

# **Royal Commission of Inquiry into Building Failure Caused by the Canterbury Earthquakes**

## **Building Act Review Cabinet Papers**

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# Cabinet

CAB Min (10) 27/10

Copy No:

## Minute of Decision

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### Building Act Review

#### Portfolio: Building and Construction

On 2 August 2010, following reference from the Cabinet Economic Growth and Infrastructure Committee (EGI), Cabinet:

#### Background

1 **noted** that on 10 February 2010, EGI:

- 1.1 agreed that, for the purpose of developing detailed policy proposals, the Department of Building and Housing undertake consultation with industry stakeholders and the public between February and April 2010 on a package of options to:
  - 1.1.1 clarify and simplify building regulatory requirements, and require a more targeted, risk-based approach to their administration by building consent authorities;
  - 1.1.2 clarify the responsibilities of building producers to residential consumers, and better equip residential consumers to transact with confidence for building work;
- 1.2 authorised the Minister for Building and Construction to release a consultation document entitled *Cost-effective Quality: Next Generation Building Control in New Zealand*;
- 1.3 invited the Minister for Building and Construction to report back to EGI by the end of June 2010 with policy recommendations arising from the consultation process;
- 1.4 directed the Department of Building and Housing to report back to EGI by the end of June 2010 on:
  - 1.4.1 progress in improving the specification of areas of the Building Code where performance requirements are poorly specified;
  - 1.4.2 progress in improving the presentation and accessibility of the Building Code so that persons wanting to build particular types of buildings are able to easily, and for a low cost, identify all relevant Building Code clauses, compliance documents, and standards, in ways convenient to them;

- 1.4.3 progress in improving the interface between the building regulatory system and the standards system, and with proposals to address any unresolved issues (in consultation with the Ministry for Economic Development);
- 1.4.4 advice on the implications of any changes to the Building Act's purpose and principles for the scope of the Code;
- 1.5 directed the Department of Building and Housing, in consultation with the Department of Internal Affairs, to report back to EGI by the end of June 2010 on:
  - 1.5.1 options to improve the administration of building regulatory functions, including their consolidation across local authorities or centralisation;
  - 1.5.2 the expected benefits, costs, and risks of these options, compared to proceeding with current institutional administrative arrangements;
- 1.6 directed the Department of Building and Housing to:
  - 1.6.1 review the retrospective application of section 363 of the Building Act 2004, including consideration of an effective means of identifying and addressing non-compliant and dangerous building work in buildings built between 1 July 1992 and 31 March 2005;
  - 1.6.2 report back to EGI on the findings and recommendations of that review by the end of June 2010;

[EGI Min (10) 1/12]

## Overview of reform proposals (Paper 1, EGI (10) 162)

### Building Act review

- 2 **noted** that the Building Act review has concluded that change to the Building Act and its administration are required in order to support other government and industry initiatives to improve the productivity, efficiency, and accountability of the building and construction sector;
- 3 **noted** that the Building Act review has concluded that change to the Building Act and its administration is necessary to:
  - 3.1 more clearly signal and reinforce accountabilities for building work;
  - 3.2 provide for accountabilities to be effectively managed through contract;
  - 3.3 improve how the regulatory system is administered so that its administration reinforces incentives on those involved in the design and construction of buildings to take primary responsibility for the quality of their work;
  - 3.4 improve the overall effectiveness and efficiency of how the regulatory system is administered;

- 4 **noted** that the papers under EGI (10) 162, EGI (10) 163, EGI (10) 164, EGI (10) 165, and EGI (10) 166 seek agreement to a package of building regulatory reforms based on the following core elements:
- 4.1 changes to the Building Act to clearly signal roles and accountabilities for building work and Building Code compliance between designers, builders, building owners, and building consent authorities;
  - 4.2 new legislative provisions to enable residential consumers to better hold building contractors to account through contract, by:
    - 4.2.1 requiring building contractors to disclose certain information to enable building consumers to make better informed decisions prior to entering into contracts;
    - 4.2.2 requiring contracts with warranties and remedies;
    - 4.2.3 providing more options for dispute resolution;
  - 4.3 changes to the Building Act and regulations to exempt a broader range of low-risk building work from consenting requirements, and to provide for a stepped risk-based approach to the administration of building consent and inspection requirements, so that building consent and inspection requirements are proportionate to the risk and consequences of building defects and the skills and capabilities of those doing the building work;
  - 4.4 further work by officials to advise on a business case and implementation plan for making improvements to the administration of the regulatory system;

#### **Accountabilities**

- 5 **agreed** to amend the Building Act, including the purpose statement and principles, to clarify the following accountabilities for the Building Code compliance of building work between owners, designers, builders, and building consent authorities:
- 5.1 those who provide and advise on building plans and specifications are accountable to the owners of building work for ensuring that their plans, specifications and advice (if followed as a basis for the building work) are sufficient to result in the subsequent building work (if built to the plans, specifications and advice) meeting the requirements of the Building Code;
  - 5.2 those who provide building construction services are accountable to the owners of building work for:
    - 5.2.1 building to any approved plans and specifications;
    - 5.2.2 the Building Code compliance of their work if it varies from or proceeds in the absence of any approved plans and specifications;
  - 5.3 owners of building work are accountable to the building regulator and subsequent owners for:
    - 5.3.1 gaining any necessary regulatory approvals, and providing regulatory authorities with any required information on their building work;

- 5.3.2 the Building Code compliance of building work in the event that they directly make or vary the details of building plans and specifications;
- 5.3.3 building to approved plans and specifications in the event that they directly undertake building work;
- 5.4 building regulatory authorities are accountable for:
  - 5.4.1 issuing building consents;
  - 5.4.2 checking building plans and specifications for Building Code compliance;
  - 5.4.3 checking at any prescribed inspection points that building work has been completed in accordance with consented plans and specifications;
  - 5.4.4 approving any critical variations to consented plans and specifications;
  - 5.4.5 certifying that the building work has been completed in accordance with any requirements of the consent at any prescribed inspection points;
- 6 **agreed** to amend the Building Act to replace the term “Compliance Document” with the terms “Acceptable Solution” and “Verification Method”;

#### Further reports

- 7 **noted** that the Minister for Building and Construction intends to submit a paper to EGI in August 2010 on proposals to improve the clarity of building code requirements relating to timber treatment, fire safety, protection from noise, and signs;
- 8 **noted** that the Minister for Building and Construction has instructed the Department of Building and Housing to:
  - 8.1 develop proposals for improving the integration and presentation of, and access to, information supporting the Building Code, including New Zealand Standards;
  - 8.2 report to EGI by the end of March 2011 with options and costs;
- 9 **directed** the Department of Building and Housing, in consultation with the Treasury, Ministry of Justice, Ministry of Economic Development, Department of Internal Affairs, and the Ministry of Consumer Affairs, to report back to EGI by 31 March 2011 on:
  - 9.1 whether any changes are needed to the application of joint and several liability in the building and construction sector, in addition to the above proposed changes, in order to achieve desired attitudinal and behavioural changes in favour of improved accountability for the quality of building work, and if changes are proposed;
  - 9.2 the implications of the proposed changes for consumers and whether or not they would necessitate a mandatory requirement for all proposed residential contract warranties to be backed by a specified scheme of insurance or financial surety;
  - 9.3 a recommended approach to providing the specified form of insurance or surety referred to in paragraph 9.2 above, including a timeframe by which it could be provided, how it would be funded, and the costs, benefits and risks that would be associated with its provision;

**Timetable for implementation**

10 **agreed** to the following timetable for the implementation of core elements of the reform package:

<b>Item</b>	<b>Date</b>
Communicate decisions and direction of change.	as soon as practicable
Amend Schedule 1 of the Building Act to broaden exemptions for very low-risk building work from consent requirements.	by end of 2010
Make changes to the Building Act to provide for: <ul style="list-style-type: none"> <li>• clarity of accountabilities;</li> <li>• improved contract provisions, clearer obligations and new legal remedies;</li> <li>• improved resolution of residential building contract disputes;</li> <li>• stepped risk-based administration of building consent and inspection requirements;</li> <li>• provide supporting information for all parties.</li> </ul>	mid 2011
Agree to a preferred approach to improving the performance of the building regulatory system.	early 2011
Introduce stepped risk-based consenting for low-risk residential building work and commercial building work.	from mid 2012

**Delivering accountability in the residential construction sector (Paper 2, EGI (10) 163)**

11 **agreed** to amend the Building Act to:

11.1 require written disclosure from the prospective building contractor to the consumer, prior to an offer of contract, of each of the following:

- 11.1.1 the skills, qualification and licensing status of those building practitioners who will do the work;
- 11.1.2 the dispute history of the building practitioners, ie the outcome of any formal dispute rulings or Court judgments (only information which is already in the public arena, and limited to the previous 10 years);
- 11.1.3 what, if any, surety or insurance backing is available for the building work;
- 11.1.4 information about the company (where the building contractor is a company), including:
  - 11.1.4.1 how long the company has operated;
  - 11.1.4.2 what role each director will play in relation to the project;
  - 11.1.4.3 any previous breaches of relevant regulatory requirements, based on information which is in the public arena and limited to the previous 10 years;

11.2 require a simple checklist to be provided by the prospective building contractor to the consumer, prior to the contract being signed, which would:

- 11.2.1 prompt the consumer to ask important questions;

- 11.2.2 explain a building contractor's legal obligations and the consumer's reciprocal obligations;
- 11.2.3 outline the risks of paying a contractor ahead of work being completed;
- 11.2.4 summarise dispute resolution options;
- 11.2.5 refer the consumer to sources of further advice and information;
- 11.3 require written contracts for residential building work (above \$20,000 in price, with this dollar threshold to be set in regulations), that include the following as a minimum:
  - 11.3.1 the names and address of the parties;
  - 11.3.2 the date the contract is agreed;
  - 11.3.3 the contract to be signed by both parties;
  - 11.3.4 a description of the work to be carried out;
  - 11.3.5 the timeframe for the project;
  - 11.3.6 details of the contract price;
  - 11.3.7 a summary of the warranty and remedy obligations on the seller, and the reciprocal obligations on the buyer;
  - 11.3.8 the process that will be followed if a dispute arises;
  - 11.3.9 details of what, if any, surety or insurance backing is available for the building work;
  - 11.3.10 the process for varying the contract;
- 11.4 require the written contracts to provide for disputes to be addressed through an adjudication process under the Construction Contracts Act 2002 (where the dispute has not been resolved through conciliation or mediation), with the parties having the flexibility to choose another process by mutual agreement;
- 11.5 introduce a set of general remedies available to consumers when building contractors are found to have breached the implied warranty and other contractual obligations, including:
  - 11.5.1 the repair of defects by the building contractor or a substitute builder;
  - 11.5.2 the replacement of defective building elements;
  - 11.5.3 the provision of compensation where replacement or repair is not possible;
- 11.6 introduce an automatic "defect repair period" of 12 months following completion of the building work, for both Building Code and non-Code related work, within which the building contractor normally would be expected to repair any defective work or replace faulty materials as a matter of routine and as quickly as possible;

- 11.7 introduce reciprocal obligations on consumers that would potentially void the warranties in cases of:
  - 11.7.1 misuse or negligent damage;
  - 11.7.2 failure to carry out reasonable maintenance;
  - 11.7.3 failure to advise the building contractor of any apparent defect within a reasonable period of its discovery;
- 11.8 require building contractors to give consumers documentation of any specific maintenance requirements for particular elements of the building, and copies of any significant product warranties, at the completion of the building work (with details to be specified in regulations);
- 11.9 require the new defect repair period and general remedies to also apply to the sale of built buildings from:
  - 11.9.1 developers to subsequent owners;
  - 11.9.2 owner-builders to subsequent owners;
- 11.10 require certain information to be provided to the relevant territorial authority by the consumer on completion of the project (and in conjunction with the consumer's application for a Certificate of Completion), including:
  - 11.10.1 the identity of the principal building contractor (or the developer or owner-builder);
  - 11.10.2 details of any guarantee or insurance which has been purchased for the building;
- 12 **agreed** to consequential amendments to the Local Government Official Information and Meeting Act 1987 to require territorial authorities to place the information referred to in paragraph 2.10 above on the Land Information Memorandum for the building;
- 13 **agreed** that regulations be drafted under the Building Act 2004 to provide for the following matters:
  - 13.1 a \$20,000 price threshold for the mandatory written contracts for building work;
  - 13.2 details of the information to be disclosed by building contractors;
  - 13.3 details of the information to be included in the checklist;
  - 13.4 the wording to be included in the written contracts in relation to warranties, remedies, and reciprocal obligations on consumers;
  - 13.5 the wording to be included in written contracts in relation to the process that will be followed in the even of a dispute;
  - 13.6 details of the information and documentation relating to maintenance and product warranties to be provided by building contractors to consumers on the completion of the building work;

- 13.7 details of the sanctions for non-compliance with the new requirements for written contracts, disclosure statements and checklists;
- 14 **directed** the Department of Building and Housing, in consultation with relevant agencies, to:
  - 14.1 develop specific proposals for the establishment of a central service to advise consumers of dispute resolution options and an “early intervention” mediation service, and to report back to EGI with proposals and fiscal implications by 31 March 2011;
  - 14.2 review the Construction Contracts Act 2002 with a view to improving its application to both residential and commercial building disputes, and to report back to EGI by 31 March 2011;
  - 14.3 report to EGI by 31 December 2010 on the options for establishing a cost-effective system for ensuring compliance with the new requirements relating to contracting, disclosure and checklists;
- 15 **noted** that the Department of Building and Housing will:
  - 15.1 publish guidance material to assist building contractors to understand and comply with the new warranty and remedy requirements, and to assist consumers to understand and comply with the reciprocal obligations on consumers, including:
    - 15.1.1 guidance on what types and levels of defect are covered by the requirements, and what types and levels of defect are “tolerable” (or reflect normal wear and tear);
    - 15.1.2 what actions by consumers would meet the reciprocal obligations (including what is reasonable maintenance);
  - 15.2 develop a communication plan relating to the new requirements and provisions, for discussion with the Minister of Building and Construction by 31 October 2010;
  - 15.3 work with industry representatives and Consumer New Zealand to:
    - 15.3.1 develop a simple checklist, disclosure form, and contract form that would meet the proposed new requirements;
    - 15.3.2 provide electronic links to downloadable versions of these documents on the consumer building website (ConsumerBuild) and relevant industry websites;
    - 15.3.3 revise the ConsumerBuild website to reflect the new requirements, and to include information on the options available for dispute resolution including private mediation, adjudication, and other services;
  - 15.4 provide access to general information, through the ConsumerBuild website, about the risks of paying building contractors ahead of the work being completed;

- 16 **directed** officials, led by the Department of Building and Housing and the Ministry of Economic Development, to report back to EGI by 31 March 2011 on:
- 16.1 the risks associated with guarantee products and services in the building sector;
  - 16.2 whether any changes to the way that these products and services are regulated would be cost-effective;

### Stepped consenting (Paper 3, EGI (10) 164)

#### Stepped building control system for residential building

- 17 **agreed** to amend the Building Act 2004 to provide for a stepped risk-based system of residential building control, the key elements of which will involve:
- 17.1 no building consent requirements for a broader range of the most low-risk work;
  - 17.2 a streamlined building consenting process for some low-risk work that checks certain conditions are met but involves almost automatic consent and no inspections;
  - 17.3 a simplified and more prescribed consenting process for certain simple residential building work at the lower-risk end of the risk spectrum that retains some limited involvement of building consent authorities in compliance checking;
  - 17.4 existing consenting and inspection requirements for moderate-to-high risk residential building work, and for lower-risk building work not involving a suitably qualified building practitioner;
  - 17.5 new commercial building consenting processes and requirements, to provide for reliance on third-party (non-building consent authority) review and quality assurance processes, provided certain conditions are met;
- 18 **noted** that certain pre-conditions are required to be in place before fully implementing stepped consenting for residential buildings:
- 18.1 greater awareness and understanding of the performance requirements of the Building Code and how to comply with those requirements;
  - 18.2 a base of competent practitioners in the sector, the cornerstone of which is the Licensed Building Practitioners' Scheme;
  - 18.3 strengthened contracting requirements and related measures in the residential construction sector;
  - 18.4 an effective monitoring regime to ensure building quality is maintained or improved;
- 19 **noted** that, in order to provide time for the pre-conditions in paragraph 18 above to be met, stepped consenting will not be introduced before mid-2012 at the earliest;
- 20 **directed** the Department of Building and Housing to report to the Minister for Building and Construction by December 2011 on progress towards the achievement of the pre-conditions referred to in paragraph 18 above, and with a plan and timeframe for implementing stepped consenting;

- 21 **agreed** to the amendments to the Building Act (including new regulation making powers) that may be required to give effect to the new consenting and inspection requirements proposed in the paper under EGI (10) 164;

#### **Building consent requirements for commercial buildings**

- 22 **agreed** to amend the Building Act to provide for a commercial building consenting process with the following key elements:
- 22.1 building consent authorities would apply risk profiling methods to identify the nature and level of risks associated with a particular building project, especially the likelihood and potential consequences of failing to comply with the Building Code;
  - 22.2 the risk assessment may take account of factors such as:
    - 22.2.1 the complexity of the building (or any individual element of the building);
    - 22.2.2 the proposed and potential uses of the building;
    - 22.2.3 the building's location and immediate environment;
    - 22.2.4 the level and frequency of human occupation;
    - 22.2.5 the skill level and compliance history of the practitioners involved in the project;
    - 22.2.6 public safety risks, such as fire safety;
    - 22.2.7 the safety of fire fighters;
  - 22.3 based on the risk assessment, appropriate third-party review requirements and a quality assurance process would be agreed between the building consent authority and the project owner who is applying for the consent, with the building consent authority having the final say in cases where agreement cannot be reached;
  - 22.4 the quality assurance requirements would be documented in a plan, which in turn would provide the basis for appropriate compliance checking by the building consent authority;
  - 22.5 the existing powers of territorial authorities would be maintained, for example to issue notices to fix, carry out inspections, or intervene, in the case of dangerous and insanitary buildings;
- 23 **noted** that further work is required to determine whether the proposed approach should apply to all commercial building work or to only a subset;
- 24 **directed** the Department of Building and Housing to report back to EGI on the final design and proposed scope of the commercial building consenting process, by December 2011;

#### **Code Compliance Certificates**

- 25 **noted** that the Building Act requires building control authorities to issue Code Compliance Certificates at the conclusion of the building consenting and inspection process;

- 26 **noted** that the Building Act review has found there is misinterpretation of the term “Code Compliance Certificate”, and that the term “Consent Completion Certificate” would more accurately capture the policy intent;
- 27 **agreed** to amend the Building Act to:
- 27.1 change all references to “Code Compliance Certificate” to “Consent Completion Certificate”;
- 27.2 clarify that the Consent Completion Certificate signifies completion of the building consent process, and that the building consent authority has satisfied itself on reasonable grounds that building work complies with the consent or, alternatively for certain building work (e.g. simple buildings), the prescribed checks and inspections have been properly carried out;

#### **Section 363B of the Building Act 2004**

- 28 **noted** that section 363B of the Building Act makes it an offence for a building owner to permit any part of a building to be used that is intended to be open to, or used by, members of the public for which:
- 28.1 building work was undertaken between 1 July 1992 and 31 March 2005;
- 28.2 a Code Compliance Certificate was never issued;
- 29 **noted** that an independent review of section 363B has concluded that:
- 29.1 section 363B is not an effective means of revealing whether there are risks to the public arising from uncertified building work undertaken under the Building Act 1991, or whether the public are at risk in such buildings;
- 29.2 section 363B is not an efficient means of controlling such risks;
- 30 **noted** that other controls are already in place that are more effective and efficient at addressing the public safety risk from uncertified building work;
- 31 **agreed** that section 363B of the Building Act be repealed as soon as possible;

#### **Fire safety**

- 32 **invited** the Minister for Building and Construction to report back to EGI, once changes have been made to clarify the fire safety requirements of the Building Code, on:
- 32.1 whether or not the current mandatory requirement to refer specified building consent applications to the New Zealand Fire Service Commission is still necessary;
- 32.2 how any change would be aligned with the implementation of the new commercial consenting process;

#### **Building Warrant of Fitness**

- 33 **noted** that buildings with certain specified systems critical to life and safety require a Building Warrant of Fitness;

- 34 **noted** that the Building Act review has identified opportunities to:
- 34.1 clarify what is a specified system, and ensure only critical systems are captured by the Building Warrant of Fitness process;
- 34.2 make a number of minor amendments to the Act to enhance and clarify the Building Warrant of Fitness regime;
- 35 **agreed** to amend the Building Act so that the details of what encompasses a specified system are set out in regulation, rather than in primary legislation;
- 36 **authorised** the Minister for Building and Construction to approve any minor amendments to the Building Act that may be required to clarify and enhance the operation of the Building Warrant of Fitness system;

### Exemptions from requirement to have a building consent (Paper 4, EGI (10) 165)

#### Schedule 1

- 37 **agreed** that an Order in Council be made, under section 41(2) of the Building Act, to amend Schedule 1 of the Act to include the building work listed in the table below:

Exempted building work that can be completed by any person (including DIY work)
<ul style="list-style-type: none"> <li>• Replacement or alteration of internal wall and floor linings and finishes in a dwelling.</li> <li>• Adding lightweight stalls (e.g. used at fairs and exhibitions) to the current exemption for tents and marquees.</li> <li>• Fabric shade sails and associated structural supports that do not exceed 50 square metres in area, with limitations on matters such as the level on which the sails are installed and distance from a legal boundary.</li> <li>• Installation, replacement or alteration of thermal insulation in existing buildings (excluding some forms of insulation in some places, e.g. in-wall foam and installing insulation in fire walls).</li> <li>• Penetrations with a maximum diameter of 300mm (including associated weatherproofing, fireproofing and any other finishing) to enable the passage of pipes, cables, ducts, wires, hoses and the like through any existing building.</li> <li>• Signs and associated structural supports where the sign is no more than 3 metres high and the face area of the sign does not exceed 6 square metres.</li> <li>• Height restriction gantries (e.g. a vehicle height warning in car park).</li> <li>• Private playground equipment used in association with a single household where no part of the equipment extends more than 3 metres above the ground.</li> </ul>
Carried out in accordance with the Plumbers, Gasfitters and Drainlayers Act 2006
<ul style="list-style-type: none"> <li>• Replacement (including repositioning) of water heaters, except for systems that are not open-vented, have an uncontrolled heat source or a controlled heat source other than gas or electricity.</li> </ul>
Carried out if designed by a Chartered Professional Engineer (CPEng)
<ul style="list-style-type: none"> <li>• Signs and plinths.</li> <li>• Retaining walls in a rural zone that retain not more than 3 metres depth of ground with limitations on matters such as the distance from any legal boundary or any existing building.</li> <li>• Playground equipment designed by a Chartered Professional Engineer (CPEng) installed in a public place for a government department, Crown entity (including a school), licensed early childhood centre or a local authority.</li> </ul>

38 **agreed** that the amendments proposed in paragraph 37 above come into force in December 2010;

39 **agreed** that an Order in Council be made, under section 41(2) of the Building Act, to amend the existing exemptions in Schedule 1 of the Act as generally set out in the table below:

