather than roads. In particular, in *Attorney-General v Body*

40 CP 2762/88, High Court, Auckland Registry, 17/12/90 Gault J.
41 Pages 9-10.
42 [1996] 3 All ER 801.
43 at 801.
44 At 805.
45 [2004] 2 All ER 326.

Corporate 200200,⁴⁶ the Court of Appeal expressly refused to follow this part of the *Stovin* decision.⁴⁷

124. The Court of Appeal did however refer to *Stovin v Wise* as an authority for the separate proposition that a duty of care is less likely to be owed in nonfeasance cases. For example, the Court of Appeal said at para [42]:

The Courts are slower to impose duties of care in relation to omissions to act (nonfeasance), as opposed to the positive exercise of statutory powers (misfeasance) (see Stovin v Wise [1996] AC 923).

125. In summary, and although the fact that the rule has been subject to criticism suggests that it will always be at some risk (as was shown in Australia), there is currently nothing to date to suggest that the New Zealand position has altered and that roading authorities in New Zealand are liable in damages to road users for failure to form or repair roads.

Three Waters Services

126. We have already noted the statutory limits imposed on local authorities in terms of closing water services. A breach of these statutory provisions may be a basis for a successful judicial review challenge and may potentially found a claim for damages.

**Please call or
email to discuss
any aspect of this
advice**

Duncan Laing
Partner



+64 4 924 3406
+64 21 434 713
duncan.laing@simpsongrierson.com

46 [2007] 1 NZLR 95.
47 At [48].