Work that can be completed by any person (including DIY work)
<ul style="list-style-type: none"> <li>• Additions to clarify that the current exemption relating to internal walls does not include load-bearing or bracing element walls (i.e. as originally approved by Cabinet in May 2008) or any part of a wall that is fire-rated or part of a specified system.</li> <li>• Increasing the height of exempted fences and hoardings from 2m to 2.5m and removing the term 'wall' from the same exemption, as this is adequately covered by the term 'fence' and avoids potential for confusion with reference to walls that are part of another building.</li> <li>• Adding to the exemption for tanks and pools to allow a wider range of volume-height configurations than are currently provided for.</li> <li>• Increasing the size of marquees and tents for public events to 100 square metres (ie. the same as is currently allowed for private events).</li> <li>• Increasing the height of exempted decks, other platforms and bridges from 1m to 1.5m, and adding the term 'boardwalks'.</li> <li>• Increasing the floor area of exempted porches and verandahs from 15 square metres to 20 square metres, adding carports to the same exemption, and removing the requirement that the structure be over a deck or a patio.</li> <li>• Increasing the area of exempted awnings from 15 square metres to 20 square metres, and adding the term 'canopies' to the same exemption.</li> </ul>
Carried out in accordance with the Plumbers, Gasfitters and Drainlayers Act 2006
<ul style="list-style-type: none"> <li>• Adding to the existing exemption allowing alterations to sanitary plumbing the clarification that the exemption excludes water heaters (which are now covered by a separate exemption) and does not permit the total number of sanitary fixtures in a dwelling to be increased.</li> </ul>

40 **agreed** that the amendments proposed in paragraph 39 above come into force in December 2010;

41 **agreed** that the definition of "storey" for the purposes of Schedule 1 of the Building Act be defined as a floor level of up to 1 metre above the supporting ground and a further 3.5 metres above the floor level (i.e. an overall height no greater than 4.5 metres);

42 **directed** the Department of Building and Housing, in consultation with the Parliamentary Counsel Office, to revise the structure of Schedule 1 of the Building Act when making the above changes, to ensure that Schedule 1 is clearer and easier to understand;

#### Public works

43 **noted** that currently there is building work conducted by Crown organisations where the building consent process adds little value because building quality is regulated by other means;

44 **agreed** to exempt from the definition of "building work" the following structures, in line with existing exemptions in the Building Act:

44.1 Network Utility Operators fittings, such as security fences and machines, including oil interception or containment systems;

44.2 structures forming part of “works”, as defined in the Electricity Act 1992 and associated regulations, such as wind turbines and gantries;

45 **directed** the Department of Building and Housing (lead), Ministry of Transport and New Zealand Transport Agency to:

45.1 examine whether any transport infrastructure commissioned by Crown organisations should be exempt from the requirement to obtain a building consent;

45.2 report back to the Minister of Building and Construction and the Minister of Transport, by 31 March 2011;

### **Delivering building regulation (Paper 5, EGI (10) 166)**

46 **noted** that achieving greater national consistency and efficiency in the administration and delivery of building regulatory requirements is desirable and will contribute to improved sector productivity;

47 **agreed** that a nationally consistent building regulatory system would have the following attributes:

47.1 accessible and nationally consistent building consent application requirements and processes for consumers;

47.2 consistent interpretation of national building performance requirements and associated building consent decision processes;

47.3 timely, responsive and predictable services for consumers;

47.4 efficient use of scarce specialist skills, capital and other resources;

47.5 administratively efficient and cost-effective system performance;

47.6 the ability to quickly and effectively implement and respond to changes in Building Code requirements, and associated building consent and other regulatory requirements;

47.7 effective use of local information on building performance and regulatory compliance to inform and modify national policies, building performance requirements, and other regulatory settings;

47.8 seamless integration with resource management and local planning, and other related activities;

48 **noted** that officials have developed and explored two options (regionalised and centralised) for improving the administration of the building regulatory system in order to identify opportunities for further reform, and to test whether or not the benefits of further administrative reform would justify the costs and risks of achieving it;

49 **noted** that officials have concluded that further reform of the administration of the building regulatory system is feasible and has the potential to deliver significant net benefits in the form of greater consistency and improved administrative efficiency, and would contribute to wider improvements in sector productivity and efficiency;

- 50 **directed** the Department of Building and Housing, in consultation with the Department of Internal Affairs, the Treasury, the Ministry for the Environment and other agencies as appropriate, to report back to EGI, by 31 March 2011, on the detail of a preferred approach to improve the performance of how the building regulatory system is administered;
- 51 **noted** that the report referred to in paragraph 50 above will include advice on:
- 51.1 the detail of functions that would be centralised and those that would need to continue to be provided locally (but not necessarily by local authorities);
  - 51.2 the design of the overall architecture and user requirements for the proposed consolidated or centralised services at the national and local levels;
  - 51.3 the costs and benefits of the options and individual components against the status quo;
  - 51.4 any issues concerning liability and advise on how these would be addressed;
  - 51.5 any interface issues with other relevant national and local authority systems (e.g. resource consenting, civil defence/emergency management, rating and infrastructure connections);
  - 51.6 any legislative issues and required changes in relation to the Building Act or other related legislation;
  - 51.7 the level of investment required and funding options;
  - 51.8 a transition plan and timeline for change;
  - 51.9 the impacts on local authorities, including financial impacts and impacts on associated processes;
  - 51.10 the implications for consumers;
  - 51.11 a viable option and transition pathway;

### Legislative implications

- 52 **noted** that:
- 52.1 the Building Amendment (No 1) Bill has a category 3 priority (to be passed in 2010 if possible) on the 2010 Legislation Programme;
  - 52.2 the Building Amendment (No 2) Bill has a category 4 priority (to be referred to a select committee in 2010) on the 2010 Legislation Programme;
- 53 **invited** the Minister of Building and Housing to issue drafting instructions to the Parliamentary Council Office to draft a Bill to amend the Building Act to give effect to the proposals;
- 54 **authorised** the Minister for Building and Construction to make decisions on any minor and technical issues that may arise during the drafting process;

**Publicity**

- 55 **noted** that the Minister of Building and Construction intends to announce Cabinet's decisions and to release the papers under EGI (10) 162, EGI (10) 163, EGI (10) 164, EGI (10) 165 and EGI (10) 166.

In Confidence

Office of the Minister for Building and Construction

Cabinet Economic Growth and Infrastructure Committee

## **Building Act review - further proposed amendments**

### **Proposal**

- 1 To approve further amendments to the Building Act 2004 that were not previously considered by Cabinet, but have arisen out of work on the review of the Act.

### **Executive summary**

- 2 The Building Amendment Bill (No 3) was introduced on 23 November 2010 to make amendments to the Building Act 2004 ("the Act") agreed to by Cabinet following a review of the Act. The Bill has been referred to the Local Government and Environment Select Committee for consideration.
- 3 Some of the amendments agreed to by Cabinet were subject to further work or for other reasons were not able to be included in the Building Amendment Bill (No 3). The Minister for Building and Construction intends to seek approval to introduce another Building Amendment Bill in 2011 to make further amendments to the Act.
- 4 This paper asks Cabinet to note some minor and technical amendments the Minister for Building and Construction has approved (under delegated authority) for inclusion in another Building Amendment Bill.
- 5 The paper also seeks Cabinet agreement to three additional amendments to be included in the Bill as follows:
  - Add a new power to deal with non-dangerous buildings that are nearby dangerous buildings;
  - Remove the word "damaged" from the exemptions for outbuildings in Schedule 1 of the Act;
  - Increase the penalty for the offence of failing to comply with a building consent to a maximum fine of \$200,000.

### **Background**

- 6 On 2 August 2010 Cabinet considered the results of a review of the Building Act 2004 ("the Act") and decided to amend the Act to:

- Clearly signal roles and accountabilities for building work and Building Code compliance between designers, builders, building owners, and building consent authorities;
- Enable residential consumers to better hold building contractors to account;
- Exempt a broader range of low-risk building work from consenting requirements;
- Provide for a stepped risk-based approach to the administration of building consent and inspection requirements;
- Clarify and enhance the building warrant of fitness regime (which ensures systems that are critical to life and safety are properly maintained);
- Improve the overall effectiveness and efficiency of how the regulatory system is administered.

[CAB Min (10) 27/10 refers]

- 7 Most of the amendments were included in the Building Amendment Bill (No 3) which was introduced on 23 November 2010 and has been referred to the Local Government and Environment Select Committee for consideration. Amendments relating to residential consumers and exempting low risk work were subject to further report backs to Cabinet or were unable to be drafted by Parliamentary Counsel Office in time to be included in the Bill.
- 8 The 2010 legislative programme contained two Building Amendment Bills. The amendments not included in the Building Amendment Bill (No 3) will be included in another Building Amendment Bill which I will seek approval to introduce in 2011.
- 9 This paper seeks approval to make further amendments, in the Building Amendment Bill to be introduced in 2011, in addition to those already approved by Cabinet.

#### **Minor/technical amendments approved by Minister**

- 10 Cabinet delegated authority to me to make decisions on minor and technical issues [CAB Min (10) 27/10, paragraph 54, refers]. Under this authority I have approved the amendments described below for inclusion in the Building Amendment Bill to be introduced in 2011.

#### *Clarify powers for Chief Executive to investigate actions of building consent authority*

- 11 Some of the Chief Executive's powers to investigate a building consent authority (which may be a territorial authority, regional authority or private company) need to be clarified to ensure the Department of Building and Housing can use the powers as Parliament intended.
- 12 Occasionally, the Department is hampered in its investigations because councils argue that the Act is not explicit as to the Department's powers. This results in unnecessary delays and diversion of resources into debating the meaning of a provision rather than conducting a timely and cost-effective investigation.

13 I have approved amendments to the Chief Executive's powers as follows:

- make it clear that the Chief Executive can proceed with an investigation where information has not been provided by the building consent authority;
- provide a new power to enable the Chief Executive to require the building consent authority to monitor and report on remedial actions;
- make it clear that the Chief Executive's investigation powers include the ability to undertake inspections of a building to allow the Department to review the quality of the building consent authority's work.

*Clarify interpretation of provisions relating to access to information held by territorial authorities*

- 14 An Ombudsman made a submission to the Building Act review raising some issues of interpretation of section 217 of the Act.
- 15 Section 217(2)(b) of the Act provides that the right of access to information held by territorial authorities is "subject to the provisions of the Local Government Official Information and Meetings Act 1987" (LGOIMA). This provision is a re-write (in modern drafting style) of the equivalent provision in the former Building Act 1991. In the former Act the provision read " Subject to the Local Government Official Information and Meetings Act 1987, every person shall have the right to inspect the information [held by territorial authorities] ...".
- 16 The Ombudsman's view is that section 217(2)(b) is open to interpretation. It could mean that the withholding grounds in LGOIMA apply to information accessed under section 217, or it could mean that access to information under section 217 is an alternative to the LGOIMA way of obtaining information. The policy intent is the first of those interpretations.
- 17 The policy intent is to preserve the meaning of the provision from the former Act, just with a more modern drafting style. The former Act, in putting the "Subject to..." wording at the start, made it clear that considerations under the LGOIMA came first and took precedence over the right to inspect.
- 18 I have approved amending section 217(2)(b) to make it clear that the LGOIMA provisions are to prevail, i.e: grounds for withholding information under that Act apply to any information a person seeks access to under s. 217.

**New power to deal with non-dangerous buildings that are nearby dangerous buildings**

- 19 As part of the response to the Canterbury earthquake temporary amendments were made to the Act to provide broader powers for dealing with dangerous buildings. I recommend these powers be included as permanent amendments to the Act.
- 20 Councils have a number of powers under the Act to deal with "dangerous" (defined in the Act) buildings.

- 21 The Canterbury Earthquake (Building Act) Order 2010 gave councils additional powers to deal with buildings that are not dangerous themselves, but are at risk of being damaged (and occupants injured/killed) because an adjacent or nearby building is dangerous and could collapse.
- 22 There is no power in the Act to deal with a building that is not dangerous itself, but is adjacent to a dangerous building. Restrictions/notices etc can only relate to a dangerous building, they cannot refer to or require any action in relation to a safe building that is next door to the dangerous building. The Canterbury earthquake has shown there can be significant risks to undamaged buildings that are next to damaged/dangerous buildings. This situation is not necessarily limited to an earthquake event (e.g: a severe fire in a building could make it so dangerous as to pose a risk to nearby buildings).
- 23 Councils should therefore be able to, at least, warn people of the nearby danger by putting up notices and in severe cases should be able to restrict use (in whole or in part) of the undamaged building until the dangerous building is dealt with. Councils' actions should be commensurate with the nature of the danger, so an escalating scale of possible actions should be provided for.
- 24 I therefore recommend a new power be added to the dangerous buildings provisions in the Act to allow territorial authorities to:
- attach a notice on or adjacent to a building, warning people there is a dangerous building nearby, including (if relevant) a warning to not use the building unless absolutely necessary, with a copy of the notice to be sent to the building owner
  - put up a hoarding or fence to prevent people from approaching or entering a building where another building nearby or adjacent is dangerous.

#### **Amendment to new exemption from building consent requirements**

- 25 On 22 November 2010 the Building (Exempt Building Work) Order 2010 was made [CAB Min (10) 42/1 refers]. The Order amends Schedule 1 of the Act to add new exemptions from the requirement to obtain a building consent. The exemptions are low risk building work where the consequences of non-compliance with the Building Code are either unlikely or low.
- 26 One of the new exemptions added by the Order is:
- Repair or replacement of all or part of a damaged building that is an outbuilding (as defined in Clause A1 of Schedule 1 to the Building Regulations 1992, i.e. the Building Code). Examples of outbuildings are garages, sheds, farm buildings and swimming pools. The limitation is that the repair or replacement must be on or within the same building footprint.
- 27 This exemption was developed originally in response to the Canterbury earthquake in September 2010 to enable damaged outbuildings to be repaired quickly without the need to obtain a building consent. The exemption now applies to all parts of

New Zealand because the low risk nature of the work is not limited to responses to emergency situations.

28 Since the Building (Exempt Building Work) Order 2010 was made, the Department of Building and Housing has reviewed whether it is necessary for the exemption to be limited to “damaged” outbuildings. I agree with the Department’s conclusion that there need not be any such caveat, because the risk of not complying with the Building Code, or consequences of non-compliance, would be the same whether the outbuilding was damaged or not.

- Removing outbuildings is low risk because the work is unlikely to affect other buildings (i.e: there are no other Building Code requirements to consider as the building is being removed, and it is the process of its removal and its effect on other buildings that is important).
- Replacing an existing outbuilding is also low risk because they are not habitable buildings and risk of harm to people is minimised because they are not intended for extensive occupation by people. The low risk is recognised in the structural requirements being lower in the Building Code for these buildings than for other buildings.

29 The next Building Amendment Bill will contain amendments to Schedule 1 of the Act already agreed to by Cabinet that were not able to be included in the Building (Exempt Building Work) Order 2010 or the Building Amendment Bill (No 3). I therefore recommend an additional amendment be made to Schedule 1 to delete the word “damaged” from the outbuildings exemption.

### Offence provisions

30 In developing the offences for the new risk-based consents provisions in the Building Amendment Bill (No 3) an inconsistency in the Act has been highlighted regarding penalties for some of the most serious offences:

- The penalty for a new offence, contained in the Bill, of breaching the terms and conditions of a commercial building work consent will be \$200,000<sup>1</sup>.
- The penalty for failing to comply with a Notice to Fix (section 168) is a maximum fine of \$200,000 plus \$20,000 per day for continuing offences. Notices to fix can be issued for a range of reasons, including to require people to stop or fix building work that is unconsented or does not comply with a consent.

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<sup>1</sup> The offence is potentially serious because the new commercial building consent system relies on correct and accurate documentation of work done and processes followed as the means for ensuring compliance with the Building Code. The high level of fine recognises that a significant amount of money could be made cutting corners in commercial building work – therefore, the level of fine should be sufficient to counter this “windfall” effect. Offences of similar severity in the Resource Management Act 1991 and Hazardous Substances and New Organisms Act 1996 have maximum fines of \$300,000 and \$500,000 respectively.

- The penalty for not complying with a building consent or doing work without a consent (section 40) is a maximum fine of \$100,000 plus \$10,000 per day for continuing offences. All of the most serious offences under the Act have maximum penalties of \$200,000, except for section 40.
- 31 A general principle of setting penalty levels is that those who act outside of the regulatory system should not be subject to a lower penalty than those who act in accordance with the regulatory system. As currently drafted, the maximum fine for those working without a building consent, when one is required (section 40), will be less than the maximum fine for those who have obtained a building consent but breach its terms and conditions (section 168 and new commercial consent offence).
- 32 There are three options for addressing this inconsistency:
- Option 1: Set penalty for new offence (relating to commercial consents) at a maximum fine of \$100,000
- Option 2: Increase penalty for section 40 offence to a maximum fine of \$200,000
- Option 3: Change nothing, i.e: proceed with the drafting of the new offence (relating to commercial consents) with the maximum penalty proposed (\$200,000) and do not amend the penalties for the existing offences.
- 33 I prefer and recommend option 2. Section 40 of the Act should be amended to increase the maximum fine for the offence of failing to obtain a building consent or not working in accordance with a building consent. The new maximum fine for the primary offence would be \$200,000 (the penalty for continuing offences, of a maximum fine of \$10,000 per day, would not be changed) and be the same as the maximum fines for the other serious offences in the Act. The amendment will also make the penalty consistent with the well-established principle in 'entry' based systems, e.g. licensing/consenting systems, that penalties for acting outside the system should not be less than those for acting within the system.
- 34 In practice, the maximum fine is rarely imposed – the maximum fine to date under section 40 is \$47,000, most fines fall in the range of \$1,000 to \$10,000. Increasing the maximum penalty may result in fines generally being higher (the Courts will likely interpret the increased maximum as meaning they should impose correspondingly higher fines), but only the worst breaches of the Act will ever result in the maximum fine being imposed. I expect most fines will remain in the under \$50,000 range.

## Consultation

- 35 The following Government Departments were sent a draft of this paper to comment on: The Treasury, Ministry for the Environment, Te Puni Kokiri, Department of Internal Affairs, Ministry for Culture and Heritage, Ministry of Education, Ministry of Social Development, Ministry of Justice and Ministry of Economic Development. All comments received are reflected in the content of this paper.

### Financial implications

36 There are no financial implications arising from the proposals in this paper.

### Human rights

37 The proposals in this paper are not considered to be inconsistent with the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993. However, a final view on consistency will be obtained when the proposed amendments to the Building Act 2004 have been drafted.

### Legislative implications

38 The proposals require amendments to be made to the Building Act 2004. There were two Building Amendment Bills on the 2010 Legislative Programme. The first was introduced on 23 November 2010: The Building Amendment Bill (No 3)<sup>2</sup>. The proposals in this paper will be included in another Building Amendment Bill for which a new legislative priority will be sought in the 2011 Legislative Programme.

### Regulatory impact analysis

39 A regulatory impact statement is not required because the proposals are technical "revisions" or consolidations that substantially re-enact the current law in order to improve legislative clarity or navigability and/or the proposals have no or only minor impacts on businesses, individuals or not-for-profit entities.

### Publicity

40 The proposals in this paper will not be specifically publicised, but will be referred to in information about the legislation when it is introduced.

### Recommendations

41 The Minister for Building and Construction recommends the Committee:

- 1 **note** the Building Amendment Bill (No 3) was introduced on 23 November 2010;
- 2 **note** the Minister for Building and Construction intends to seek legislative priority for another Building Amendment Bill to be introduced in 2011 to give effect to proposals agreed by Cabinet (on 2 August 2010 [CAB Min (10) 27/10 refers]) that were not included in the Building Amendment Bill (No 3);
- 3 **note** the Minister for Building and Construction, acting under delegated authority from Cabinet, has agreed the following minor or technical amendments be made to the Building Act 2004 and included in another Building Amendment Bill to be introduced in 2011:

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<sup>2</sup> There have been two previous Building Amendment Bills in this Parliamentary session.

- 3.1 Clarification of the powers of the Chief Executive of the Department of Building and Housing to deal with complaints about territorial authorities and regional councils
- 3.2 Clarification that access to information held by territorial authorities is subject to the withholding provisions of the Local Government Official Information and Meetings Act 1987;
- 4 **agree** amendments be made to the Building Act 2004 to:
  - 4.1 add new powers to the dangerous buildings provisions in the Act to allow territorial authorities to:
    - 4.1.1 attach a notice on or adjacent to a building, warning people there is a dangerous building nearby, including (if relevant) a warning to not use the building unless absolutely necessary, with a copy of the notice to be sent to the building owner
    - 4.1.2 put up a hoarding or fence to prevent people from approaching or entering a building where another building nearby or adjacent is dangerous;
  - 4.2 Remove the word "damaged" from the exemptions for outbuildings in Schedule 1 of the Act;
  - 4.3 Increase the penalty for the offence of carrying out building work not in accordance with a building consent (section 40(2) of the Act) to a fine not exceeding \$200,000;
- 5 **invite** the Minister for Building and Construction to issue drafting instructions to the Parliamentary Counsel Office to draft another Building Amendment Bill to amend the Building Act 2004 to give effect to the amendments agreed above;
- 6 **authorise** the Minister for Building and Construction to make decisions on any further minor and technical issues that may arise during the drafting process.



Hon Maurice Williamson  
Minister for Building and Construction

14, 12, 2010

In Confidence

Office of the Minister for Building and Construction

Cabinet Economic Growth and Infrastructure Committee

## **Building Act review 1: Overview of reform proposals**

### **Proposal**

- 1 Ministers are asked to agree to changes to the building regulatory system as set out in this and supporting papers to: clarify accountability; provide for improved contracting practices, warranties and remedies in support of accountabilities; provide a stepped risk-based approach to the administration of building consent and inspection requirements; and provide for more national consistency in administration. This overview paper seeks agreement to the overall direction and timeframe and specifically seeks agreement to:
  - amend the Building Act 2004 to clarify accountabilities for building work
  - direct further work to advise on whether changes are needed to the joint and several liability framework
  - have the Minister of Building and Construction publicly announce Cabinet's decisions arising from the review of the Building Act 2004 and release this and the supporting Cabinet papers and the attached synopsis of submissions.

### **Executive summary**

- 2 This paper is one of five papers proposing changes to the building regulatory system that will contribute to a more productive, efficient and accountable building and construction sector. It provides an overview of proposed reforms and seeks agreement to changes needed to the Building Act 2004 (the Act) to clarify accountabilities. The other papers are:
  - *Building Act review 2: Delivering accountability in the residential construction sector* which seeks agreement to recommendations to strengthen contracting requirements and related measures in the residential construction sector.
  - *Building Act review 3: Stepped consenting* which seeks agreement to recommendations to provide for building consent authorities to take a stepped risk-based approach to administration of building consent and inspection

requirements in proportion to the risk and complexity of the work and the skills and capability of those doing the work.

- *Building Act review 4: Exemptions from the requirement to have a building consent* which seeks agreement to broaden the range of minor low-risk building work that does not require a building consent.
  - *Building Act review 5: Delivering building regulation* which seeks agreement to the attributes of a nationally consistent regulatory system and further work to develop a preferred approach to improving the performance of the system.
- 3 As part of the Government's regulatory reform programme, in August 2009 I announced a review of the Act to reduce the costs associated with the building regulatory system without compromising building quality. In February 2009 Cabinet agreed to the Department of Building and Housing consulting on a package of options to reform the building regulatory system [CAB Min (10)5/3]. A total of 381 submissions were considered by the review.
- 4 The review concluded that:
- regulatory reform is needed to help achieve improvements in the productivity, efficiency and accountability of the building and construction sector, alongside other initiatives to improve skills and capability
  - those best placed to ensure the quality of building work (by ensuring it complies with the Building Code) are those directly involved in its design and construction
  - Building Code requirements and supporting information on how to comply with them need to be clear and easily accessible to designers and builders
  - regulatory requirements should be administered in ways that reinforce the accountability of those designing and constructing building work for the work that they do.
- 5 It also concluded that compliance costs can be reduced by:
- broadening the scope of minor low-risk building work that does not require a building consent
  - reducing consent and inspection requirements where there is less risk (for example simple homes built to proven designs and methods by licensed building practitioners) subject to clarifying accountabilities for building work and improving contracting arrangements
  - minimising duplication of effort and formalising best practice for commercial buildings by providing for reliance on third-party (non-building consent authority) review and quality assurance processes as an alternative provided certain conditions are met

- over the medium to long term providing greater national consistency and standardisation across the administration of the regulatory system.
- 6 The review identified that, in order to ensure building quality is maintained, it is necessary to carefully manage the sequencing of changes so that measures to incentivise improvements in quality are in place before changes are made to the consenting system.
- 7 Agreement is sought to amend the Act to:
- clarify accountabilities for building work complying with the Building Code (as set out in this paper)
  - provide for accountability to be managed and enforced in the residential construction sector through mandatory written contracts, supported by information disclosure, clearer legal obligations and remedies and improved dispute resolution options (as set out in Paper 2)
  - provide for a stepped risk-based system of building control and exempt a broader range of low-risk work from consenting requirements (as set out in Papers 3 and 4).
- 8 Agreement is also sought for:
- officials to undertake further work on whether or not changes are also needed to the joint and several legal liability framework as it applies in the building and construction sector (as set out in this paper)
  - the development of a preferred approach to deliver a nationally consistent and administratively efficient building regulatory system (as set out in Paper 5)
  - the Minister of Building and Construction to publicly announce decisions, to release this and the accompanying Cabinet papers and the attached synopsis of submissions.
- 9 Ministers are asked to note that work is continuing on clarifying Building Code requirements and improving access to the Building Code and supporting information.

## **Background**

- 10 The Act provides for a regulatory system that:
- sets minimum performance requirements for building work (the Building Code)

- provides information on particular ways of complying with these minimum requirements (designers can also demonstrate other ways of meeting performance requirements)
  - requires owners of building work to apply for building consents prior to commencing building work and for building consent authorities to decide whether or not to grant them (on the basis of whether the planned work complies with the minimum requirements/Building Code)
  - requires owners of building work to apply for code compliance certificates on completion of building work and for building consent authorities to decide whether or not to issue them
  - provides for the administration of building consent and inspection requirements by building consent authorities, and for territorial authorities to be building consent authorities and to enforce regulatory requirements.
- 11 In August 2009 I announced a review of the Act to reduce the costs associated with the building regulatory system without compromising building quality.
- 12 To ensure that the review addressed issues critical to the sector, I appointed a reference group with the following members: Peter Neven (Fletcher Construction), Richard Harris (New Zealand Institute of Architects), John Gray/Roger Levie (Home Owners and Buyers Association), Brent Mettrick (Registered Master Builders Federation), Richard Merrifield (Certified Builders Association), Gordon Buswell (ITM Building Supplies), Adam Thornton (Institution of Professional Engineers New Zealand and Association of Consulting Engineers New Zealand), John Duthie (Auckland City Council), George Skimming (Wellington City Council), Irene Clarke (Local Government New Zealand, and from February 2010 Sue Chetwin (Consumers Institute of New Zealand). This group met regularly through the course of the review. Members are generally supportive of the findings of the review and the options proposed.
- 13 In February 2010 Cabinet considered the initial findings of the review [CAB Min (10)5/3] and:
- 1 agreed, for the purpose of developing detailed policy proposals, to the Department of Building and Housing consulting with industry stakeholders and the public between February and April 2010 on a package of options to:
    - i) clarify and simplify building regulatory requirements and require a more targeted, risk-based approach to their administration by building consent authorities
    - ii) clarify the responsibilities of building producers to residential consumers and better equip residential consumers to transact with confidence for building work
  - 2 directed the Minister for Building and Construction to report to Cabinet Economic Growth and Infrastructure Committee by the end of June 2010 with policy recommendations arising from the consultation.

14 Between February and April this year, the Department of Building and Housing (the Department) managed a process of public consultation. A series of meetings were held across the country to discuss options for reform. These meetings were attended by over 1,000 people spanning building professions and trades, consumers and local authorities. 381 written submissions were received and considered by the review. A synopsis of submissions is attached to this paper.

### **A productive, efficient and accountable building sector**

15 The building and construction sector is vital to New Zealand's economic growth and prosperity as:

- it currently accounts for 4.2% of GDP (down from around 5% prior to the recession)
- it currently employs around 150,000 people or 8% of all those employed, and
- it is an important enabler of wider economic activity.

16 The quality of building work is important to the health, safety and financial security of all New Zealanders. The weathertightness crisis illustrates how serious the economic and social costs of poor quality building work can be.

17 From a national perspective, we want a productive and efficient sector that stands behind the quality of its work. In an ideal world:

- those designing, building, commissioning and regulating building work would all know what they are accountable for and what they can rely on others for, and transact with confidence
- building professionals, trades people and construction businesses would take pride in and stand behind the quality of their work and would compete on skills and reliability as well as price
- consumers would make informed decisions in their purchase of building work and would understand the risks and consequences of their decisions
- the general quality of building work would improve, there would be fewer defects, fewer complaints and less rework and as a result productivity will be high
- any defects would be promptly fixed and any disputes would be resolved quickly and at less cost
- information on the quality of building outcomes, such as any emerging trends in defects, would be rapidly shared throughout the sector and acted on.

### **Issues for reform**

18 Unfortunately the sector is not generally like this. It is characterised by low productivity, general and specific skill gaps, problems for consumers in holding

practitioners to account for the quality of their work and low levels of consumer confidence.

- 19 Recent reports on construction sector productivity and skills, commissioned by the Department and the Building Research Association of New Zealand, have concluded that the level of productivity is low, relative to the construction sector in other countries, and productivity growth has been poor. The research attributes the poor productivity, in part, to general and specific skill deficits and deficient management practices.
- 20 Research commissioned by the review found that around 20% of residential consumers of building work since 2005 experienced what they considered to be a serious dispute with their builder that took months or years to resolve.
- 21 Building regulation alone is not responsible for (nor able to solve) all of these problems. Regulatory rules and how they are applied do, however, create incentives on building professionals and trades people, and consumers, to behave in ways that may or may not contribute to a productive, efficient and accountable sector. Regulatory reform can support the desired behaviour change, but needs to sit alongside other related sector and government initiatives to improve sector productivity and accountability. Initiatives underway include:
  - a joint work programme being developed by the Department and sector leaders to address skills and productivity issues
  - licensing building practitioners to promote, recognise and support professional skills and behaviour
  - addressing the legacy weathertightness issue.
- 22 The first stage of the review found that while building quality has improved since the Act was enacted in 2004, the current regulatory system is more costly than necessary and less efficient and effective than it could be, with weaknesses and imbalances between its component parts.
- 23 It also identified how weathertightness litigation has contributed to risk averse behaviour by local authorities in their granting of building consents, undertaking of building inspections and issuing of code compliance certificates. This has resulted in increasing compliance costs.
- 24 Subsequent public consultation and analysis confirmed this, and also identified the following issues.
  - There are gaps in designers and builders knowledge and understanding of the minimum requirements set out in the Building Code.
  - Designers, builders, consumers and building consent authorities are not always clear on who is accountable for meeting Building Code requirements and what they can rely on others for. For instance, many designers believe that they

should be able to rely on builders to construct their designs to meet Building Code requirements without the designer needing to specify all of the necessary detail. At the same time, many builders do not believe they need to know relevant Building Code clauses. Both believe that they can rely on building consent authorities to identify and correct inadequacies in their work.

- Since the weathertightness crisis in particular, consumers, designers and builders rely heavily on building consent authorities to provide quality assurance and to ultimately underwrite the quality of residential building work when things go wrong.
  - Designers and builders are unwilling to accept accountability for the quality of their work if it means them being exposed to all of the costs of building defects (including those attributable to other parties that cannot be brought to account)
  - There are gaps and weaknesses in the measures in place to support consumers in their purchase of building work, to resolve disagreements or disputes with building contractors, and to hold building contractors to account for the quality of their building work.
  - Skill deficits are a major concern for many people across all areas (building consent authorities, designers and builders, and consumers), and are a constraint on reducing the role of building consent authorities.
- 25 All of the above issues contribute to limiting the ability of consumers to hold building practitioners and tradespeople to account for the quality for their work, reinforce undue reliance on building consent authorities for quality control and contribute to higher than necessary compliance costs.

### **Options for reform**

- 26 Change is required to address these issues. Achieving change will take time. Success requires attitudinal and behavioural changes from all those involved in building work, including consumers, alongside improvements in skills and capability across the sector.
- 27 The review has concluded that to leave the regulatory system unchanged is not an option. The system needs to change to provide incentives for building professionals and trades people to take responsibility for the quality of their work and stand behind it, as a prerequisite to improving productivity and efficiency and delivering better quality buildings at reasonable cost.
- 28 Incentives to change behaviour can be achieved through changing the Act and its administration to: more clearly signal accountabilities; strengthen contracting arrangements in support of accountabilities; provide for a stepped risk-based approach to how building consent and inspection requirements are administered; and develop a more nationally consistent and efficient approach to administering regulatory requirements.

- 29 In addition to these changes, the review considered the option of changing the joint and several liability framework that applies in negligence cases in the building and construction sector.
- 30 Under joint and several, all of the parties who contribute to any given building defect through their negligence are jointly and severally liable to the plaintiff for the costs of the defect. When more than one party has contributed to the defect, the costs are initially apportioned between parties on the basis of each party's fault. In the event that one or more of the negligent parties is unable to meet its share of the costs, these costs are shared between those who can pay.
- 31 In practice in weathertightness cases, this has seen local authorities carrying between 40 and 70 percent<sup>1</sup> of the total cost of settlements. It has also seen other parties pursued and found liable for amounts that they perceive as out of proportion to their actions.
- 32 Consultation identified that joint and several liability, as applied in weathertightness cases, is a significant disincentive to desired behaviours. Submitters, including most local authorities and industry groups, identified the following concerns with the operation of joint and several liability.
- Particular parties with deep pockets, such as local authorities who have strong capital positions and the power to rate, should not be liable, on an ongoing basis, for costs in excess of their apportioned share of the fault.
  - It is impacting on the availability and cost of professional indemnity insurance, because a person with professional indemnity insurance can become a 'deep pocket' in the event that other parties have ceased to trade. This is a problem for professionals and others who consider this form of insurance critical to managing their accountability.
  - It is reinforcing incentives for building professionals and trades people to structure their affairs and operate in ways that minimise their exposure through, for instance, the use of project specific companies, or by limiting the scope of their involvement in building work. This is generally detrimental for consumers.
  - It is contributing to defensive and risk adverse behaviour by local authorities that is resulting in them seeking more detail on plans, making more inspections, and contributing to greater compliance costs than are necessary.
- 33 Consultation also identified that any change to joint and several liability would be a significant change to the law in New Zealand and would leave consumers vulnerable to little or nil recovery of costs in the event of the failure of a builder or developer.

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<sup>1</sup> PricewaterhouseCoopers report to Department of Building and Housing, *Weathertightness – Estimating the cost* July 2009

34 The review has concluded that further work is needed to consider whether change to the application of joint and several liability to the building and construction sector is necessary, and to assess the implications of any such change for consumers and other sectors.

### **Proposals for change**

35 I propose that the Committee agree to amend the Act, including the purpose statement and principles, to provide a clearer framework of accountabilities for building work, whereby the following will be clear.

- i) Those who provide and advise on building plans and specifications are accountable, to owners of building work, for ensuring that their plans, specifications and advice (if followed as a basis for building work) are sufficient to result in the subsequent building work (if built to the plans, specifications and advice) meeting the requirements of the New Zealand Building Code.
- ii) Those who provide building construction services are accountable to owners of building work for:
  - building to any approved plans and specifications, and
  - the Building Code compliance of their work if it varies from or proceeds in the absence of any approved plans and specifications.
- iii) Owners are accountable to the building regulator and subsequent owners for:
  - gaining any necessary regulatory approvals and providing regulatory authorities with any required information on their building work, and
  - for the Building Code compliance of building work in the event that they directly make or vary the details of building plans and specifications
  - for building to approved plans and specifications in the event that they directly undertake building work.
- iv) Building regulatory authorities are accountable for issuing building consents, for checking building plans and specifications for Building Code compliance, for checking that building work has been completed in accordance with consented plans and specifications, for approving any critical variations to consented plans and specifications and for certifying that the building work has been completed in accordance with any requirements of the consent subject to any regulations that prescribe inspection points.

36 In order to provide the means for consumers to enforce the above accountabilities under contract, I also propose that the Committee agree to the proposals in Paper 2 to amend the Act to:

- i) require a written contract for residential building work, supported by mandatory disclosure of information including what if any surety or insurance backing is available, clearer obligations and new legal remedies
- ii) provide more options for dispute resolution, to enable parties to resolve disputes as quickly as possible and under contract.

37 In order to ensure that the building consent and inspection requirements are administered in ways that reinforce the above accountabilities, I recommend that the Committee agree to the proposals made in Papers 3, 4 and 5 to:

- i) amend Schedule 1 of the Act to exempt a broader range of low-risk building work from the requirement to obtain a building consent
- ii) amend the Act to provide for a stepped risk-based approach to issuing consents and inspecting building work, where the role of building consent authorities at each step would be aligned with the risk involved, taking into account the risk and complexity of the work and the skills and capabilities of those doing the building work, starting where the risk is minimal
- iii) direct officials to advise on a preferred approach to improving the performance of the building regulatory system.

38 In order to consider whether any change is required to the application of joint and several liability in the building and construction sector, and the implications of any change for consumers, I also propose to direct that officials report back to us with advice. This advice would look at what, if any, further action is required in support of other proposals to achieve desired attitudinal and behavioural changes in favour of improved accountability for the quality of building work. Because of the potential implications for consumers, this advice would also consider options for ensuring that consumers can obtain financial compensation for building defects. This work would be led by the Department of Building and Housing in consultation with officials from the Treasury, Ministry of Justice, Ministry of Economic Development, Department of Internal Affairs and the Ministry of Consumer Affairs.

### **Clarifying and improving access to Building Code**

39 In support of increased accountability, I also ask the Committee to note that the Department is continuing work to improve the clarity of Building Code requirements and improve access to the Building Code and supporting information, which is essential to improving compliance. The framework supporting the Building Code is conceptually sound and consistent with international best practice, but submissions to the review and other feedback<sup>2</sup> show that building professionals, trades people, and building consent authorities sometimes have difficulty accessing and understanding the Building Code and associated documents that make up the Code framework. Fire safety requirements are causing particular concerns.

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<sup>2</sup> Building Code Review 2007

40 I will shortly be bringing papers to Cabinet on proposals to better specify the performance requirements and improve the presentation of the Code and associated documents related to fire safety, timber durability, noise, and signage.

41 I have also agreed a programme of work with the Department over the next three years to further address clarity and access with a particular focus on health and safety and economic impacts. The work programme includes:

- reviewing definitions, building classifications and aspects of Building Code clauses relating to natural light, sanitation, personal hygiene, access, durability and hazardous substances that have been raised as issues in submissions to the review to ensure clarity and consistency with the Building Act and other legislation
- reviewing Building Code clause B1 (structural stability) and supporting documents relating to steel and timber design methods<sup>3</sup>, timber quality, and secondary structural elements<sup>4</sup>
- reviewing and developing wall cladding and roofing solutions (Building Code clause E2 external moisture)
- reviewing the performance requirements for internal moisture and ventilation
- clarifying insulation requirements for additions and alteration work
- reviewing and developing guidance material for practitioners on the interpretation of Building Code clauses and the building science principles they need to consider to satisfy each Building Code clause, to promote the use of innovative solutions.

42 The review has also identified that a barrier to understanding how the Building Code system functions is the use of the term 'Compliance Document'. The Building Code specifies the minimum performance requirements that must be achieved for building work but it does not prescribe how the building is to be built. The Department has published Compliance Documents which set out either Acceptable Solutions or Verification Methods for each technical clause of the Building Code. These Compliance Documents prescribe one way, but not the only way, of achieving compliance with the Building Code. Feedback from the review strongly suggested that the term 'Compliance Document' is perceived as meaning the methods set out in the document must be followed. This perception is a barrier to innovation. I propose to amend the Act to remove the term 'Compliance Document' and refer only to Acceptable Solutions and Verification Methods, terms that are better understood and already defined in the Act.

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<sup>3</sup> Concrete design methods were updated in 2008.

<sup>4</sup> Learning from the experience of the recent Chile earthquake which caused approximately \$30B damage, a very high proportion attributed to secondary damage such as suspended ceiling collapse, sprinkler and other building service damage.

43 In addition the Department will do further work in a number of areas.

- Investigate the feasibility of establishing an expert advisory service to provide advice about Building Code compliance where it is unclear whether an innovative design meets Building Code performance requirements.
- Develop an education programme for building practitioners, working with existing education providers, to address knowledge gaps on Building Code requirements and to ensure that more resources are devoted to education.
- Develop protocols and guidance to improve the interface between the building regulatory system and the New Zealand Standards system.
- Develop a detailed business case with options for improving the integration and presentation of the information contained in the various documents, including New Zealand Standards, that make up the Building Code system, so that it can be accessed, or sorted, according to building type, location and/or the different parties involved in the building process. The business case will include options for making better use of information technology. This work will be integrated with the work on consolidating the administration of building regulatory requirements set out in Paper 5.

### **Sequencing and implementation of proposed changes**

44 Skill constraints, low consumer confidence in the sector and administration of regulatory controls across 75 local authorities all constrain our ability to quickly implement changes to how building consent and inspection requirements are administered. Simply reducing or streamlining these requirements without first providing other means of quality assurance, including contracts and licensing of building practitioners, would jeopardise building quality. However change is needed in order to reinforce accountabilities and we must start somewhere.

45 For this reason, the timing and sequencing of each part of the proposed reform package is important. I propose a staged approach as follows.

46 Stage 1: amendments to Schedule 1 to exempt a wider range of low-risk work from consent requirements are progressed as soon as possible, as there are limited risks to doing so and benefits from reducing compliance costs.

47 Stage 2: put in place accountability measures including:

- i) amend the Act to clarify accountabilities and code requirements
- ii) put in place new contract provisions, clearer obligations and new legal remedies supported by information for all parties.

48 Stage 3: introduce stepped risk-based consenting subject to Stage 2 being achieved, and

- i) Greater awareness and understanding of the performance requirements of the Building Code and how to apply
- ii) building practitioners having to be licensed to do or supervise restricted building work (work that is critical to the integrity of the building including a house's foundations, framing, roofing and cladding)
- iii) an effective system is operating to monitor and provide information on the quality outcomes of building work.

49 I also propose that the initial starting point for stepped risk-based consenting should be building work where the likelihood of failure to comply with the Building Code is minimal, such as a single story house designed and built by licensed building practitioners using proven design, methods and products. In future, once building professionals and trades people and consumers have developed confidence in the proposed approach, there may be potential to extend this approach to a wider range of building work.

50 I seek the Committee's agreement to the following timetable for amending the Act and implementing the component parts of the proposed package.

Item	Date
Communicate decisions and direction of change.	ASAP
Amend Schedule 1 to broaden exemptions for very low-risk building work from consent requirements.	By end of 2010
Make changes to the Act to provide for: <ul style="list-style-type: none"> <li>• clarity of accountabilities</li> <li>• improved contract provisions, clearer obligations and new legal remedies</li> <li>• improved resolution of residential building contract disputes</li> <li>• stepped risk-based administration of building consent and inspection requirements</li> <li>• provide supporting information for all parties.</li> </ul>	mid 2011
Agree to a preferred approach to improving the performance of the building regulatory system	mid 2011
Introduce stepped risk-based consenting for low-risk residential building work and commercial building work.	From mid 2012

#### **Other recommended amendments – minor or technical**

51 A number of minor or technical issues have been identified during consultation as potentially requiring amendment to the Act to correct errors, omissions and inconsistencies. I am proposing that I be given delegated authority to approve any such amendments that are necessary to improve the Act's workability, where no new policy issues arise.

## Regulatory impact analysis

52 The Regulatory Impact Analysis (RIA) requirements apply to the proposal in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached as Appendix 1. The Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared by the Department and associated supporting material, and considers that the information and analysis summarised in the RIS meets the quality assurance criteria.

53 Overall, the options are expected to result in net benefits, over a five to 10 year period. Realisation of the benefits will be dependant on the extent to which the proposed package of proposals is effective in contributing to desired attitudinal and behavioural changes by those directly involved in the provision of building services and consumers.

54 In summary, the following effects are expected.

- A rebalancing of risks and accountabilities, resulting in an improved set of incentives to “build right, first time”, and improved productivity through the building industry. In the event of any defects, this will result in more of the cost falling on the designer, builder and consumer, and less on the building consent authority.
- Greater support provided for consumers through mandatory written contracts and disclosure requirements. These will assist consumers in making better and more informed choices, and to understand and enforce their rights more easily.
- Consenting and inspection procedures more targeted at risk, with significant benefits expected to accrue over time (over \$120m per annum). Some immediate reduction in compliance costs for those undertaking minor building work that will be added to the list of building work exempt from consent requirements. This has been estimated to account for 5% of work currently consented.
- Some immediate additional costs to builders in providing information and offering contracts and warranties to residential consumers. Increasing skill demands on practitioners from consumers, and increasing demand from consumers for warranty surety products.
- Increasing demand for professional indemnity insurance and other risk management products from builders and designers, and increasing demand from consumers and builders for dispute adjudication services.
- Less litigation through court, and less exposure to the costs of liability from regulatory authorities.

## Consultation

- 55 The following Departments have been consulted and agree with the contents of this paper: the Treasury, the Department of Prime Minister and Cabinet, the Ministry of Economic Development, the Department of Internal Affairs, the Ministry for the Environment, the Ministry of Justice and Te Puni Kōkiri.
- 56 A sector reference group and working groups made up of members of the building industry, local authorities and consumer advocates provided strategic and operational input to the review, ensuring that the sector's issues are being addressed and that the Department's analysis is robust when viewed from sector perspectives.
- 57 A discussion document was issued for public consultation in February 2010. Approximately 1000 people attended meetings around the country to discuss the proposals and 381 submissions were received. A synopsis of submissions is attached to this paper as Appendix 2. The following are key themes from submissions.
- While there is support for the principle of moving to a risk-based approach to building control, there is a high level of concern about whether many designers and builders have the skills, or the willingness, to take more responsibility for their work, or whether reducing council checking and inspection will erode quality and create new problems. Suggestions about how to address these issues included a strong focus on education, with some calls for 'raising the bar' on the Licensed Building Practitioners scheme, so that practitioners have to do more to qualify for and retain a licence.
  - A strong focus on accountability and liability, with many submitters actively seeking a change away from joint and several liability by legislating for proportional liability. There is some recognition that mandatory contracts including warranties and backed by surety together provide an alternative way of protecting consumers' interests. There is strong support for mandatory surety, but also significant concern about the potential cost. Many suggestions were put forward including several variations on a national ACC-type no-fault fund.
  - General support for more national consistency in administration, balanced by the need to ensure local accessibility and preserve knowledge of local conditions.
  - General support for more clarity around the purpose and principles of the Act, the Building Code and the interface with Standards, with a strong emphasis on the need for more education.
  - Strong views from those involved in fire engineering and design on the need for improvement to the current system for fire safety review of building plans.

- Some comment on the importance of products/materials in the quality building equation, and a desire for better/clearer national guidance on products. This is being addressed in the Department's ongoing work programme, and a guide for manufacturers and suppliers to achieving product assurance and demonstrating Building Code compliance was recently published.

### **Financial implications**

58 There are no financial implications from the specific proposals set out in this paper because any costs will be covered from the Department's baseline funding.

### **Human rights**

59 The proposed amendments appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. A final view as to whether the proposals will be consistent with the Bill of Rights Act will be possible once the legislation has been drafted.

### **Legislative implications**

60 The proposals in this paper involve substantial amendments to the Building Act 2004, and are likely to require consequential amendments to other legislation including the Construction Contracts Act 2002 and Local Government Official Information and Meetings Act 1987. Two Building Amendment Bills (with category 3 and 4 priorities) are included in the 2010 legislative programme.

### **Publicity**

61 It is proposed that the Minister for Building and Construction announce Cabinet decisions to key sector leaders at a specially arranged briefing in Auckland, tentatively scheduled for 12 August 2010, and make a media release.

## Recommendations

62 I recommend that the Committee:

1 **note** that on 15 February 2010 Cabinet

- i) agreed, for the purpose of developing detailed policy proposals, to the Department of Building and Housing consulting with industry stakeholders and the public between February and April 2010 on a package of options to:
  - (1) clarify and simplify building regulatory requirements and require a more targeted, risk-based approach to their administration by building consent authorities
  - (2) clarify the responsibilities of building producers to residential consumers and better equip residential consumers to transact with confidence for building work
- ii) directed the Minister for Building and Construction to report to Cabinet Economic Growth and Infrastructure Committee by the end of June 2010 with policy recommendations arising from the consultation authorised above
- iii) directed the Department of Building and Housing to report to Cabinet Economic Growth and Infrastructure Committee by June 2010 on its progress in:
  - improving the specification of areas of the Building Code where performance requirements are poorly specified
  - improving the presentation and accessibility of the Building Code so that persons wanting to build particular types of buildings are able to easily and for a low cost identify all relevant Building Code clauses, compliance documents and standards in ways convenient to them
  - improving the interface between the building regulatory system and the standards system, and proposals to address any unresolved issues (in consultation with the Ministry for Economic Development)
  - the implications of any changes to the Act's purpose and principles for the scope of the Code
- iv) directed the Department of Building and Housing in consultation with the Department of Internal Affairs to report to Cabinet Economic Growth and Infrastructure Committee in June 2010 on options to improve the administration of building regulatory functions including their consolidation across local authorities or centralisation, and on the expected benefits, costs and risks of these options compared to proceeding with current institutional administrative arrangements

- v) directed that the Department of Building and Housing to review the retrospective application of section 363, including consideration of an effective means of identifying and addressing non-compliant and dangerous building work in buildings built between 1 July 1992 and 31 March 2005, and report to Cabinet Economic Growth and Infrastructure Committee on the findings and recommendations of that review by the end of June 2010
- 2 **note** that the Building Act review has concluded that change to the Building Act and its administration are required in order to support other government and industry initiatives to improve the productivity, efficiency and accountability of the building and construction sector
- 3 **note** that the Building Act review has concluded that change to the Building Act and its administration is necessary to:
- i) more clearly signal and reinforce accountabilities for building work
  - ii) to provide for accountabilities to be effectively managed through contract
  - iii) to improve how the regulatory system is administered so that its administration reinforces incentives on those involved in the design and construction of buildings to take primary responsibility for the quality of their work, and
  - iv) to improve the overall effectiveness and efficiency of how the regulatory system is administered.
- 4 **note** that this and accompanying papers seek agreement to a package of building regulatory reform based on the following core elements:
- i) changes to the Building Act to clearly signal roles and accountabilities for building work and Building Code compliance between designers, builders, building owners and building consent authorities
  - ii) new legislative provisions requiring for building contractors to disclose certain information to enable building consumers to make better informed decision prior to entering into contracts, to require contracts with warranties and remedies, and to provide more options for dispute resolution, to enable residential consumers to better hold building contractors to account through contract
  - iii) changes to the Building Act and regulations to exempt a broader range of low-risk building work from consenting requirements and to provide for a stepped risk-based approach to the administration of building consent and inspection requirements, so that building consent and inspection requirements are proportionate to the risk and consequences of building defects and the skills and capabilities of those doing the building work

- iv) further work by officials to advise on a business case and implementation plan for making improvements to how the regulatory system is administered
- 5 **agree** to amend the Building Act, including the purpose statement and principles, to clarify the following accountabilities for the Building Code compliance of building work between owners, designers, builders and building consent authorities, being that:
- i) those who provide and advise on building plans and specifications are accountable, to owners of building work, for ensuring that their plans, specifications and advice (if followed as a basis for building work) are sufficient to result in the subsequent building work (if built to the plans, specifications and advice) meeting the requirements of the New Zealand Building Code
  - ii) those who provide building construction services are accountable to owners of building work for:
    - (1) building to any approved plans and specifications, and
    - (2) the Building Code compliance of their work if it varies from or proceeds in the absence of any approved plans and specifications
  - iii) owners of building work are accountable to the building regulator and subsequent owners for:
    - (1) gaining any necessary regulatory approvals and providing regulatory authorities with any required information on their building work
    - (2) for the Building Code compliance of building work in the event that they directly make or vary the details of building plans and specifications
    - (3) for building to approved plans and specifications in the event that they directly undertake building work
  - iv) building regulatory authorities are accountable for issuing building consents, for checking building plans and specifications for Building Code compliance, for checking at any prescribed inspection points that building work has been completed in accordance with consented plans and specifications, for approving any critical variations to consented plans and specifications and for certifying that the building work has been completed in accordance with any requirements of the consent at any prescribed inspection points.
- 6 **agree** to amend the Building Act to replace the term Compliance Document with the terms Acceptable Solution and Verification Method
- 7 **note** that I will be presenting to Cabinet in August 2010 proposals to improve the clarity of building code requirements relating to timber treatment, fire safety, protection from noise, and signs

- 8 **note** that I have instructed the Department of Building and Housing to develop proposals for improving the integration and presentation of, and access to, information supporting the Building Code including New Zealand Standards, and report to Cabinet by end of March 2011 with options and costs
- 9 **direct** officials from the Department of Building and Housing in consultation with the Treasury, Ministry of Justice, Ministry of Economic Development, Department of Internal Affairs and the Ministry of Consumer Affairs to report back to Cabinet EGI Committee by the end of June 2011 on:
- i) whether any changes are needed to the application of joint and several liability in the building and construction sector, in addition to the above proposed changes, in order to achieve desired attitudinal and behavioural changes in favour of improved accountability for the quality of building work, and if changes are proposed
  - ii) the implications of the proposed changes for consumers and whether or not they would necessitate a mandatory requirement for all proposed residential contract warranties to be backed by a specified scheme of insurance or financial surety
  - iii) a recommended approach to providing the specified form of insurance or surety in 9 (ii) above, including a timeframe by which it could be provided, how it would be funded and the costs, benefits and risks that would be associated with its provision
- 10 **agree** to the following timetable for implementation of core elements of the proposed reform package:

Item	Date
Communicate decisions and direction of change.	ASAP
Amend Schedule 1 to broaden exemptions for very low-risk building work from consent requirements.	By end of 2010
Make changes to the Act to provide for: <ul style="list-style-type: none"> <li>• clarity of accountabilities</li> <li>• improved contract provisions, clearer obligations and new legal remedies</li> <li>• improved resolution of residential building contract disputes</li> <li>• stepped risk-based administration of building consent and inspection requirements</li> <li>• provide supporting information for all parties.</li> </ul>	mid 2011
Agree to a preferred approach to improving the performance of the building regulatory system	mid 2011
Introduce stepped risk-based consenting for low-risk residential building work and commercial building work.	From mid 2012

- 11 **invite** the Minister of Building and Housing to issue drafting instructions to Parliamentary Council Office to draft a Bill to amend the Building Act
- 12 **note** that two Building Amendment Bills (with category 3 and 4 priorities) are included in the 2010 legislative programme
- 13 **agree** that the Minister for Building and Construction has delegated authority to approve amendments to correct any minor errors, omissions and inconsistencies that may be identified, where no new policy matters arise
- 14 **invite** the Minister of Building and Construction to announce the above decisions and release this and the accompanying Cabinet papers and the attached synopsis of submissions.

Hon Maurice Williamson

Minister for Building and Construction

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In Confidence

Office of the Minister of Building and Construction

Cabinet Economic Growth and Infrastructure Committee

## **Building Act review 2: Delivering accountability in the residential construction sector**

### **Proposal**

- 1 Ministers are asked to agree to a set of amendments to the Building Act 2004 and other measures to assist consumers to hold building contractors to account, and to drive better performance in the construction sector.
- 2 The amendments would introduce effective contracting, new requirements for disclosure and information provision by building contractors, clearer legal obligations on all parties, and new legal remedies available to consumers. These changes would be supported by fast and effective dispute resolution options.

### **Executive summary**

- 3 This paper is the second of five papers proposing changes to the building regulatory system that will contribute to a more productive, efficient and accountable building and construction sector.
- 4 Paper 1 *Building Act review: Overview of reform proposals* seeks agreement to amend the Building Act 2004 (the Act) to clarify the legal roles and accountabilities of different parties for building work.
- 5 This paper seeks agreement to a set of proposals to ensure these accountabilities can be managed and enforced in practice within the residential construction sector. (This sector includes any building which contains a unit intended for use as a residential dwelling. Residential consumers are vulnerable - they rarely commission building work, and they have limited knowledge of the associated risks and the options for managing these.)
- 6 To ensure that accountabilities are clear, the paper proposes mandatory written contracts between building contractors and consumers, for all projects above \$10,000 in price, supported by information disclosure, clearer obligations and new legal remedies. (A building contractor is any party who contracts with the owner to deliver building work – the contractor may be an individual or a company. Building work covers work to construct, alter, repair, demolish or remove a building. It does not cover design.)
- 7 The Act currently implies a set of warranties into every building contract. These warranties require building work to be undertaken with reasonable care and skill,

and to be fit for purpose (among other requirements) for up to 10 years. These warranties will be retained and summarised in written building contracts.

- 8 It is not recommended at this stage that financial surety (such as a guarantee or home warranty insurance product) is mandated for new building work. Instead the paper proposes that building contractors would be required to disclose what, if any, financial surety is available where a building contractor is unable to fulfil the new remedy obligations.
- 9 This disclosure requirement will make it clear, before a building contract is signed, whether financial surety is available. This should increase the demand for, and supply of surety products and services in the market over time. Work is proposed on whether changes are merited to the way that building guarantee products and services are regulated.
- 10 To ensure building contractors can be held to account in practice, measures are also proposed to address existing gaps in dispute resolution services. These measures, together with a clause in building contracts setting out how disputes will be resolved, are intended to enable parties to resolve residential building disputes as quickly as possible and under contract, where this is feasible and cost-effective.
- 11 To help subsequent owners to hold the original building contractor to account, the paper proposes that critical information (identity of the contractor and copies of any surety or insurance policy for the work) is placed on the Land Information Memorandum for the property held by the relevant territorial authority.
- 12 These proposals will lift productivity over time, and improve building quality, by:
  - helping consumers to choose competent and reliable building contractors
  - motivating consumers to identify and notify any defects as quickly as possible
  - strengthening the incentives on building contractors to perform (and to repair any defective work)
  - motivating building contractors to employ or sub-contract skilled practitioners
  - making it more difficult for poor performers to remain in the market (without improving their practices and skill levels)
  - reducing the incidence and severity of building defects.
- 13 This package is a pre-requisite to the introduction of stepped consenting and inspection processes based on construction risk.

### **Improve accountability in the residential construction sector**

- 14 The proposals in this paper will deliver an effective accountability system within the residential construction sector. These proposals together will:
  - assist consumers to make informed choices in purchasing building work
  - assist consumers to hold building contractors to account in practice
  - ensure any defective building work is identified, reported and repaired as quickly as possible

- increase the number of consumers who obtain some financial compensation, when work is defective and a building contractor defaults on obligations to remedy the problem
- assist subsequent owners to hold building contractors to account (and make a claim against any guarantee or insurance which has been purchased for the building).

15 A summary of the proposals and their expected impacts is provided in Table 1. The proposals are then discussed in more detail below.

**Table 1: Proposals to improve accountability in the residential construction sector**

<b>Objective</b>	<b>Proposed measures</b>	<b>Effects</b>
<i>Ensure consumers can make informed choices in purchasing building work</i>	<p>Building contractors to disclose critical information, before contract is signed</p> <p>Building contractors to give the consumer a published checklist with:</p> <ul style="list-style-type: none"> <li>• questions to ask</li> <li>• information on the risks of paying ahead of completion</li> <li>• parties' legal obligations</li> <li>• dispute resolution options</li> <li>• sources for further advice</li> </ul>	<p>Consumers better able to distinguish between good and poor building contractors and practitioners</p> <p>Over time, more difficult for poor performers to get work and stay in the market</p> <p>Improved building quality</p> <p>More confident consumers</p>
<i>Ensure building contractors can be held to account in practice</i>	<p>Mandatory written contracts</p> <p>Warranties will be summarised in contracts</p> <p>Website information on the risks of paying for work ahead of completion</p> <p>Advice on dispute resolution options</p> <p>'Early intervention' dispute service - mediation by telephone or face-to-face</p> <p>Adjudication of contractual disputes</p>	<p>Fewer disputes - as both parties have clear expectations and the same understanding of what has been agreed</p> <p>Disputes that do arise are resolved quickly</p> <p>Less court litigation</p> <p>Stronger incentives on building contractors to perform</p> <p>Improved building quality</p>
<i>Ensure defects are identified, reported and repaired as quickly as possible</i>	<p>Clear obligations on the consumer (including to quickly alert the building contractor of defects)</p> <p>Strengthened obligation on the building contractor to fix any defects notified within 12 months after completion</p> <p>Obligation on the building contractor to provide key maintenance information</p> <p>New legal remedies available to the consumer</p> <p>Guidance to help all parties understand the new remedies and obligations</p>	<p>Defects are identified quickly</p> <p>Early defects (notified by the consumer within 12 months) are fixed promptly</p> <p>Latent defects are more likely to be remedied by the building contractor</p> <p>The extent of damage (resulting from building defects) is lower</p> <p>The costs of repair are lower</p>
<i>Increase the number of consumers who obtain financial redress</i>	<p>Disclosure by the building contractor of whether financial backing is available (such as a guarantee or insurance)</p> <p>Examination of whether any changes to the regulation of guarantee products and services within the building sector are merited</p>	<p>A greater number of consumers purchase a guarantee or insurance product</p> <p>The choice of products in the market increases over time</p> <p>Consumers can make an informed choice among products</p> <p>Consumers can be confident that guarantee products are sound</p> <p>More consumers obtain financial compensation, when there is a defect and the building contractor defaults on obligations to remedy</p>
<i>Assist subsequent owners</i>	<p>Make critical information available to subsequent owners (through the Land Information Memorandum)</p>	<p>Subsequent owners better able to hold contractors to account or obtain redress</p>

### **Ensure consumers can make informed choices in purchasing building work**

- 16 At present consumers have little ability to distinguish between contractors who have a history of good performance and who use experienced, qualified and skilled practitioners, and contractors who do not.
- 17 Building contractors who use low skilled labour, take shortcuts and do not stand behind their work can have a competitive advantage: as consumers are unable to distinguish between building contractors on the basis of performance, many consumers choose on the basis of price alone. This means that well performing building contractors are often undercut by poor performers.
- 18 As a result, it is possible for unreliable, poor performers to remain in the market. This is a critical issue for the building sector – it undermines building quality, increases the need for rework and repairs, and reduces productivity.
- 19 Further, consumers are exposed to considerable risk. Most consumers who purchase building work do so infrequently and have limited knowledge of how to select a competent and responsible building contractor.
- 20 In Australian states (and elsewhere) prospective building contractors are required to disclose critical information before a contract is signed. Typically the contractor must also give the consumer a simple publication with key information (such as what to do if a dispute arises) and/or a checklist of questions for the consumer to ask the contractor.

#### *Disclosure and provision of critical information*

21 I propose amendments to the Act to require:

- i. written disclosure from the prospective building contractor (whether this is a company or an individual) to the consumer, prior to an offer of contract, of each of the following:
  - the skills, qualification and licensing status of those building practitioners who will do the work
  - dispute history of the building practitioners – ie, the outcome of any formal dispute ruling or court judgement (only information which is already in the public arena, and limited to the previous 10 years)
  - what if any surety or insurance backing is available for the building work
  - information about the company (where the building contractor is a company) including:
    - how long the company has operated
    - what role each director will play in the project
    - any previous breaches of relevant regulatory requirements, based on information which is in the public arena and limited to the previous 10 years

- ii. a simple checklist to be provided by the prospective building contractor to the consumer, prior to the contract being signed - the checklist would:
- prompt the consumer to ask important questions
  - explain a building contractor's legal obligations and the consumer's reciprocal obligations
  - outline the risks of paying a contractor ahead of work being completed
  - summarise dispute resolution options
  - refer the consumer to sources for further advice and information.

### **Ensure consumers can hold building contractors to account in practice**

22 Once a building project is underway or completed, a large number of problems can emerge.

23 Research carried out for the Department of Building and Housing (the Department) in 2010 found that among a large, representative sample of consumers who had purchased significant building work in 2005 (valued at over \$50,000 and for which a building consent was needed):

- 31% had a disagreement with their building contractor
- 19% had a major dispute
- major disputes often had more than one cause, and causes included:
  - timelines not being met (37% of those with a major dispute)
  - non-completion of the project (33% of those with a major dispute)
  - non-compliant or defective work (56% of those with a major dispute)
  - poor workmanship (55% of those with a major dispute)

#### *Mandatory written contracts*

24 Typically it is difficult and costly for consumers to hold building contractors to account and to obtain remedy when a problem emerges, for several reasons.

25 First, not all consumers enter a formal written contract which sets out clearly the commitments and obligations of each party, the risks attached to the project (such as slippage in timeframes or increases in product prices) and how these risks will be managed, or what will happen in the event of a dispute.

26 The research on consumers who had carried out building work in 2005 found that in the absence of comprehensive contracts, disputes were more likely to arise, and resolving them satisfactorily (and without incurring high cost) was more difficult.

27 Submissions on the Building Act review proposals emphasised the value of comprehensive written contracts in ensuring that both parties have clear and realistic expectations, and ensuring that these expectations are aligned (this reduces the likelihood of a dispute, and facilitates the resolution of any dispute that does arise).

28 I propose amendments to the Act to require written contracts for residential building work in excess of \$10,000 price. The written contracts would be required to include the following as a minimum:

- the names and address of the parties
- the date the contract is agreed
- the contract to be signed by both parties
- a description of the work to be carried out
- the timeframe for the project
- details of the contract price
- a summary of the warranty and remedy obligations on the seller, and the reciprocal obligations on the buyer
- the process that will be followed if a dispute arises
- details of what, if any, surety or insurance backing which is available
- the process for varying the contract.

*Summary of existing legal warranties in written contracts*

29 Second, under the Act a set of warranties is implied into every building contract. These require all building work to be fit for purpose, to meet the Building Code, and to be undertaken with reasonable care and skill (and related requirements). However, many consumers and building contractors are unaware of these general requirements. Under the above proposals, a summary of the implied warranties would be included in the proposed written contracts

*Information about the risks of paying a building contractor ahead of work being completed*

30 Third, some consumers agree to make progress payments to their building contractor ahead of work being completed. This means that the consumer has little financial leverage to pressure the contractor to meet agreed timelines or quality standards. Also the contractor is able to walk off the project with money for work that has not been completed (the research on consumers found that of those with a major building dispute, 33% reported non-completion).

31 The practice of pre-payment is associated with lower quality work (because payment is not dependent on performance), more rework and additional costs for the consumer.

32 Information for consumers about the risks of pre-payment would support better business practices in the sector, and make it more difficult for poor performers and under-capitalised businesses to continue in the market, without improving the way they work.

33 The Department will provide access to information through the ConsumerBuild website about the risks of pre-payment (an outline of these risks will also be included in the checklist discussed in paragraph 21 ii).

*Alternative dispute resolution*

- 34 Fourth, there are gaps in dispute resolution. Currently, where building contractors default on, or dispute their legal and contractual obligations there are dispute resolution options available to consumers including private mediation and private adjudication services, the Disputes Tribunal (for disputes up to \$15,000, or up to \$20,000 when both parties agree), the District Court and the High Court.
- 35 However the research on consumers found that around half of major disputes took months or years to resolve (and a quarter had not been resolved after five years). Most consumers were not aware of existing dispute services (such as the Disputes Tribunal) or chose not to use them (only 6% of consumers with a major dispute used the Disputes Tribunal – this is partly because the Tribunal can only be used for disputes up to \$15,000 in value or \$20,000 if both parties agree). Most tried to resolve the dispute themselves through direct negotiation with the building contractor.
- 36 Consultation on the Building Act review proposals indicated that there are three significant gaps in the services currently available to assist consumers to resolve a building dispute:
- a central source of advice on dispute resolution options
  - an ‘early intervention’ service to help parties to resolve any disagreement as early as possible through negotiation or mediation
  - a fast and cost-effective adjudication service which people are aware of and which is clearly available for general residential building disputes.
- 37 The Construction Contracts Act 2002 establishes an adjudication process which is currently being used for a wide range of commercial and residential disputes (including disputes over payment, workmanship and defects). A number of private providers of dispute resolution services have established themselves in the market to provide adjudication services under the Construction Contracts Act.
- 38 It is widely agreed among industry and consumer representatives that the Construction Contracts Act process has the potential to be a fast, effective and fair model for resolving disputes. A large number of submitters to the Building Act review strongly supported the Construction Contracts Act model for both residential and commercial disputes.
- 39 However, people noted that improvements were needed, particularly to the provisions for remedy and enforcement. Adjustments are also needed to clarify that the Construction Contracts Act applies to residential disputes: its stated purpose, to address payment issues under commercial contracts, is narrower than its actual jurisdiction and the range of disputes it is being used to resolve in practice.

- 40 In order to provide for disputes to be resolved efficiently and under contract (where this is feasible) I seek the Committee's agreement to:
- i. amend the Building Act to provide for all residential building contracts to include a mandatory clause outlining the process to be followed in the event of a dispute, and providing for disputes to be addressed through an adjudication process under the Construction Contracts Act (where the dispute has not been resolved through conciliation or mediation) – with the parties having the flexibility to choose another process by mutual agreement
  - ii. direct the Department to develop specific proposals for the establishment of a central service to advise consumers of dispute resolution options, and an 'early intervention' mediation service, and report to Cabinet with proposals and fiscal implications by 31 March 2011.
  - iii. direct the Department to review the Construction Contracts Act with a view to improving its application to both residential and commercial building disputes, partly to encourage and enable parties to resolve residential disputes as quickly as possible, and under contract (where this is feasible) – with a report to Cabinet by 31 March 2011.
- 41 Consumers would then have clear access to a full range of cost-effective dispute resolution options, as outlined in Table 2 below.

**Table 2: Dispute resolution options**

Type of dispute	Cost-effective dispute resolution options	Approximate cost to each party on average
Straightforward or minor disagreement (up to \$20,000 at stake)	New 'early intervention' mediation service	To be decided
	Disputes Tribunal (available for disputes up to \$15,000, or \$20,000 if both parties agree)	\$30 - \$100
	Private mediation (cost of around \$200 per hour)	\$400 - \$800 *
Moderately serious or complex disputes	Construction Contracts Act adjudication	\$500 - \$3,000 *
Major and highly complex disputes (over \$50,000 at stake)	District Court High Court	\$5,000 plus *

\* These figures do not include fees for legal advice

### **Ensure any defective work is identified, reported and repaired as quickly as possible**

- 42 Where building work is defective, the best outcomes for all parties are achieved when the defects are identified, reported to the building contractor and then repaired as quickly as possible. This often reduces the direct costs of repair (because damaged building elements can deteriorate over time).
- 43 The Building Act is silent on how any breaches of the implied warranties (which are discussed above) should be remedied. There is an opportunity to strengthen the legal obligations on building contractors to remedy any damage they have caused, and to send clearer signals to the building sector and the courts in this regard.

#### *General remedies*

- 44 I propose amendments to the Act to introduce a set of general remedies. These remedies would reflect and codify existing common law. The remedies would be available to consumers where building contractors had breached the implied warranty and other contractual obligations. The remedies would be available for up to 10 years, to match the length of the warranties. The remedies would include:
- the repair of defects by the building contractor or a substitute builder
  - the replacement of defective building elements
  - the provision of compensation where replacement or repair is not possible.
- 45 Building contractors would retain the right to present evidence and arguments (in the context of a dispute resolution process or a court case) where they disputed the cause or extent of defective building work or damage.

#### *A twelve month 'defect repair period'*

- 46 Early detection and repair of any defects is critically important with building work, for several reasons:
- the condition of a damaged building can deteriorate over time, leading to higher repair costs
  - some types of damage can give rise to health or safety risks
  - litigation and disputes are more likely, the longer a matter (relating to defective building work) is left unaddressed.
- 47 The warranties and the proposed new general remedies discussed above will strengthen the existing obligations on building contractors to 'put things right' within 10 years.
- 48 However, given the critical importance of early action, I propose to establish even stronger obligations for the first 12 months following completion of the building work.
- 49 For this purpose I propose to introduce an automatic 12 month 'defect repair period' covering any defects that were notified by the consumer within 12 months of completion.
- 50 During the 'defect repair period' the remedy obligations would be stronger than during the remaining nine years of the legal warranty and remedy period.

Amendments to the Act would make it clear that during the 12 month ‘defect repair period’:

- the building contractor normally would be expected to remedy any defects (or replace faulty material) as a matter of routine
- a building contractor would retain the right to dispute the cause or extent of defects or damage – however the onus would be on the contractor to prove that the consumer’s request was unreasonable.

51 As a result of these amendments, for most building projects it would be more cost-effective for a contractor simply to remedy any problems that were notified within the first 12 months (rather than disputing the matter).

52 Further, the consumer would have a strong incentive to identify any defects, and report them to the building contractor, as quickly as possible.

53 The new ‘defect repair period’ would be more prescriptive than remedy provisions in other consumer legislation (such as the Consumer Guarantees Act 1993 and the Fair Trading Act 1986). However building work differs from many other goods and services: damage can worsen over time, leading to higher costs, possible health and safety risks, and disputes and litigation (as demonstrated by the weathertightness problem).

54 Beyond the initial 12 month period the existing warranties and the new remedies would still apply (for the remaining nine years following completion). However the obligation to repair would not be automatic. With latent defects the causes of damage are more difficult to unravel, and the consumer is more likely to have contributed.

55 The new ‘defect repair period’ would codify what often happens in practice. As a matter of good business practice, and to enhance their reputation, well performing building contractors will often commit to fixing any defects on a ‘no questions asked’ basis within a certain time period following completion. (Practices vary in terms of the length of this commitment.)

56 Making this a standard requirement would help to ensure that poor performing building contractors, who are not willing to stand behind their work, do not have a competitive advantage.

#### *Reciprocal obligations on consumers*

57 I also propose amendments to the Act to introduce reciprocal obligations on consumers for up to 10 years. These obligations already exist in common law. A building contractor’s warranty or remedy obligations could be reduced or voided in cases of:

- misuse or negligent damage by the consumer
- failure to carry out reasonable maintenance
- failure to advise the building contractor of any apparent defect within a reasonable period of its discovery.

58 It is important for consumers to be aware of any specific maintenance requirements for their building, and any specific product warranties. For this reason I propose that building contractors be required to give the consumer documentation of any specific maintenance requirements for particular elements of the building, and copies of any significant product warranties, at completion of the building work (the building contractor would normally obtain this information from the designer).

*Obligations on developers and owner-builders<sup>1</sup>*

59 I also propose amendments to the Act to require the general remedies and the 'defect repair period' to also apply to the sale of built buildings from:

- developers to subsequent owners; and
- owner-builders to subsequent owners.

*Publication of guidance material*

60 The Department will publish guidance material to assist consumers and sellers of building services to understand and comply with the warranty and remedy requirements and the reciprocal obligations on consumers, including:

- the types and levels of defect covered by the requirements, and what types and levels of defect are 'tolerable' (or reflect normal wear and tear)
- the actions consumers would need to take to meet the reciprocal obligations (including what is reasonable maintenance)

**Increase the number of consumers who obtain some financial compensation when work is defective and a building contractor defaults**

*Increase the take-up of surety products and services in the market*

61 Even where building contractors are pursued, obligations to remedy will not necessarily be met where building contractors lack the means to fix the problem or to pay for damages - this can be particularly difficult if latent defects become apparent several years after completion, by which time the contractor might have ceased to trade.

62 I am not recommending at this stage that financial surety (such as a guarantee or home warranty insurance product) should be mandated for new building work. Instead I am proposing that building contractors be required to disclose what, if any, financial backing is available.

63 Around 50% of new builds are covered by one of the surety products or services currently in the market – this proportion is likely to increase as a result of the proposed disclosure requirement. Disclosure means in effect consumers who choose not to purchase any surety will be making an informed choice.

64 As not all consumers will purchase a surety product or service, some will not obtain financial compensation when building work is defective and a building contractor defaults on obligations to remedy.

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<sup>1</sup> An owner-builder will be defined in legislation as a person who builds a household unit with the intention or for the purpose of selling the household unit.

65 Recent experience with mandatory insurance in Australia indicates that home warranty insurance is expensive to provide, and direct government provision can be necessary to ensure for its continuing supply.

66 In New Zealand private providers would be very unlikely to provide the needed cover: insurance industry representatives have reported concerns about building quality, skill levels and the lack of data to price risk. Government intervention would be needed (i.e. underwriting and possibly also subsidising or providing cover for certain risks). This would incur significant fiscal risk given the lack of data on building quality, low skill levels, and the long-tailed nature of financial backing for building defects.

*The work ahead on financial surety*

67 The Department will monitor the take-up of surety products and services in the market, and the extent to which take-up increases following the new requirement for building contractors to disclose whether and what financial surety is available.

68 Paper 1 proposes further consideration of mandatory surety in the context of further work on whether change is required to the application of joint and several liability in the building and construction sector.

69 The proposals to deliver accountability are likely to reduce the incidence and severity of building defects. At the same time the new disclosure requirement should increase the take-up of surety products and services. Under these outcomes, mandating the purchase of surety products or services by consumers would be difficult to justify (i.e. outside the context of a change from joint and several liability to proportionate liability, which would potentially increase the costs and risks faced by consumers).

*Proposed work on the regulatory framework for guarantee products and services*

70 At present owners can purchase guarantee products for building work (such as the guarantees offered by Master Builders Federation of New Zealand which are financed through a mutual fund). There is a question of whether these guarantees are appropriately regulated.

71 Providers of these guarantees must comply with general consumer law (the Fair Trading Act 1986 and the Consumer Guarantees Act 1993). However, they are not required to comply with insurance regulations because they are not offering insurance products, and they are not subject to most general financial market regulation (such as the Securities Act 1978). As a result, providers are not required to meet specific disclosure or product regulation requirements.

72 Consumers who purchase these guarantees pay 'up front' in the expectation of there being sufficient financial backing, some years in the future, to fulfil a legitimate claim. At present:

- it may be possible for guarantee products without sufficient financial backing to enter the market

- it may be difficult for consumers to make informed choices among different products.

73 Further work is required on these matters and on whether changes to the way that guarantee products are currently regulated would be cost-effective.

74 I seek the Committee's agreement to direct officials from the Department and the Ministry of Economic Development to report back by 30 June 2011 on the risks associated with guarantee products and services in the building sector, and whether any changes to the way these products and services are regulated would be cost-effective.

### **Ensure that subsequent homeowners can hold building contractors to account**

75 It can be particularly difficult for subsequent owners to locate and pursue the original building contractor, as they were not a party to the contract. It is important to assist subsequent owners to hold the original contractor to account where appropriate (and to assist prospective buyers to make informed purchase decisions).

76 I propose amendments to the Act to require certain information to be provided to the relevant Territorial Authority by the consumer on completion of the project (and in conjunction with the consumer's application for a Certificate of Completion) including:

- identity of the principal building contractor (or the developer or owner-builder)
- details of any guarantee or insurance which has been purchased for the building.

77 I propose that the Committee agree to consequential amendments to the Local Government Official Information and Meeting Act 1987 to require Territorial Authorities to place the above information on the Land Information Memorandum for the building.

### **Promote behavioural change and ensure compliance with the new requirements**

78 It will be critically important to effectively communicate the new mandatory requirements (relating to disclosure, provision of a checklist, and written contracts, the new legal remedies, and other matters) to consumers and building contractors. Communication and education initiatives will be essential to build capability, drive behavioural change and support compliance.

79 The Department will develop a communication plan relating to the new requirements and provisions, and discuss this with me, by 31 October 2010.

80 The Department will also work with industry representatives and Consumer New Zealand to:

- develop a simple checklist, disclosure form and contract form to meet the proposed new requirements

- provide electronic links to these documents on the consumer building website ConsumerBuild and relevant industry websites
  - revise the ConsumerBuild website to reflect the new requirements, and to include information on the options available for dispute resolution (including private mediation, adjudication and other services).
- 81 To ensure parties comply with the new requirements for written contracts, disclosure statements and checklists, it will be important that:
- consumers and others are able to advise an appropriate authority of any apparent breaches of the requirements
  - there is a process for independent investigation of complaints
  - a set of sanctions is available for application to parties who have been found to have breached the requirements (sanctions could include an initial warning letter, and civil penalties such as fines).
- 82 I propose that the Department be directed to report to Cabinet by 31 December 2010 on the options for establishing a cost-effective system for ensuring compliance with the new requirements related to contracting, disclosure and checklists.

### **Consultation**

83 The following Departments have been consulted: the Treasury, the Department of Prime Minister and Cabinet, the Ministry of Economic Development, the Department of Internal Affairs, the Ministry for the Environment, the Ministry of Justice and the Ministry of Consumer Affairs. In addition Te Puni Kōkiri has been informed.

### **Financial implications**

- 84 There are no fiscal implications arising from the proposals in this paper.
- 85 The Department of Building and Housing will develop a communication plan for the new requirements and provisions, and discuss this with me, by 31 October 2010. Effective communication of the new requirements could incur one-off operating expenditure of \$0.5 million to \$1 million (to develop and publish information and forms, and upgrade the website) and around \$200,000 to \$400,000 per annum to disseminate information.
- 86 Funding may be required to establish a central service to advise consumers of dispute resolution options, and an 'early intervention' mediation service. The costs of establishing these services and possible sources of funding (including revenue from user charges) will be outlined in the December 2010 report to Cabinet with specific proposals and fiscal implications.

## Human rights

87 The proposed amendments appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. A final view as to whether the proposals will be consistent with the Bill of Rights Act will be possible once the legislation has been drafted.

## Legislative implications

88 Legislative implications are discussed in Paper 1.

## Regulatory impact analysis

89 The regulatory impact is discussed in the overall Building Act review regulatory impact assessment, attached to Paper 1.

## Publicity

90 Plans for publicity are discussed in Paper 1.

## Recommendations

91 I recommend that the Committee:

- 1 **agree** to amend the Building Act 2004 to:
  - i. require written disclosure from the prospective building contractor to the consumer, prior to an offer of contract, of each of the following:
    - the skills, qualification and licensing status of those building practitioners who will do the work
    - dispute history of the building practitioners – ie, the outcome of any formal dispute rulings or court judgements (only information which is already in the public arena, and limited to the previous 10 years)
    - what, if any, surety or insurance backing is available for the building work
    - information about the company (ie, where the building contractor is a company) including:
      - how long the company has operated
      - what role each director will play on the project
      - any previous breaches of relevant regulatory requirements, based on information which is in the public arena and limited to the previous 10 years
  - ii. require a simple checklist to be provided by the prospective building contractor to the consumer, prior to the contract being signed - the checklist would:
    - prompt the consumer to ask important questions

- explain a building contractor's legal obligations and the consumer's reciprocal obligations
  - outline the risks of paying a contractor ahead of work being completed
  - summarise dispute resolution options
  - refer the consumer to sources for further advice and information
- iii. require written contracts for residential building work (above \$10,000 in price, with this dollar threshold to set in regulations) that include the following as a minimum:
- the names and address of the parties
  - the date the contract is agreed
  - the contract to be signed by both parties
  - a description of the work to be carried out
  - the timeframe for the project
  - details of the contract price
  - a summary of the warranty and remedy obligations on the seller, and the reciprocal obligations on the buyer
  - the process that will be followed if a dispute arises
  - details of what, if any, surety or insurance backing is available for the building work
  - the process for varying the contract
- iv. require the written contracts to provide for disputes to be addressed through an adjudication process under the Construction Contracts Act 2002 (where the dispute has not been resolved through conciliation or mediation) – with the parties having the flexibility to choose another process by mutual agreement
- v. introduce a set of general remedies available to consumers when building contractors are found to have breached the implied warranty and other contractual obligations, including:
- the repair of defects by the building contractor or a substitute builder; or
  - the replacement of defective building elements; or
  - the provision of compensation where replacement or repair is not possible
- vi. introduce an automatic 'defect repair period' of 12 months following completion of the building work, for both Building Code and non-Code related work, within which the building contractor normally would be expected to repair any defective work or replace faulty materials as a matter of routine and as quickly as possible

- vii. introduce reciprocal obligations on consumers that would potentially void the warranties in cases of:
    - misuse or negligent damage
    - failure to carry out reasonable maintenance
    - failure to advise the building contractor of any apparent defect within a reasonable period of its discovery
  - viii. require building contractors to give consumers documentation of any specific maintenance requirements for particular elements of the building, and copies of any significant product warranties, at completion of the building work (with details to be specified in regulations)
  - ix. require the new defect repair period and general remedies to also apply to the sale of built buildings from:
    - developers to subsequent owners
    - owner-builders to subsequent owners
  - x. require certain information to be provided to the relevant Territorial Authority by the consumer on completion of the project (and in conjunction with the consumer's application for a Certificate of Completion) including:
    - identity of the principal building contractor (or the developer or owner-builder)
    - details of any guarantee or insurance which has been purchased for the building.
- 2 agree to consequential amendments to the Local Government Official Information and Meeting Act 1987 to require Territorial Authorities to place the information referred to in recommendation 1 (x) above on the Land Information Memorandum for the building
- 3 agree that regulations be drafted under the Building Act 2004 to provide for the following matters:
- a \$10,000 price threshold for the mandatory written contracts for building work
  - details of the information to be disclosed by building contractors
  - details of the information to be included in the checklist
  - the wording to be included in the written contracts in relation to warranties, remedies and reciprocal obligations on consumers
  - the wording to be included in written contracts in relation to the process that will be followed in the event of a dispute
  - details of the information and documentation related to maintenance and product warranties to be provided by building contractors to consumers on completion of the building work
  - details of the sanctions for non-compliance with the new requirements for written contracts, disclosure statements and checklists

- 4 direct the Department of Building and Housing in consultation with relevant agencies to:
  - i. develop specific proposals for the establishment of a central service to advise consumers of dispute resolution options, and an 'early intervention' mediation service, and report to Cabinet with proposals and fiscal implications by 31 March 2011
  - ii. review the Construction Contracts Act 2002 with a view to improving its application to both residential and commercial building disputes and report to Cabinet by 31 March 2011
  - iii. report to Cabinet by 31 December 2010 on the options for establishing a cost-effective system for ensuring compliance with the new requirements related to contracting, disclosure and checklists
- 5 note that the Department of Building and Housing will:
  - i. publish guidance material to assist building contractors to understand and comply with the new warranty and remedy requirements and to assist consumers to understand and comply with the reciprocal obligations on consumers, including:
    - guidance on what types and levels of defect are covered by the requirements, and what types and levels of defect are 'tolerable' (or reflect normal wear and tear)
    - what actions by consumers would meet the reciprocal obligations (including what is reasonable maintenance)
  - ii. develop a communication plan relating to the new requirements and provisions, and discuss this with me, by 31 October 2010
  - iii. work with industry representatives and Consumer New Zealand to:
    - develop a simple checklist, disclosure form and contract form that would meet the proposed new requirements
    - provide electronic links to downloadable versions of these documents on the consumer building website (ConsumerBuild) and relevant industry websites
    - revise the ConsumerBuild website to reflect the new requirements, and to include information on the options available for dispute resolution including private mediation, adjudication and other services
  - iv. provide access to general information, through the ConsumerBuild website, about the risks of paying building contractors ahead of work being completed

- 6 direct officials led by the Department of Building and Housing and the Ministry of Economic Development to report to Cabinet by 30 June 2011 on the risks associated with guarantee products and services in the building sector, and whether any changes to the way that these products and services are regulated would be cost-effective.

Hon Maurice Williamson

Minister of Building and Construction

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In Confidence

Office of the Minister for Building and Construction

Cabinet Economic Growth and Infrastructure Committee

### **Building Act review 3: Stepped consenting**

#### **Proposal**

- 1 Agreement is sought to amend the Building Act 2004 (the Act) to provide for a stepped risk-based system of building regulation with the following key elements:
  - no building consent requirements for a broader range of the most low-risk work with consequential benefits in terms of reduced compliance costs (as set out in Paper 4)
  - a streamlined building consenting process for some low-risk work that checks that certain conditions are met (for example the work is undertaken by a licensed building practitioner) but involves almost automatic consent and no inspections
  - a simplified and more prescribed consenting process for certain simple residential building work at the lower-risk end of the spectrum (e.g. simple single-storey buildings with low structural and weathertightness risks), putting more reliance on the skills and experience of licensed building practitioners but retaining some limited involvement of building consent authorities in compliance checking
  - existing consenting and inspection requirements for moderate- to high-risk residential building work, and for lower-risk building work not involving a suitably qualified building practitioner, until such time that it is clear that regulatory oversight could be further reduced without compromising quality, and
  - new building consenting processes and requirements for commercial buildings, to provide for reliance on third-party (non-building consent authority) review and quality assurance processes as an alternative to the current consenting and inspection requirements provided certain conditions are met.
- 2 Agreement is also sought to proposals to:
  - report back on how the building regulatory system provides assurance regarding fire safety risk in buildings, subject to:

- implementing changes to the Building Code to clarify performance requirements (that I will bring to Cabinet in the near future), and
- implementing changes to commercial building consenting requirements proposed in this paper
- repeal section 363B of the Building Act
- clarify Building Warrant of Fitness requirements.

### **Executive summary**

- 3 This paper is the third of five proposing changes to the building regulatory system that will contribute to a more productive, efficient and accountable building and construction sector.
- 4 The Building Act review found that building consent authorities take a risk-averse approach to building consenting because of concerns about their liability and the high reliance placed on them by building professionals and trades people and consumers. This has led to unnecessary checks and inspections for certain building work where the risk to public health and safety is relatively low (for example low complexity building work where there is a competent building practitioner involved). The review also identified opportunities to broaden the range of building work not requiring a building consent to include more work that has low probability and consequence of failure for health and safety.
- 5 This paper proposes changes to the building consent system to introduce a stepped system of regulatory oversight, where the role of consent authorities at each step would be aligned with the risk involved. In particular, how building consent authorities discharge building consent and inspection requirements would be prescribed in law for low-risk building work (for example, the maximum number of inspections around critical points in the building process). Appropriate controls would be in place, such as requirements for a licensed building practitioner to undertake the work. For residential building work of moderate- to high-risk and complexity, current consent and inspection requirements would remain in place until such time that it is clear that regulatory oversight can be further reduced without negative effects.
- 6 Changes are also proposed for commercial buildings, whereby the Act would provide for building consent authorities to apply risk profiling methods to determine the appropriate level of third-party review and quality assurance process for a particular building project.
- 7 These proposals would reduce compliance costs, especially in relation to low-risk building work. If all the changes proposed are implemented, the Department of Building and Housing (the Department) estimates potential for compliance cost savings of up to \$125 million per annum. There will be costs in the short term

associated with implementation, particularly for building consent authorities making changes to systems and processes and training staff.

- 8 Importantly, the changes proposed to the consenting system also reinforce incentives created by proposed changes to the accountability framework for building professionals and trades people to take primary accountability for the quality of their work. These changes to the accountability framework are set out in more detail in Papers 1 and 2.
- 9 Consultation on the proposals has been broadly supportive of this direction of change, although caution has been expressed about the pace of change and the readiness of the sector to accept accountability for regulatory compliance. Specifically, concern has been raised about whether the skill base within the sector is adequate to produce Building Code compliant work with limited oversight by building consent authorities. Concerns have also been raised about the cost of liability protection for builders and designers.
- 10 I acknowledge these concerns and therefore propose a staged approach to implementation. I propose to start by relaxing regulatory requirements for building work where the likelihood and consequences of failure to comply with the Building Code is considered minimal. In practice this would see
  - proposals to broaden the range of exemptions to Schedule 1 of the Act progressed immediately
  - other changes outlined in this paper implemented on a slower track to allow time for the Licensed Building Practitioners Scheme to bed in and the restricted building work regulations to come into force. These regulations will require that work that is critical to the integrity of the building including a house's foundations, framing, roofing and cladding, will only be able to be carried out by or under the supervision of a licensed building practitioner.
- 11 Excluding Schedule 1, changes to the consenting system require legislative change.
- 12 Implementation of proposed changes to the commercial building consenting process, together with changes I will shortly propose to the Building Code in relation to fire safety, may mean it is no longer necessary to require building consent authorities to provide certain applications for building consent to the New Zealand Fire Service Commission for its advice. I propose to report back on whether this requirement should be changed once changes to the Building Code are in place.
- 13 I also seek Cabinet's agreement to repeal s363B of the Act and to amend the Act to improve the clarity and operation of the Building Warrant of Fitness regime

## Background

14 The Act provides a process for checking whether building work complies with the Building Code that includes the following core elements:

- a list of certain building work that is exempt from the requirement to obtain building consent (Schedule 1 of the Act)
- a consenting process that involves the checking of design plans and specifications by building consent authorities for Building Code compliance and the issuing of a building consent
- the provision of powers for building consent authorities to carry out inspections to check that building work is being carried out in accordance with the consent
- a certification process that confirms the work is complete and consent requirements have been met, including the issuing of a Code Compliance Certificate, and
- a monitoring/record-keeping process, where owners and prospective owners of a property can search the property record for evidence of compliance with the building consent requirements.

15 Phase 1 of the review found that building consent authorities have taken a risk averse approach to granting building consents, inspecting building work and issuing Code Compliance Certificates, leading to greater than necessary checking and inspections (and higher than necessary compliance costs). This is due to a range of factors including:

- the duty of care owed by building consent authorities to residential homeowners imposed by the courts
- the use of risk avoidance techniques (such as creating limited-life companies) by people in the building sector
- the financial impact of joint and several liability rulings in weathertightness cases.

16 In February 2010, Cabinet [CAB(10) 5/3] agreed to consult on a package of proposals including a risk-based building control system where building consent authority oversight and checking is in proportion to the risks and consequences of failure of the building work. This was intended to rebalance the system, by moving from the current heavy reliance on building consent authorities checking building work, to greater reliance on builders and designers accepting accountability for ensuring their work is compliant. It is also intended to improve efficiency by focussing building consent authority effort on areas where the risk and consequences of failure are greater, in particular for health and safety.

17 The proposals agreed to by Cabinet for consultation included:

- exempting more minor work from consent requirements by extending Schedule 1 of the Act (see Paper 4)
  - a streamlined process for simple residential buildings and other low-risk buildings designed and built by licensed building practitioners, and
  - a streamlined process for complex commercial buildings when they are designed and constructed by registered and licensed professionals and building practitioners, and subject to requirements for professional oversight and peer review and a systematic approach to quality assurance.
- 18 The proposals did not include any change to the process for more complex residential buildings because of the higher risks involved.
- 19 In total 381 submissions were received and feedback was also obtained from a series of consultation meetings and targeted engagement with relevant interest groups. While consultation on the proposals has been broadly supportive of this direction of change, caution has been expressed about the readiness of the sector to accept accountability for regulatory compliance. Specifically, concern has been raised about whether the skill base within the sector is adequate to produce Building Code compliant work without significant oversight by building consent authorities, especially in the residential sector.
- 20 Submitters expressed general support for existing practices in the commercial building area, including retaining some regulator oversight, and a number commented on the need for independent third-party oversight to counter commercial pressures to cut costs and corners.

### **Introducing a stepped risk-based building control system**

- 21 I propose to amend the Act to provide for a stepped risk-based approach to issuing consents and inspecting building work, where the role of building consent authorities at each step would be aligned with the risk involved and correspondingly builders and designers would be expected to take greater accountability for ensuring their work is Code compliant.
- 22 These changes are needed to reinforce the accountability of designers and builders for Building Code compliance and building right first time, while providing sufficient compliance monitoring in the system to provide owners and users with an appropriate degree of assurance regarding building safety and performance. The changes are also a response to the situation where compliance costs for certain minor and low-risk work have become disproportionate to the underlying risk. While in principle the current regulatory system allows for a risk-based approach, in practice building consent authorities have weak incentives to adopt this approach without changes to the law because of their exposure to liability for defective building work.
- 23 Following are the key elements of a stepped risk-based system of building control.

- No building consent requirements for a broader range of the most low-risk work with consequential benefits in terms of reduced compliance costs (as set out in Paper 4)
  - A streamlined building consenting process for some low-risk work that checks that certain conditions are met (for example the work is undertaken by a licensed building practitioner) but involves almost automatic consent and no inspections
  - A simplified and more prescribed consenting process for certain simple residential building work at the lower-risk end of the risk spectrum (e.g. simple single-storey buildings with low structural and weathertightness risks), putting more reliance on the skills and experience of licensed building practitioners but retaining some limited involvement of building consent authorities in compliance checking
  - Existing consenting and inspection requirements for moderate- to high-risk residential building work, and for lower-risk building work not involving a suitably qualified building practitioner, until such time that it is clear that regulatory oversight could be further reduced without compromising quality, and
  - New building consenting processes and requirements for commercial buildings, to provide for reliance on third-party (non-building consent authority) review and quality assurance processes as an alternative to the current consenting and inspection requirements, provided certain conditions are met.
- 24 In designing the thresholds for the above steps in the consenting system, officials have taken into account the likelihood and consequence of non-compliance with the Building Code, which in turn are a function of the risk category of the building work (including its complexity) and the skills and capabilities of those doing the building work. It is anticipated that the scope of work to which streamlined consenting and inspection processes apply could be expanded over time, as confidence grows in builders' and designers' capacity to accept accountability for Building Code compliance. The thresholds will be prescribed in regulations, to provide flexibility for the system to evolve over time without requiring future amendments to the Act.
- 25 The proposals for low-risk and simple residential building work are intended to limit the liability of local authorities to the performance of certain prescribed checks and inspections. This would have the effect of limiting their exposure to losses where building work is subsequently found to be defective, provided that the building consent authority has not been negligent in its performance of the required checks and inspections.
- 26 These proposals are expected to reduce the workload of building consent authorities. The impacts are estimated to be proportionally larger on smaller local authorities because of the different mix of building work carried out in smaller rural districts. This potential impact on smaller building consent authorities provides

further support for proposals to consolidate the delivery of building consent authorities functions, as described in Paper 5.

27 Each of the elements outlined in paragraph 23 is discussed further below, with the exception of the first item which is the subject of Paper 4.

*Streamlined consenting process for low-risk building work*

28 Some of the building work that was identified during phase 1 of the review as potentially able to be exempted from building consent requirements is, after further consultation and analysis, not suitable for exemption (e.g. a detached building of less than 20 square metres that does not contain cooking facilities or plumbing). The reasons for this include:

- the building work is only low risk under certain circumstances (e.g. if carried out by a licensed building practitioner)
- monitoring compliance with the Building Code would be hampered by significantly widening the range of building work currently exempted
- certain building consent applications trigger other local authority processes (e.g. compliance checks with district plan requirements) and there are advantages of not losing this integration between building regulation and other local authority functions
- there are advantages in having certain building work notified on the property information file held by local authorities for inspection by the public (in particular prospective building owners).

29 Nevertheless, providing certain simple conditions are met, a significantly streamlined process could be introduced. In some cases the granting of a consent would be almost automatic (e.g. subject only to checking the license status of the builder) with no requirement for further inspection.

30 The list of work to which these new arrangements might apply is included in Appendix 1. The Act would need to be amended to provide for the streamlined consenting process to be developed and to allow for its implementation by regulation.

*Simplified and more prescribed process for simple residential building work*

31 The proposed simplified process for simple residential building work would initially apply to buildings that fall within the current definition of a simple house, as contained within the Simple House Acceptable Solution. These are residential buildings with low structural and weathertight risks, generally constructed according to tried and tested designs and methods and using recognised products (e.g. a single story weatherboard house with a roof with wide eaves).

32 This starting point is a departure from the proposal included in the review discussion document, which proposed starting with the Category 1 definition under

the Licensed Building Practitioner Scheme. This narrowing of scope reflects concerns about the sector's skills base, and to minimise the risk of compromising building quality. It should be possible to further expand the scope of building work covered by this process as skills and confidence in the sector grow.

33 I also propose that this process be restricted to building work that is designed by a licensed building practitioner and built by a licensed building practitioner.<sup>1</sup> This is an important control given concerns expressed about whether unlicensed builders have the skills and capability to do Building Code compliant building work without significant oversight by building consent authorities.

34 This process requires amending the Act to provide for the following key changes:

- building consent applications would be required to be processed by a consent authority within five working days (instead of the current 20 working day maximum)
- a limited number of plan checks and inspections to be performed by a consent authority would be prescribed in regulation (currently building consent authorities are required to exercise discretion in determining appropriate numbers of plan checks and inspections), and
- a building consent authority would be required to issue a consent completion certificate<sup>2</sup> subject only to completion of the prescribed checks and inspections, and compliance with any notices to fix issued during the construction process (currently a building consent authority must issue a Code Compliance Certificate).

35 Officials estimate that approximately 20,000 building consents per year would go through this process.

36 The number of plan checks and inspections prescribed in regulation would be maxima, allowing a building consent authority to do less checking and inspection where it believed this would not compromise Building Code compliance. This would allow those local authorities that currently operate schemes to reward consistently good performance by local builders to continue to do so.

37 MultiProof approvals (statements by the Department that a specific set of building plans and specifications complies with the Building Code) for simple residential buildings would also go through this process.

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<sup>1</sup> Owners building under the owner builder exemption are likely to need more checks by building consent authorities than licensed building practitioners, therefore, owner builders are not subject to the simple buildings process.

<sup>2</sup> The terminology 'consent completion certificate' is a departure from the current terminology in the Building Act. This is a more general change proposed to the Act that would apply to all building work. This is discussed further later in this paper.

*Consenting and inspection process for residential building work not covered by the above proposals*

38 I propose that the status quo be maintained for residential building work that is not covered by the above proposals. This is consistent with the proposals consulted on as part of the review. In practice this means no changes to the building consenting and inspection requirements for moderate- to high-risk building work irrespective of who carries out the building work, and for lower-risk building work not involving a suitably qualified building practitioner. Approximately 30,500 building consents would fall within this category.

39 The stepped consenting proposals represent a cautious start but this is necessary given significant concerns about the sector skill base and readiness of the sector to take on greater accountability for regulatory compliance. Over time it may be possible to further expand the scope of building work covered by the streamlined consenting proposals as skills and confidence in the sector grow.

*Pre-conditions for implementing stepped consenting for residential buildings*

40 It is critical that certain pre-conditions are met before we can move to a stepped consenting system. These are:

- greater awareness and understanding of the performance requirements of the Building Code and how to comply, including ongoing sector education to this end
- a base of competent practitioners in the sector, the cornerstone of which is the Licensed Building Practitioners Scheme with its competence-based entry hurdle and ongoing skill acquisition requirements
- strengthened contracting requirements and related measures in the residential construction sector (as detailed in Paper 2)
- an effective monitoring regime to ensure building quality is maintained or improved.

41 Meeting these pre-conditions depends on the progress of other proposals outlined in this set of papers and related initiatives (e.g. the coming into force of restricted building work).

42 Taking account of the above, I propose to start by relaxing regulatory requirements for building work where the likelihood and consequences of failure to comply with the Building Code is considered minimal. In practice this would see;

- proposals to expand exemptions to Schedule 1 progressed immediately
- other changes implemented on a slower track to allow time for the Licensed Building Practitioners Scheme to bed in and the restricted building work regulations to come into force.

43 I propose to direct the Department to report to me no later than December 2011 as to whether the pre-conditions described in paragraph 40 are met, thereby allowing the introduction of stepped consenting. In practice, the introduction of stepped consenting would be no earlier than mid-2012 to coincide with the introduction of restricted building work provided that the other pre-conditions are also satisfied. The amendments to the Act that are necessary to enable stepped consenting can be passed into law, and brought into force by a future Order in Council once these pre-conditions are satisfied.

*Building consent requirements for commercial buildings*

44 Commercial buildings are currently subject to the same building consent requirements as residential homes. They go through a standard process of obtaining a building consent, undergoing inspection at key stages during construction, and getting a Code Compliance Certificate on completion of the work.

45 In practice, many of these projects are commissioned by well-informed consumers and are designed, built, supervised and peer reviewed by experienced, contractually accountable professionals. Further, building consent authorities often lack the in-house technical expertise to carry out detailed design checks and inspections and instead rely heavily on third-party review of design and specifications.

46 Some building consent authorities have moved to accepting producer statements (i.e. signed statement of compliance from the professionals involved in design and/or construction) and requiring third-party review by qualified professionals. Where quality assurance systems are in place, building consent authorities have a higher level of confidence in doing this. The courts have not found that building consent authorities owe a duty of care to commercial building owners, who are therefore highly incentivised to manage building quality risks.

47 Consultation with the sector (including with building consent authorities) confirms the view that building consent authorities' current involvement in commercial building consenting duplicates and adds little value to the process of third-party review utilised by most large commercial builders. However, use of third-party peer review is not universal and there is general unease with the notion of totally removing independent oversight of commercial building by building consent authorities. In particular, building consent authorities are seen as playing an important role at the building commissioning stage of the process (e.g. in relation fire safety, evacuation, accessibility etc).

48 A range of options were considered for changing the commercial building consenting process to realise efficiencies in the process while ensuring sufficient regulatory oversight. Options considered included:

- explicitly providing in law for building consent authorities to rely on producer statements signed by appropriate parties
- amending the Act to provide for building consent authorities to rely on third-party (non-building consent authority) review and quality assurance processes

provided certain conditions are met and taking account of the risk-profile for the building

- providing for private building officials to grant consents, as is done in some other jurisdictions (e.g. parts of Australia).

49 Irrespective of which option is employed, third-party review is central to ensuring Building Code compliant building work. Quality assurance systems play an important verification role in the process. Most large commercial building companies routinely use third-party quality assurance, particularly during the building design stage, because of the potential liability they face if things go wrong and because quality assurance makes good commercial sense (i.e. third-party review often identifies design improvements and/or savings that can be made and leads to improvements in building design and construction).

50 Provided certain controls are in place, including an acceptable degree of independent oversight by the regulator, it makes good sense to explicitly provide in the Act for recognition of third-party review and supporting quality assurance systems as a means of providing assurance of Building Code compliance. As noted above, to a large degree this would formalise existing best practice and broaden its application.

51 I propose amending the Act to provide for a commercial building consenting process with the following key elements:

- building consent authorities would apply risk profiling methods to identify the nature and level of risks associated with a particular building project, especially the likelihood and potential consequences of failing to comply with the Building Code
- the risk assessment may take account of factors such as:
  - the complexity of the building (or any individual element of the building)
  - the proposed and potential uses of the building
  - the building's location and immediate environment
  - the level and frequency of human occupation
  - the skill level and compliance history of the practitioners involved in the project
  - public safety risks, such as fire safety
  - safety of fire fighters
- based on the risk assessment, appropriate third-party review requirements and quality assurance process would be agreed between the building consent authority and the project owner who is applying for the consent, with the

building consent authority having the final say in cases where agreement cannot be reached

- as a minimum, the quality assurance system would provide the building consent authority with confidence:
  - in the procurement model adopted for the project ensuring inputs meet both contract and Building Code specifications
  - that control procedures provide for only those who are technically competent to do specified technical functions, do so (i.e. qualified façade engineers certify façade installation)
  - that all responsibilities and authorities of those in the building project are clear and unambiguous
  - that appropriate levels of internal and external audit and check of final outputs are carried out
  - that all critical third-party reviews identified in the risk profile are carried out as specified in the risk profile
  - that all documentation is prepared, managed and controlled systematically
  - that the quality assurance system controls product design and development, ensuring review, approval, verification and monitoring, and
  - that all design changes (during the design stage and during construction) are validated, managed and documented
- the quality assurance requirements would be documented in a plan, which in turn would provide the basis for appropriate compliance checking by the building consent authority
- existing powers of territorial authorities would be maintained, for example to issue notices to fix, carry out inspections or intervene in the case of dangerous and insanitary buildings.

52 Overall, the benefits of the proposed approach include:

- clearly assigning accountability for Building Code compliance for commercial buildings to professionals involved in the building's design and construction, and to the owner, to ensure competent and appropriately qualified people are engaged in the building's design and construction
- maintaining an appropriate degree of independent regulatory oversight over building practitioner's quality assurance systems, while allowing for a degree of independent assurance in relation to the risk a commercial building may pose to public health and safety

- reducing scope for duplication of effort (e.g. where building consent authorities currently undertake or contract their own review of design on top of the building practitioner's own third-party review), and
- providing for the degree of third-party review required to be tailored to the individual circumstances of the project, to ensure regulatory requirements are not out of proportion to the risks involved.

53 Building consent authorities would incur costs associated with implementing the proposed process, including establishing systems, processes and capability to undertake risk assessments and determining appropriate quality assurance systems.

54 For many large operators the proposed approach will build on their existing quality assurance systems and formalise existing informal arrangements with building consent authorities. For smaller scale commercial builders, and developers that utilise project specific building companies, there would be additional costs associated with the process especially if they do not currently use third-party review. International studies show that building quality increases with the introduction of independent quality assurance processes, including reduced levels of rework. The studies also suggest there are savings associated with identification of design enhancements early in the process, and reduced rework during construction, more than covers the additional costs involved.

55 Further work is required to determine whether the proposed approach should apply to all commercial building work or only a subset. The proposal in the review discussion document was that a more streamlined process apply only to large scale complex commercial building work but firms in the construction sector have argued it should apply to all commercial work (i.e. approximately 16,500 building consents per annum).

56 I propose that the final scope is set in regulation, and the Department is directed to report back on the final design and proposed scope of the commercial building consenting process by December 2011. I propose implementation of the changes no earlier than mid-2012.

#### *Changes to the Code Compliance Certificate*

57 The Act currently requires a building owner to apply to a building consent authority for a Code Compliance Certificate on completion of all building work carried out under a building consent. A building consent authority is required to issue a Code Compliance Certificate if it is satisfied that the building work complies with the building consent.

58 The review found that the term 'Code Compliance Certificate' is regarded by some homeowners and banks as a 'guarantee' that is given by a building consent authority that building work is Building Code compliant. This is not quite accurate. A Code Compliance Certificate falls short of being an absolute guarantee. Rather, the Courts have ruled that it is a certificate of assurance that the Council has taken

reasonable care in performing its obligations to check the building work is Building Code compliant.

59 I therefore propose that the term 'Code Compliance Certificate' be replaced by the term 'Consent Completion Certificate'. I also propose that the status of this certificate be clarified so that it clearly signifies completion of the building consent process and that the building consent authority has satisfied itself on reasonable grounds that building work complies with the consent or, alternatively, for certain building work that the prescribed checks and inspections have been properly carried out. For certain building work subject to the streamlined consenting requirements proposed in this paper (e.g., simple residential buildings where designed and built by licensed building practitioners) properly carrying out the prescribed checks and inspections would be deemed to be reasonable grounds.

### **Other matters**

60 The review also considered proposals in relation to Section 363 B of the Act, Fire Safety review of plans, and Building Warrant of Fitness.

### **Section 363 B**

61 On 12 February 2010 Cabinet [CAB (10) 5/3] directed that the Department review the retrospective application of Section 363 of the Act, including consideration of an effective means of identifying and addressing non-compliant and dangerous building work in buildings built between 1 July 1992 and 31 March 2005, and report to Cabinet Economic Growth and Infrastructure Committee on the findings and recommendations of that review.

62 Section 363 was originally drafted to address the Cave Creek Inquiry's recommendations by requiring local authorities to confirm the safety of the parts of premises intended for public use that are affected by building work. It originally did this by making it an offence to allow a building affected by building work to be used by the public prior to the issuing of a Code Compliance Certificate. The intention of this was to provide a means of ensuring the safety of completed building work prior to its public use so as to minimise risks to human life and safety of faulty building work. Section 363B was inserted later to clarify that the section applies to building work that commenced prior to 31 March 2005.

63 Section 363B makes it an offence for a building owner to permit the use of any part of a building that is intended to be open to or used by members of the public for which building work was undertaken between 1 July 1992 and 31 March 2005 but a Code Compliance Certificate never issued for the work. Phase 1 of the review found concerns relating to the likely effectiveness and efficiency of Section 363B, and whether there may be a more effective and efficient means of achieving its policy intent.

64 An independent review was commissioned to determine if Section 363 B provides an efficient and effective means of identifying and addressing risks to public health

and safety arising from uncertified building work undertaken prior to the enactment of the Building Act 2004<sup>3</sup>. The independent review found that:

*'Section 363B is not an effective means of revealing whether there are risks to the public arising from uncertified building work undertaken under the Building Act 1991 or whether the public are at risk in such buildings, nor is it an efficient means of controlling such risks. Other controls are potentially more effective and efficient and are also able to address sources of risk other than faulty building work.'*

65 The other controls in place that are more effective and efficient at addressing the public safety risk from uncertified building work include the:

- Building Warrant of Fitness regime, which is required for any building with a specified system
- dangerous building regime, and
- ability of local authorities to prosecute for various building offences that protect public safety.

66 On this basis I propose that Cabinet agree that Section 363B of the Act is repealed as soon as possible.

## **Fire Safety**

67 The Act currently requires that building consent authorities refer building consent applications for specified types of public and commercial buildings to the New Zealand Fire Service Commission for its advice on:

- providing means of escape from fire
- meeting the needs of authorised fire fighters entering the building to undertake fire fighting.

68 This requirement was intended to avoid problems with the New Zealand Fire Service Commission refusing to approve evacuation schemes required under its legislation once construction was complete. In practice this requirement has resulted in delays in the processing and issuing of building consents. The principal issues relate to:

- differences in interpretation of Building Code requirements between parties
- sometimes poor quality documentation by fire designers to support their designs

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<sup>3</sup> The Section 363B Review was conducted by risk management specialist Roger Estall in April 2010.

- concerns about the skills and capability of some fire safety designers
- 69 As an alternative to the current approach, the review consulted on a proposal to seek the input of the New Zealand Fire Service Commission prior to a building consent application being lodged. Consultation showed strong support from the commercial sector for changing the process.
- 70 Changes that I will shortly propose to the Building Code will clarify requirements around fire safety to reduce the potential for disagreement. The proposals also include providing a process to verify alternative designs.
- 71 These changes, together with the implementation of proposed changes to the commercial consenting process should in future ensure that fire safety risk is effectively managed, without automatic referral to the Fire Service.
- 72 Under the proposed commercial consenting process, the building consent authority will ensure that fire safety risk is managed by:
- considering the risk attributes such as occupancy level and public safety risks
  - considering the skills and capability of those involved in the building work (e.g. recognising those with a good track record)
  - requiring the third-party review and the quality assurance system to be commensurate with the level of risk, which could include:
    - requiring the consent applicant to seek advice from the New Zealand Fire Service Commission prior to submitting a building consent application (e.g. for high public safety risk designs where they have this expertise)
    - encouraging the use of the International Fire Engineering Guidelines process to ensure that key stakeholders, such as the New Zealand Fire Service Commission, are consulted early in the design process.
- 73 As part of this proposed process, the Department would issue guidance to building consent authorities that would include encouraging them to require the use of the International Fire Engineer Guidelines process for some forms of fire designs (e.g. when the verification method is used for fire safety design).
- 74 Once the proposed changes to the Building Code have been agreed, I propose to report back on whether the current mandatory requirement to refer specified building consent applications to the New Zealand Fire Service Commission is still necessary, and how any change to this requirement would be aligned with the implementation of the new commercial consenting process (mid 2012). This will include consideration of how fire safety risk would be managed in any categories of building currently covered by the mandatory requirement but outside the scope of the commercial consenting process.

## **Building Warrant of Fitness**

- 75 Buildings with certain ‘specified systems’ (i.e. systems critical to life and safety, for example sprinklers, fire alarms and lifts) require a Building Warrant of Fitness. This is a statement from a building owner that the systems have been maintained and checked for the previous 12 months (in accordance with a compliance schedule) and that they will continue to perform as required.
- 76 Phase 1 of the Building Act review identified some lack of clarity about exactly what systems are covered, and some inconsistency in the way the requirements are interpreted and applied by different building consent authorities resulting in unnecessary complexity and compliance costs.
- 77 Further consultation found there is general support for the Building Warrant of Fitness concept but there are opportunities to reduce compliance costs by:
- clarifying what is a specified system and ensuring only critical systems are captured by the Building Warrant of Fitness process, and
  - making a number of minor amendments to the Act to enhance and clarify the Building Warrant of Fitness regime.
- 78 Currently both the Act and regulations set out what a specified system is, creating unnecessary confusion. I propose to amend the Act so that the details of what encompasses a specified system are set in regulations only. I also seek the Committee’s agreement give me delegated authority to develop a number of minor amendments to the Act to enhance and clarify the Building Warrant of Fitness system.

## **Consultation**

- 79 The Department publicly consulted on proposals relating to stepped consenting. 381 submissions were received. Additional feedback was obtained from a series of consultation meetings and targeted engagement with relevant interest groups.
- 80 The Department has consulted with Treasury, Department of Internal Affairs, Ministry for the Environment, Ministry of Education, Ministry of Economic Development, Te Puni Kōkiri, and the New Zealand Fire Service Commission. Department of Prime Minister and Cabinet, Ministry of Culture and Heritage and Ministry of Social Development were informed.

## **Financial implications**

- 81 There are no financial implications because any costs will be covered from the Department’s baseline funding.

## **Human rights**

82 The proposed amendments appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. A final view as to whether the proposals will be consistent with the Bill of Rights Act will be possible once the legislation has been drafted.

## **Legislative implications**

83 The introduction of stepped consenting requires a number of amendments to the Act, including new regulation making powers.

84 I propose the Committee agree to the amendments to the Act (including new regulation making powers) that are needed to give effect to new consenting and inspection requirements proposed in this paper.

85 I propose to amend the Act to repeal Section 363B which currently makes it an offence for a building owner to permit any part of a building to be used that is intended to be open to or used by members of the public for which building work was undertaken between 1 July 1992 and 31 March 2005.

86 All the proposed amendments to the Act bind the Crown.

## **Regulatory impact analysis**

87 The regulatory impact is discussed in the overall Building Act review regulatory impact assessment, attached to Paper 1.

## **Disability perspective**

88 There are no implications from a disability perspective at this stage. The consultation on specified systems is expected to involve examining whether the checking of some facilities for people with a disability (such as disabled toilets) should be included within the Building Warrant of Fitness regime.

## **Publicity**

89 Plans for publicity are discussed in Paper 1.

## Recommendations

90 I recommend the Committee:

### *Stepped building control system for residential building*

- 1 **agree** to amend the Building Act 2004 to provide for a stepped risk-based system of residential building control, the key elements of which involve:
  - i) no building consent requirements for a broader range of the most low-risk work
  - ii) a streamlined building consenting process for some low-risk work that checks that certain conditions are met but involves almost automatic consent and no inspections
  - iii) a simplified and more prescribed consenting process for certain simple residential building work at the lower-risk end of the risk spectrum that retains some limited involvement of building consent authorities in compliance checking
  - iv) existing consenting and inspection requirements for moderate- to high-risk residential building work, and for lower-risk building work not involving a suitably qualified building practitioner
  - v) new commercial building consenting processes and requirements, to provide for reliance on third-party (non-building consent authority) review and quality assurance processes provided certain conditions are met.
- 2 **note** that certain pre-conditions are required to be in place before fully implementing stepped consenting for residential buildings:
  - i) greater awareness and understanding of the performance requirements of the Building Code and of how to comply with them
  - ii) a base of competent practitioners in the sector is needed, the cornerstone of which is the Licensed Building Practitioners Scheme
  - iii) strengthened contracting requirements and related measures in the residential construction sector
  - iv) an effective monitoring regime to ensure building quality is maintained or improved.
- 3 **note** that in order to provide time for the pre-conditions in recommendation 2 to be met, stepped consenting will not be introduced before mid-2012 at the earliest
- 4 **note** that the Department of Building and Housing will report to me no later than December 2011 on progress towards the pre-conditions in recommendation 2 and a plan and timeframe for implementing stepped consenting

- 5 **agree** to the amendments to the Act (including new regulation making powers) that are needed to give effect to new consenting and inspection requirements proposed in this paper

*Building consent requirements for commercial buildings*

- 6 **agree** to amend the Act to provide for a commercial building consenting process with the following key elements:
- building consent authorities would apply risk profiling methods to identify the nature and level of risks associated with a particular building project, especially the likelihood and potential consequences of failing to comply with the Building Code
  - The risk assessment may take account of factors such as:
    - the complexity of the building (or any individual element of the building)
    - the proposed and potential uses of the building
    - the building's location and immediate environment
    - the level and frequency of human occupation
    - the skill level and compliance history of the practitioners involved in the project
    - public safety risks, such as fire safety
    - safety of fire fighters
  - Based on the risk assessment, appropriate third-party review requirements and a quality assurance process would be agreed between the building consent authority and the project owner who is applying for the consent, with the building consent authority having the final say in cases where agreement cannot be reached
  - The quality assurance requirements would be documented in a plan, which in turn would provide the basis for appropriate compliance checking by the building consent authority
  - Existing powers of territorial authorities would be maintained, for example to issue notices to fix, carry out inspections or intervene in the case of dangerous and insanitary buildings
- 7 **note** that further work is required to determine whether the proposed approach should apply to all commercial building work or only a subset
- 8 **direct** the Department of Building and Housing to report back to Cabinet on the final design and proposed scope of the commercial building consenting process by December 2011

### *Changes to Code Compliance Certificate*

- 9 note** that the Building Act 2004 requires building control authorities to issue Code Compliance Certificates at the conclusion of the building consenting and inspection process
- 10 note** that the Building Act review has found there is misinterpretation of the term and that the term 'Consent Completion Certificate' would more accurately capture the policy intent
- 11 agree** to amend the Building Act 2004 to change all references to 'Code Compliance Certificate' to 'Consent Completion Certificate' and to clarify that the certificate signifies completion of the building consent process and that the building consent authority has satisfied itself on reasonable grounds that building work complies with the consent or, alternatively, for certain building work (e.g. simple buildings) the prescribed checks and inspections have been properly carried out

### *Section 363B of the Building Act 2004*

- 12 note** that Section 363B makes it an offence for a building owner to permit any part of a building to be used that is intended to be open to or used by members of the public for which building work was undertaken between 1 July 1992 and 31 March 2005 but a Code Compliance Certificate was never issued
- 13 note** that an independent review of Section 363B concluded it is not an effective means of revealing whether there are risks to the public arising from uncertified building work undertaken under the Building Act 1991 or whether the public are at risk in such buildings, nor is it an efficient means of controlling such risks
- 14 note** that other controls are already in place that are more effective and efficient at addressing the public safety risk from uncertified building work
- 15 agree** that section 363B of the Act be repealed as soon as possible

### *Fire safety*

- 16 note** that once changes have been made to clarify the fire safety requirements of the Building Code, I will report back on whether or not the current mandatory requirement to refer specified building consent applications to the New Zealand Fire Service Commission is still necessary, and how any change would be aligned with the implementation of the new commercial consenting process.

### *Building Warrant of Fitness*

- 17 note** that buildings with certain specified systems critical to life and safety require a Building Warrant of Fitness

**18 note** that the Building Act Review has identified opportunities to:

- clarify what is a specified system and ensure only critical systems are captured by the Building Warrant of Fitness process, and
- make a number of minor amendments to the Act to enhance and clarify the Building Warrant of Fitness regime

**19 agree** to amend the Act so that the details of what encompasses a specified system be set out in regulation rather than in primary legislation

**20 delegate** authority to me to develop a number of minor amendments to the Act to clarify and enhance the operation of the Building Warrant of Fitness system.

Maurice Williamson

Minister for Building and Construction

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## APPENDIX 1 – Building work for which streamlined low-risk consenting requirements could apply

### Proposals subject to a low level of intervention in the building control system

- Construction of detached non-habitable buildings that do not exceed 40 square metres in floor area with limitations on matters such as floor level, height, distance from a legal boundary or existing buildings, facilities that may be contained in the building, undertaken by licensed building practitioners or under the supervision of licensed building practitioners (insofar as relevant licence classes apply).
- Construction of a detached non-habitable buildings in a rural zone that do not exceed 100 square metres in floor area with limitations on matters such as floor level, height, distance from a legal boundary or existing buildings, facilities that may be contained in the building, undertaken by licensed building practitioners or under the supervision of licensed building practitioners (insofar as relevant licence classes apply).
- Complete or substantial replacement, by licensed building practitioners or under the supervision of licensed building practitioners (insofar as relevant licence classes apply), of piles in an existing, single storey building, with comparable piles.
- Deck, platform, footbridge, boardwalk, or the like, from which it is possible for a person to fall no more than 3 metres (including in the event of collapse), provided that the work is undertaken by licensed building practitioners or under the supervision of licensed building practitioners (insofar as relevant licence classes apply) and does not require specific design.
- Signs and plinths designed by design licensed building practitioner.

### Retain within the consenting process with low level of intervention to ensure linkages with other territorial functions

- Small-scale (up to 25m high) non-Network Utility Operator wind turbines.
- Frost fans
- Detached buildings that do not exceed 20 square metres in floor area with limitations on matters such as floor level, height, distance from a legal boundary or residential accommodation, facilities that may be contained in the building.

In Confidence

Office of the Minister for Building and Construction

Cabinet Economic Growth and Infrastructure Committee

## **Building Act review 4: Exemptions from requirement to have a building consent**

### **Proposal**

- 1 To amend the Building Act 2004 (the Act) so that a broader range of building work is exempt from building consent requirements, for example building a carport.

### **Executive Summary**

- 2 This paper is the fourth paper of five proposing changes to the building regulatory system that will contribute to a more productive, efficient and accountable building and construction sector. It seeks agreement to exempt a broader range of minor building work from the requirements to obtain a building consent, by adding to the existing Schedule 1 of the Building Act 2004.
- 3 As part of the Building Act review the Department of Building and Housing put forward 29 proposals of types of work that could be exempt. Feedback showed support for some of the proposals but in other cases concerns were expressed about removing the work from regulatory oversight for a variety of reasons, such as concerns about the sector's capability. Following consideration of the issues raised by submitters, I am proposing to add some, but not all, of these types of work to Schedule 1, and make some conditional on being designed by a Chartered Professional Engineer. I also propose to clarify and expand some existing exemptions under Schedule 1.
- 4 I also propose to exempt some electricity sector structures from the definition of building work because the Electricity Act and regulations provide adequate assurance of health and safety outcomes from building work in this sector.
- 5 There is also building work undertaken by some public infrastructure agencies where the building consent process adds little value because building quality is regulated by other means (e.g. procurement arrangements). I propose that the Department of Building and Housing, Ministry of Transport and New Zealand Transport Agency examine if any transport infrastructure commissioned by Crown organisations should be exempt from the requirement to obtain a building consent and report back to their respective Ministers by June 2011.

## Background

- 6 Schedule 1 of the Act lists 23 types of building work that do not require a building consent but are required to be built to meet Building Code requirements. The intention of Schedule 1 is to exempt work:
- that is minor and low-risk (in terms of building quality)
  - where the compliance costs of obtaining a building consent would be out of proportion to any benefit of the work being part of the consenting system and/or the actual cost of doing the work.
- 7 In February 2010, the Department of Building and Housing released a discussion document that included proposals to:
- expand the range of building work to be exempt from the requirement to obtain a building consent to include building work that is unlikely to fail or where the consequences of failure (especially for health and safety) are minimal
  - explore how best to provide appropriate oversight of public infrastructure works, including bridges and tunnels.
- 8 The discussion document suggested 19 proposed items to be added to broaden Schedule 1 and sought views on the appropriateness of adding a further 10 items.
- 9 A range of views were expressed on the proposals to broaden building work subject to Schedule 1, from general comfort with most proposals to opposition to most proposals. Many submitters supported some proposals and not others. The main concerns were:
- that practitioner skill and competence levels are not sufficient to enable some building work to be undertaken without building consenting system oversight
  - some work was not in fact low-risk and had potential public health and safety risks
  - council loses the ability to highlight to owners other non-building related issues (e.g. natural hazards, storm water disposal, resource management and heritage issues) which may result in increases in enforcement activities and costs
  - potential for creep, and to break larger building projects into small projects to avoid consenting requirements.

## Comment

### *Schedule 1*

- 10 In determining whether a type of building work should be exempted by being included in Schedule 1, my core focus is whether the work is low-risk in terms of risk of building quality failure (including health and safety risks and the potential for, and the nature of, economic loss). In determining the building quality risk, I considered:
- the views of submitters
  - the advice from building quality experts within the Department
  - information on overseas practice where appropriate.
- 11 I am recommending that we proceed with some proposals for exemption put forward in the discussion document. However, in acknowledgement of concerns expressed

during consultation, I am recommending that some types of low-risk work should still require a consent to ensure that conditions are met, for example it is done by a licensed building practitioner. This would include for example a free-standing garage or a large shed such as a kiwifruit packing shed. This work would be subject to a streamlined consenting process (as outlined in Paper 3).

12 My recommendations, set out in the following tables, address each of the proposals put forward in the discussion document.

- Table 1 recommends new types of work to be added to Schedule 1, with some that may only be undertaken by certain types of persons, for example Chartered Professional Engineers.
- Table 2 recommends clarifying or broadening existing exemptions under Schedule 1.
- Table 3 notes types of work that I consider should not be exempt because of concerns about public safety or health risks. These proposals do not meet the criteria for inclusion in Schedule 1 because they are not low-risk.
- Table 4 notes types of work that I consider should still be subject to building consent requirements because some control needs to be retained. As noted above, these would be subject to a streamlined consenting process.
- Table 5 notes types of work that I consider should still be subject to building consent requirements to retain linkages with other territorial authority functions.

13 My recommendations to add to, clarify or extend the existing exemptions as set out in Tables 1 and 2 are not expected to impact on building quality.

14 Based on consideration of the relevant matters, I propose that Cabinet agree to my recommendations as set out in Tables 1 and 2 below.

**Table 1: New exemptions to be added to Schedule 1**

Exempted building work that can be completed by any person (including DIY work)
<ul style="list-style-type: none"> <li>• Replacement or alteration of internal wall and floor <u>linings</u> and finishes in a dwelling<sup>1</sup>.</li> <li>• Adding lightweight stalls (e.g. used at fairs and exhibitions) to the current exemption for tents and marquees.</li> <li>• Fabric shade sails and associated structural supports that do not exceed 50 square metres in area (with limitations on matters such as the level on which the sails are installed and distance from a legal boundary).</li> <li>• Installation, replacement or alteration of thermal insulation in existing buildings (excluding some forms of insulation in some places e.g. in-wall foam and installing insulation in fire walls).</li> <li>• Penetrations with a maximum diameter of 300mm (including associated weatherproofing, fireproofing and any other finishings) to enable the passage of pipes, cables, ducts, wires, hoses and the like through any existing building.</li> <li>• Signs and associated structural supports where the sign is no more than 3 metres high and the face area of the sign does not exceed 6 square metres.</li> <li>• Height restriction gantries (e.g. a vehicle height warning in a car park).</li> <li>• Private playground equipment used in association with a single household where no part of the equipment extends more than 3 metres above the ground.</li> </ul>
Carried out in accordance with the Plumbers, Gasfitters and Drainlayers Act 2006
<ul style="list-style-type: none"> <li>• Replacement (including repositioning) of water heaters, except for systems that are not open-vented, have an uncontrolled heat source or a controlled heat source other than gas or electricity.</li> </ul>
Carried out if designed by a Chartered Professional Engineer (CPEng)
<ul style="list-style-type: none"> <li>• Signs and plinths.</li> <li>• Retaining walls in a <u>rural zone</u> that retain not more than 3 metres depth of ground with limitations on matters such as the distance from any legal boundary or any existing building.</li> <li>• Playground equipment designed by a Chartered Professional Engineer (CPEng) installed in a public place for a government department, Crown entity (including a school), licensed early childhood centre or a local authority.</li> </ul>

<sup>1</sup> This proposal differs from the existing exemption relating to internal walls in two ways. Firstly, it provides clarity that wall linings can be replaced and altered, whereas the existing exemption refers to “construction, alteration, or removal of an internal wall” which implies the entire wall and not just the linings. Secondly, it adds the reference to floor linings. The use of the term linings clarifies that the changes are more than simple resurfacing e.g. putting new floor coverings in place.

**Table 2: Proposals to clarify or broaden existing exemptions under Schedule 1**

Work that can be completed by any person (including DIY work)
<ul style="list-style-type: none"> <li>• Additions to clarify that the current exemption relating to internal walls does not include load-bearing or bracing element walls (i.e. as originally approved by Cabinet in May 2008) or any part of a wall that is fire-rated or part of a specified system.</li> <li>• Increasing the height of exempted fences and hoardings from 2m to 2.5m and removing the term 'wall' from the same exemption as this is adequately covered by the term 'fence' and avoids potential for confusion with reference to walls that are part of another building.</li> <li>• Adding to the exemption for tanks and pools to allow a wider range of volume-height configurations than are currently provided for.</li> <li>• Increasing the size of marquees and tents for public events to 100 square metres (ie. the same as is currently allowed for private events).</li> <li>• Increasing the height of exempted decks, other platforms and bridges from 1m to 1.5m and adding the term 'boardwalks'.</li> <li>• Increasing the floor area of exempted porches and verandahs from 15 square metres to 20 square metres, adding carports to the same exemption and removing the requirement that the structure be over a deck or a patio.</li> <li>• Increasing the area of exempted awnings from 15 square metres to 20 square metres and adding the term 'canopies' to the same exemption.</li> </ul>
Carried out in accordance with the Plumbers, Gasfitters and Drainlayers Act 2006
<ul style="list-style-type: none"> <li>• Adding to the existing exemption allowing <u>alterations</u> to sanitary plumbing the clarification that the exemption excludes water heaters (which are now covered by a separate exemption) and does not permit the total number of sanitary fixtures in a dwelling to be increased.</li> </ul>

**Table 3: Proposals in the Building Act review discussion document that should not be exempt because of concerns about public safety or health risks**

Concerns about public safety or health risks
<ul style="list-style-type: none"> <li>• Outdoor concert stages because of public safety risks, particularly in the event of collapse.</li> <li>• Installation or removal of domestic free-standing solid fuel fire appliances because of risk to life from fires resulting from poor installation.</li> <li>• Temporary structures that are used/ re-erected repeatedly for public/private events (such as fair ground equipment).</li> <li>• Additions to existing sanitary plumbing, if work is done by a craftsman plumber.</li> <li>• Detached non-habitable building (in any location) not exceeding 100 square metres built and supervised by a licensed building practitioner and designed by a design licensed building practitioner.</li> <li>• Detached non-habitable building <u>in a rural zone of any size</u> designed by a design licensed building practitioner.</li> <li>• Additions to an existing residential building not exceeding 20 square metres in floor area.</li> <li>• Replacement of cladding on a timber– framed roof, if: <ol style="list-style-type: none"> <li>1 work is done by a licensed building practitioner; and</li> <li>2 structural stability of the roof is not reduced (that is, no substantial increase in weight of cladding), and weathertightness is not reduced.</li> </ol> </li> </ul>

**Table 4: Proposals in the Building Act review discussion document that should not be exempt, but should be subject to a low level of intervention in the building control system<sup>2</sup>**

Proposals subject to a low level of intervention in the building control system
<ul style="list-style-type: none"> <li>• Construction of detached non-habitable buildings that do not exceed 40 square metres in floor area with limitations on matters such as floor level, height, distance from a legal boundary or existing buildings, facilities that may be contained in the building, undertaken by licensed building practitioners or under the supervision of licensed building practitioners (insofar as relevant licence classes apply).</li> <li>• Construction of a detached non-habitable buildings <u>in a rural zone</u> that do not exceed 100 square metres in floor area with limitations on matters such as floor level, height, distance from a legal boundary or existing buildings, facilities that may be contained in the building, undertaken by licensed building practitioners or under the supervision of licensed building practitioners (insofar as relevant licence classes apply).</li> <li>• Complete or substantial replacement, by licensed building practitioners or under the supervision of licensed building practitioners (insofar as relevant licence classes apply), of piles in an existing, single storey building, with comparable piles.</li> <li>• Deck, platform, footbridge, boardwalk, or the like, from which it is possible for a person to fall no more than 3 metres (including in the event of collapse), provided that the work is undertaken by licensed building practitioners or under the supervision of licensed building practitioners (insofar as relevant licence classes apply) and does not require specific design.</li> <li>• Signs and plinths designed by design licensed building practitioner.</li> </ul>

**Table 5: Proposals in the Building Act review discussion document that should not be exempt so as to ensure information is captured by local authorities for their other roles (e.g. Resource Management Act 1991)**

Retain within the consenting process with low level of intervention to ensure linkages with other territorial authority functions
<ul style="list-style-type: none"> <li>• Small-scale (up to 25m high) non-Network Utility Operator wind turbines.</li> <li>• Frost fans</li> <li>• Detached buildings that do not exceed 20 square metres in floor area with limitations on matters such as floor level, height, distance from a legal boundary or residential accommodation, facilities that may be contained in the building.</li> </ul>

*Reformat the schedule*

15 The current Schedule 1 can be difficult to read and this problem will be exacerbated by the addition of more building work. I propose that the Parliamentary Counsel Office and the Department work together to look at ways of improving the format of Schedule 1 to make it easier to understand and use.

16 One change is proposed that could reduce the application of an existing exemption. This is to provide a definition of 'one storey' building. Currently some buildings that have high foundations, but are one storey (e.g. boatsheds) have been unintentionally

<sup>2</sup> See Paper 3

captured by the exemption. Higher foundation structures can be complex and therefore should be subject to the building consent process. I propose that the definition of 'storey' for the purposes of Schedule 1 is defined as a floor level of up to one metre above the supporting ground and a further 3.5m above the floor level (i.e. an overall height no greater than 4.5 metres).

#### *Impacts of changes to Schedule 1*

17 The proposed expansion of Schedule 1 is expected to result in 3,000 fewer building consents per year. This would result in an estimated savings in time to the building sector of \$2.8 to \$4.4 million. The estimated total savings for building owners in consent and inspection fees is \$3 million. Consequently, local authorities' cost-recovery revenue would reduce by \$3 million.

#### *Other matters*

18 The consultation on ways to provide appropriate oversight of public infrastructure work found that there was general support, including from building consent authorities, to remove public infrastructure works such as land transport tunnels and bridges, from having a building consent where they are adequately regulated by other means. Most building consent authorities noted that there was limited value added by building consent authorities by having this work subject to the building control system.

19 Consultation confirmed that some building work in the electricity sector should not be subject to the Act because the Electricity Act and regulations already ensures that the building work focuses on ensuring health and safety of the electricity installations. Therefore I propose to exempt from the definition of building work the following structures in line with existing exemptions in the Building Act:

- Network Utility Operators fittings such as security fences, and machines, including oil interception or containment systems
- Structures forming part of works, as defined in the Electricity Act and associated Regulations, such as wind turbines and gantries.

20 In terms of the land transport infrastructure proposals, further work is needed to adequately ensure there are no gaps in the oversight of building quality between the Building Act and transport legislation and procurement processes. Therefore, I propose that the Department of Building and Housing, the Ministry of Transport and the New Zealand Transport Agency undertake further work and report back to me and the Minister of Transport by June 2011 on the possibility of exempting some types of building work (such as bridges, tunnels, railways infrastructure) from the requirement to have a building consent.

#### **Consultation**

21 The Department has consulted with the Treasury, Department of Internal Affairs, Ministry of Transport, Te Puni Kōkiri, Ministry for the Environment, Ministry of Education, Ministry of Economic Development and Ministry of Justice, and their comments have been taken into account. The Department of the Prime Minister and Cabinet and Ministry of Social Development have been informed.

## Financial implications

22 There are no financial implications because any costs will be covered from the Department's baseline funding. No changes to the amount of building levy collected by the Department is expected because most work that is proposed for inclusion in Schedule 1 is below \$20,000, and does not currently attract a building levy.

## Human rights

23 The proposed amendments appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. A final view as to whether the proposals will be consistent with the Bill of Rights Act will be possible once the legislation has been drafted.

## Legislative implications

### *Act amendments*

24 I seek agreement to amend the Act to exempt from the definition of building work the following structures in line with existing exemptions in the Act:

- Network Utility Operators fittings, such as security fences and machines, including oil interception or containment systems
- structures forming part of works, as defined in the Electricity Act and associated Regulations, such as wind turbines and gantries.

### *Regulations*

25 I propose to amend Schedule 1 of the Act by Order in Council to:

- provide for additional work to be exempt from the requirement to have a building consent as generally set out in Table 1
- clarify or broaden existing exemptions as generally set out in Table 2
- make the schedule format clearer and easier to understand
- amend some of the existing exemptions to make them clearer or to broaden them where appropriate
- clarify the definition of 'storey' for Schedule 1 work.

26 I propose that changes to Schedule 1 be implemented in December 2010 to allow 'DIY' homeowners to do the broader range of exempted work over the Christmas break.

## Regulatory impact analysis

27 The regulatory impact of these changes to Schedule 1 of the Act is discussed in the overall Building Act review regulatory impact assessment, attached to Paper 1.

**Disability perspective**

28 There are no implications from a disability perspective. The current Schedule 1 allows for low risk building work associated with preparing a home for someone with a disability. For example, in Schedule 1 the alteration to an entrance or an internal doorway of a dwelling to improve access for persons with disabilities, if compliance with the provisions of the building code relating to structural stability is not reduced.

**Publicity**

29 Plans for publicity are discussed in Paper 1.

## Recommendations

30 I recommend that the Committee:

### *Schedule 1*

- 1 **agree** that an Order in Council be made under section 41(2) of the Building Act to amend Schedule 1 to include the building work listed in the table below with amendments to come in to force in December 2010;

Exempted building work that can be completed by any person (including DIY work)
<ul style="list-style-type: none"> <li>• Replacement or alteration of internal wall and floor <u>linings</u> and finishes in a dwelling.</li> <li>• Adding lightweight stalls (e.g. used at fairs and exhibitions) to the current exemption for tents and marquees.</li> <li>• Fabric shade sails and associated structural supports that do not exceed 50 square metres in area with limitations on matters such as the level on which the sails are installed and distance from a legal boundary.</li> <li>• Installation, replacement or alteration of thermal insulation in existing buildings (excluding some forms of insulation in some places e.g. in-wall foam and installing insulation in fire walls).</li> <li>• Penetrations with a maximum diameter of 300mm (including associated weatherproofing, fireproofing and any other finishing) to enable the passage of pipes, cables, ducts, wires, hoses and the like through any existing building.</li> <li>• Signs and associated structural supports where the sign is no more than 3 metres high and the face area of the sign does not exceed 6 square metres.</li> <li>• Height restriction gantries (e.g. a vehicle height warning in car park).</li> <li>• Private playground equipment used in association with a single household where no part of the equipment extends more than 3 metres above the ground.</li> </ul>
Carried out in accordance with the Plumbers, Gasfitters and Drainlayers Act 2006
<ul style="list-style-type: none"> <li>• Replacement (including repositioning) of water heaters, except for systems that are not open-vented, have an uncontrolled heat source or a controlled heat source other than gas or electricity.</li> </ul>
Carried out if designed by a Chartered Professional Engineer (CPEng)
<ul style="list-style-type: none"> <li>• Signs and plinths.</li> <li>• Retaining walls in a rural zone that retain not more than 3 metres depth of ground with limitations on matters such as the distance from any legal boundary or any existing building.</li> <li>• Playground equipment designed by a Chartered Professional Engineer (CPEng) installed in a public place for a government department, Crown entity (including a school), licensed early childhood centre or a local authority.</li> </ul>

- 2 **agree** that an Order in Council be made under section 41(2) of the Building Act to amend the existing exemptions in Schedule 1 as generally set out in the table below with amendments to come in to force in December 2010;

Work that can be completed by any person (including DIY work)
<ul style="list-style-type: none"> <li>• Additions to clarify that the current exemption relating to internal walls does not include load-bearing or bracing element walls (i.e. as originally approved by Cabinet in May 2008) or any part of a wall that is fire-rated or part of a specified system.</li> <li>• Increasing the height of exempted fences and hoardings from 2m to 2.5m and removing the term 'wall' from the same exemption as this is adequately covered by the term 'fence' and avoids potential for confusion with reference to walls that are part of another building.</li> <li>• Adding to the exemption for tanks and pools to allow a wider range of volume-height configurations than are currently provided for.</li> <li>• Increasing the size of marquees and tents for public events to 100 square metres (ie. the same as is currently allowed for private events).</li> <li>• Increasing the height of exempted decks, other platforms and bridges from 1m to 1.5m and adding the term 'boardwalks'.</li> <li>• Increasing the floor area of exempted porches and verandahs from 15 square metres to 20 square metres, adding carports to the same exemption and removing the requirement that the structure be over a deck or a patio.</li> <li>• Increasing the area of exempted awnings from 15 square metres to 20 square metres and adding the term 'canopies' to the same exemption.</li> </ul>
Carried out in accordance with the Plumbers, Gasfitters and Drainlayers Act 2006
<ul style="list-style-type: none"> <li>• Adding to the existing exemption allowing alterations to sanitary plumbing the clarification that the exemption excludes water heaters (which are now covered by a separate exemption) and does not permit the total number of sanitary fixtures in a dwelling to be increased.</li> </ul>

- 3 **agree** that the definition of 'storey' for the purposes of Schedule 1 is defined as a floor level of up to 1 metre above the supporting ground and a further 3.5m above the floor level (i.e. an overall height no greater than 4.5 metres);
- 4 **direct** Parliamentary Counsel Office and the Department of Building and Housing to revise the structure of Schedule 1 of the Building Act when making the changes to ensure that Schedule 1 is clearer and easier to understand;

*Public works*

- 5 **note** that currently there is building work conducted by Crown organisations where the building consent process adds little value because building quality is regulated by other means;
- 6 **agree** to exempt from the definition of building work the following structures in line with existing exemptions in the Building Act:
- Network Utility Operators fittings, such as security fences and machines, including oil interception or containment systems

- structures forming part of works, as defined in the Electricity Act and associated Regulations, such as wind turbines and gantries.
- 7 **direct** the Department of Building and Housing (lead), Ministry of Transport and New Zealand Transport Agency to examine if any transport infrastructure commissioned by Crown organisations should be exempt from the requirement to obtain a building consent and report back to their respective Ministers by June 2011.

Hon Maurice Williamson

Minister for Building and Construction

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In Confidence

Office of the Minister of Building and Construction

Cabinet Economic Growth and Infrastructure Committee

## **Building Act review 5: Delivering building regulation**

### **Proposal**

- 1 In order to achieve greater national consistency and standardisation in the administration of building regulatory requirements and to improve the overall effectiveness and efficiency of how the building regulatory system is administered agreement is sought on:
  - the attributes of a nationally consistent and administratively efficient building regulatory system
  - further work to advise on the detail of a preferred approach to improving the performance of the building regulatory system.

### **Executive summary**

- 2 This paper is the fifth of five proposing changes to the building regulatory system that will contribute to a more productive, efficient and accountable building and construction sector.
- 3 The building regulatory system has evolved over time from a localised system where local authorities both set and administered regulatory requirements to the current system which involves a mix of centralised functions (such as the setting of performance requirements for buildings, the registration of building consent authorities and the licensing of building practitioners by the Department of Building and Housing) and local administration of building consent requirements and enforcement activity.
- 4 The Building Act review has concluded that to contribute to an efficient, productive and accountable sector, the regulatory system should be administered in a way that results in:
  - accessible and nationally consistent building consent application requirements and processes for consumers
  - consistent interpretation of national building performance requirements and associated building consent decision processes
  - timely, responsive and predictable services for consumers
  - efficient use of scarce specialist skills, capital and other resources
  - administratively efficient and cost-effective system performance

- the ability to quickly and effectively implement and respond to changes in Building Code requirements and associated building consent and other regulatory requirements
  - effective use of local information on building performance and regulatory compliance to inform and modify national policies, building performance requirements and other regulatory settings
  - seamless integration with resource management and local planning, and other related activities.
- 5 The review investigated options for moving towards a system that operates in this way, with input from a working group involving senior local government building control officials.
  - 6 It has concluded that moving to a more nationally consistent regulatory system, with more centralisation of decision making rules and supporting functions (such as back office functions and training), more uniform consent application requirements and better management and use of information would contribute to improvements in productivity and efficiency, and would significantly reduce the overall costs of administering building regulatory requirements. It has also concluded that there is significant potential to improve the overall administrative efficiency of the system through greater consolidation of the management and provision of local consent and enforcement functions.
  - 7 Agreement is sought to develop a preferred approach to achieving a nationally consistent regulatory system, so as to achieve greater national consistency and standardisation in the administration of the building consent process, to improve the flow of information on building quality outcomes through the regulatory system, and to reduce overall administrative costs.
  - 8 Because of the potential impacts on local government, I propose that local government representatives be involved in the development of the preferred approach to reform.

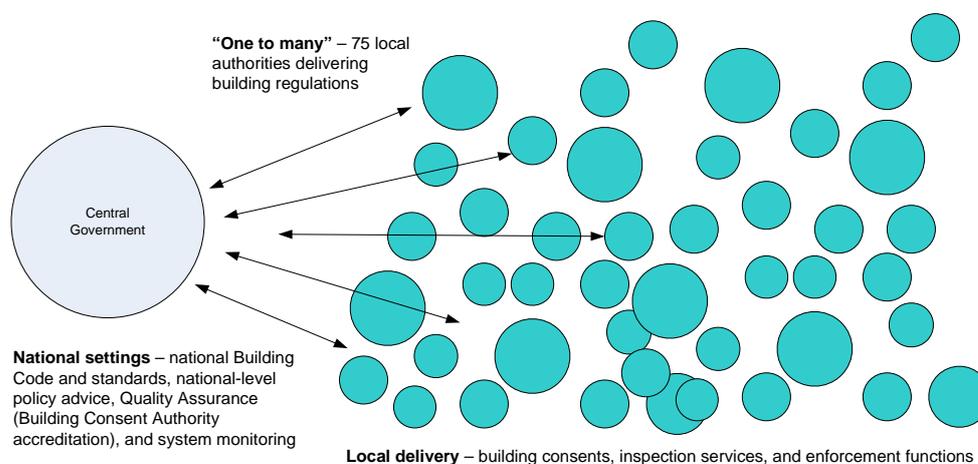
## **Background**

- 9 In February 2010 Cabinet directed the Department of Building and Housing (the Department) in consultation with the Department of Internal Affairs to report to the Cabinet Economic Growth and Infrastructure Committee on options to improve the administration of building functions [Cab Min (10) 5/3]. This was to include options for consolidation across local authorities, or centralisation.
- 10 How the building regulatory system is administered impacts on both the effectiveness and efficiency of the system itself and, more significantly, the productivity and efficiency of the sector that it regulates.
- 11 The current building regulatory system has evolved from a local system under which local authorities set and administered building performance and related regulatory requirements, to a system where building performance and related regulatory requirements are set nationally but administered locally.
- 12 The Building Act 2004 (the Act) provides for a national Building Code, national guidance on how to comply with Building Code requirements, a national system of builder licensing and a national system of accrediting and registering building consent authorities. It requires all territorial authorities to perform the functions of a building consent authority for their own districts, administering the building

consent process and performing additional enforcement and other building control functions.

- 13 The Act also allows territorial authorities to transfer building consent functions to others, and allows private entities to become building consent authorities. These provisions were intended to allow for the consolidation of building consent functions across local authorities and potentially for both local and national competition in the provision of building consent functions. In practice little consolidation or competition has occurred. In many local authorities these functions are embedded so that the building consenting process is a trigger for other functions, for example identifying if a resource consent is required, and as a mechanism to collect property information required for rating information, infrastructure connections and civil defence/emergency management.
- 14 Currently 75 building consent authorities process around 70,000 consents per year. This represents an average of less than 1,000 per authority<sup>1</sup>. Each separately establishes and manages regulatory systems and processes, such as those needed for customers to submit consent applications. The costs of doing so are passed on to customers through fees and charges, with any shortfall borne by ratepayers<sup>2</sup>.
- 15 The current system can be represented as follows:

**Diagram 1 - Current system**



- 16 The direct cost of operating this system is in the order of at least \$250m a year. This cost is approximate and is based on analysis of a representative sample of building consent authorities, including staff costs (approximately 55% of costs), accommodation, and overheads (about 35%). The average cost per consent is approximately \$3,570. This equates to approximately 2% of the value of the work consented. This cost estimate does not include any assessment of compliance or other indirect costs, which are economically significant.

<sup>1</sup> Based on data for 2008/09, 17 building consent authorities issued less than 500 consents, 21 issued between 500 and 1,000 consents, and 26 issued between 1,000 and 2,000 consents. Only nine authorities issued more than 2,000 consents.

<sup>2</sup> Local authorities have discretion over the level of funding they will seek to recover directly from consent applicants, and how much of the service will be subsidised by ratepayers.

## Discussion

- 17 While the accreditation and other provisions of the Act have resulted in performance improvements within building consent authorities, they have not resulted in significant improvements to the consistency of regulatory decision making across building consent authorities. Nor has there been any significant consolidation of building regulatory functions across local authorities for a variety of reasons including:
- concerns about the potential consequences and risk of transferring liability for building failure from one local authority to another
  - the requirement to follow the consultation requirements for changes to “significant activities” under the Local Government Act
  - the level of capital investment required for change – e.g. establishing new regional online business support systems,
  - local concerns with maintaining services and employment, and the unwillingness of some local authorities and communities to relinquish local “front-desk” services and functions despite often bearing costs to ratepayers in providing these.
- 18 Submissions to the review confirmed the findings of a 2007 review project<sup>3</sup> that developers, builders and other users of the building regulatory system experience the following issues with the system:
- delays and unpredictable timeframes in the processing of building consents, scheduling of inspections and issuing of Code Compliance Certificates
  - inconsistencies in the interpretation of regulatory requirements including the Building Code by those administering them and in the administration of building consent requirements (e.g. information required, forms and variable fees).
- 19 The review also identified that the current administrative arrangements result in:
- duplication of support systems across local authorities, such as information technology systems used to manage and support building consent application and inspection processes
  - variability in the treatment of overheads and approaches to costing and charging fees for building regulatory services between local authorities
  - constraints, especially for small local authorities, in making investments necessary to achieve system improvements, such as the development of online consent systems
  - scarce specialist knowledge and capability is competed for and thinly spread nationwide, such as technical specialists able to review and advise on consent applications for complex commercial buildings
  - an aging workforce
  - varying information technology systems, of varying capability, to support business processes. These are an obstacle to achieving better interfaces between local authorities and with the Department. In some cases, they are

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<sup>3</sup> *Quality Regulation Review Resource/Building Interface Project (2007)* undertaken by the Department of Building and Housing, Department of Internal Affairs, and Ministry for the Environment

also an obstacle to the adoption of online technologies and smarter business support systems

- difficulties in getting information from local building consent authorities to the Department on system performance and building quality outcomes, that is necessary to support national policy and regulatory settings.

20 Currently, the impact of this inconsistency and variation falls particularly on those firms that design and build across local authority boundaries. These are typically large building companies and group or volume home builders, who account for around a third of the residential building market (35% in 2009). It also falls on those wanting to use innovative and novel designs and products, who must repeatedly satisfy different building consent authorities of the Building Code compliance of these systems and products.

21 Agreement to broaden the range of building work exempt from consent requirements and to introduce a stepped consenting system (see Papers 3 and 4) will reduce the annual number of building consent applications by several thousand a year. It will also reduce the number of building inspections required to be done by buildings consent authorities but will require them to make more complex risk assessments than in the current system.

22 In addition to the above issues, the following initiatives also make it timely to consider the overall design of the regulatory system.

- MultiProof – a centralised multi-use approval for buildings of a standardised design that will be built nationwide (e.g. group homes, garages, farm buildings) provided by the Department.
- Local government amalgamation – Auckland governance reforms and development of the Auckland Council will collapse seven local building regulatory systems into one system.
- Private inspection services – private sector inspections services have been trialled in Manukau for example, achieving demonstrable efficiencies.
- Shared forms/services – some local authorities are working together to develop shared forms (e.g. the Waikato group), and there has been some sharing of inspection services (e.g. Palmerston North and Manawatu).
- Developments in online technology, which offer the potential to provide a consistent application process and a common business support system<sup>4</sup>. Currently there are 11 varying software consenting systems operating nationwide that have been adapted into 75 operating environments. The eight local authorities in the Wellington region have investigated the feasibility of clustering building functions and introducing online technology<sup>5</sup>. North Shore City Council has done development work and testing on an application portal. Both initiatives offer potential to be worked with and built on.

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<sup>4</sup> Various online consenting systems have been introduced in for example the United Kingdom, Singapore, and some Australian States (e.g. Queensland, Western Australia) to good effect. Officials and building sector representatives conducted a study tour in 2008 that confirmed the potential of the English and Welsh systems.

<sup>5</sup> A report *Wellington Regional Shared Services Building Control Feasibility Study* (March 2010) has been produced by Council officers, but has not undergone political engagement. This work has been put on hold awaiting the outcome of the Building Act Review.

23 Online access to key technical resources, namely the Building Code and supporting information including Standards, is being investigated by the Department (see Paper 1). This will aid productivity by speeding up building professionals and trades peoples' ability to rapidly link to and reference relevant details. It will also help them learn and keep up to date with requirements.

### **Proposals to achieve a more consistent and efficient regulatory system**

24 To provide a sound basis for further work to improve the administration of the building regulatory system, I seek agreement to the following characteristics of a nationally consistent and administratively efficient building regulatory system that would contribute to wider sector efficiency and productivity:

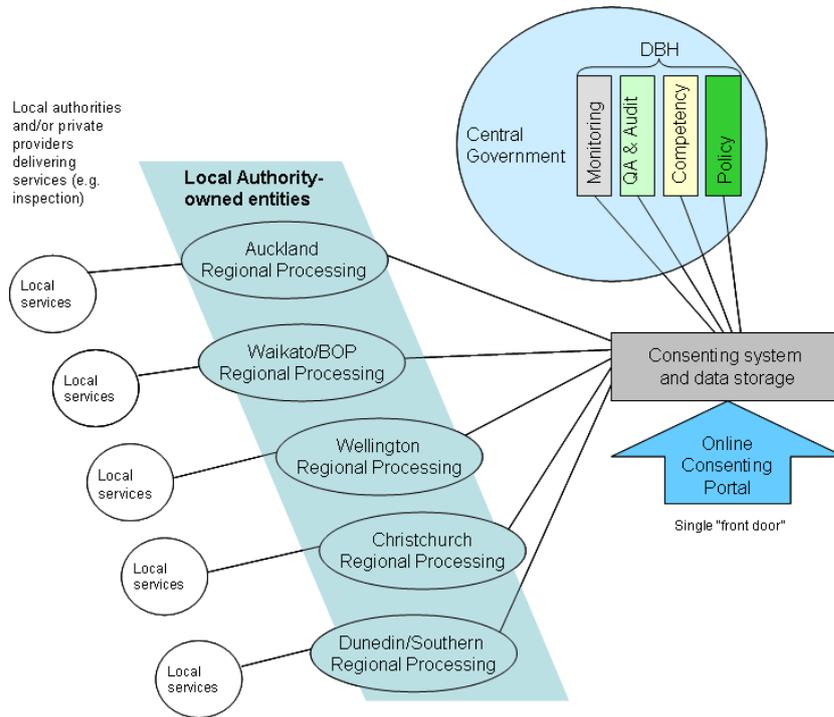
- accessible and nationally consistent building consent application requirements and processes for consumers
- consistent interpretation of national building performance requirements and associated building consent decision processes
- timely, responsive and predictable services for consumers
- efficient use of scarce specialist skills, capital and other resources
- administratively efficient and cost-effective system performance
- the ability to quickly and effectively implement and respond to changes in Building Code requirements, and associated building consent and other regulatory requirements
- effective use of local information on building performance and regulatory compliance to inform and modify national policies, building performance requirements and other regulatory settings
- seamless integration with resource management and local planning, and other related activities.

25 Delivery of such a system will continue to involve a mix of centralised policy functions, regulatory settings and decision support functions, and local delivery of building consent and inspection services, and enforcement services.

26 As part of the Building Act review officials developed and explored two options for improving administration of the regulatory system. The purpose of doing so was to identify opportunities for further reform and to test whether or not the benefits of further administrative reform would justify the costs and risks of achieving it. The two options were:

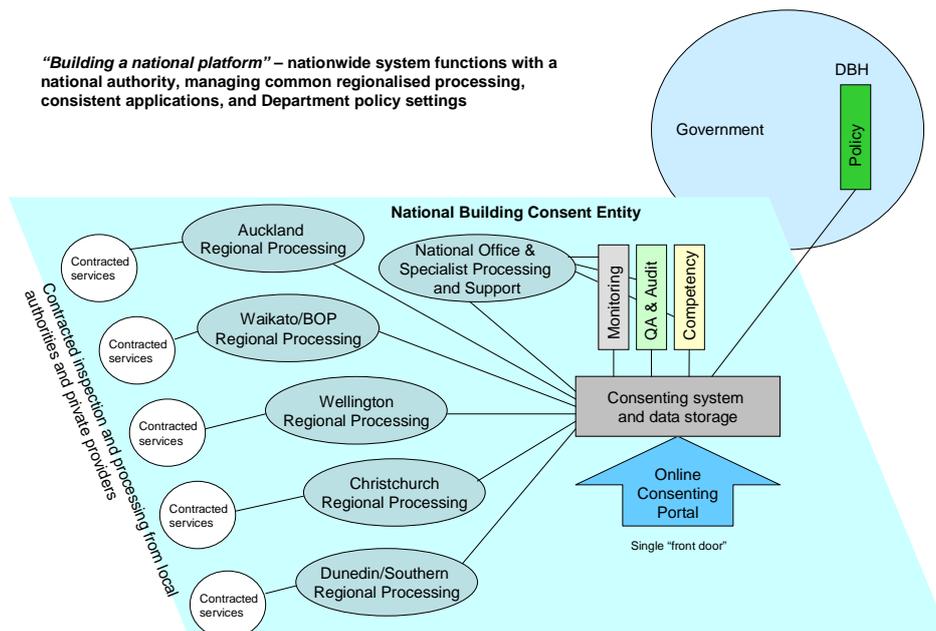
- 1 **regionalised option** - the establishment of a small number of regional hubs that would provide management and back office support for the local delivery of building consent inspection and enforcement services. This option is represented in the following diagram.

**Diagram 2: Regionalised option**



- 2 **centralised option** - delivery of building consent functions by a single national entity supported by its own regional service centres. This would see central government assuming greater responsibility. It would require the development of a national consenting capability, supported by regional processing centres, along with national specialisation for specific consenting categories or issues such as those involved with complex commercial buildings, as represented below.

**Diagram 3: Centralised option**



- 27 Both options are enabled by developments and reductions in the cost of information technology. Both options retain and build on the current national regulatory functions performed by the Department, which would continue to set national regulatory requirements and would retain policy functions and sector leadership accountabilities. Under both options local authorities could retain some building control staff to undertake local enforcement functions, such as building warrants of fitness and insanitary building inspections. Alternatively, these functions and staff could be transferred to a regional delivery hub.
- 28 The first option builds on existing local capability and offers transitional continuity and flexibility. It has the potential to provide improved efficiency over the local authorities' full range of building functions and could also provide a model for integrating resource management consent processing into a regional consent approach.
- 29 The second option provides for strong central governance and management for consistency. It would enable optimal system efficiencies and specialisation of services including the centralisation of specialist skills.
- 30 The review has concluded that both options potentially lead to significant savings and benefits in building consenting, and would translate to productivity improvements. Quantifiable benefits identified include lower system operating costs and savings in time and costs for consumers. These benefits would be achievable over the short to medium term. Costs would be recoverable in the medium term (over 5 to 7 years) as there would be transition costs to develop regional and national system infrastructure and establish new arrangements.
- 31 Under either option, public sector investment would be required for building regional and national infrastructure that would be used by consumers and regional or local providers of regulatory services.
- 32 In summary, both options provide potential benefits that:
- improve the consistency of consumer experience and the quality of decision-making
  - reduce costs of consent production by an estimated 40%
  - achieve estimated consumer benefits and operational savings around \$250m over five years (i.e. one year's total operating costs every five years)
  - decrease the costs of building consent and inspection services for consumers
  - translate to time and money savings that reduce drag on sector productivity.
- 33 Both options would require central government involvement to provide leadership for change, capital investment, removal of legislative barriers, and coordination of the development of a national system.
- 34 Both options have associated impacts and risks. In particular, local government operations may be impacted, particularly in the centralised option. Both options would have financial impacts on local government, with some financially benefiting from not delivering building services, while others may lose some revenue and critical mass for carrying organisational overheads. Change may also affect how local authorities operate associated functions such as resource management consenting. There is a risk, largely controllable through implementation, that this proposal could result in a less customer-centric approach to the overall land and building development process.

35 Officials consider that either option would deliver significant improvements for consumers of regulatory services, namely the building and construction sector. The drag on productivity from regulation would be lightened by a faster, more efficient, consistent and more transparent building consent process.

## Proposals

36 Agreement is sought to the attributes of a nationally consistent regulatory system as set out in paragraph 24 above. This will provide the basis for further work and advice on a preferred approach to achieving improvements in the administration of the building regulatory system.

37 I also recommend that officials be directed to develop and advise on a preferred approach to delivering a nationally consistent regulatory system. This work will be done by Department in consultation with the Department of Internal Affairs, Treasury, Ministry for the Environment and other agencies as required and will involve local government representatives, including senior management and elected members.

38 Central government investment options will need to be detailed, along with a transition plan for implementation. Financial and other implications for consumers and local government will also need to be explored.

39 This work will:

- advise on the detail of functions that would be centralised and those that would need to continue to be provided locally (but not necessarily by local authorities)
- design the overall architecture and user requirements for the proposed consolidated or centralised services at the national and local levels
- consider the costs and benefits of the proposed approach against the status quo
- consider any issues concerning liability and advise on how these would be addressed
- consider and advise on any interface issues with other relevant national and local authority systems (e.g. resource consenting, civil defence/emergency management, rating and infrastructure connections)
- identify any legislative issues and required changes in relation to the Building Act or other related legislation
- advise on the level of investment required and funding options
- develop a transition plan and timeline for change
- produce a detailed understanding of impacts on local authorities, including financial and impacts on associated processes
- explore the implications for consumers
- meet all the Government's Gateway Review requirements<sup>6</sup> due to the proposed scale of investment and change indicated

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<sup>6</sup> Covering strategic assessment, justification and options, delivery strategy, investment decision, readiness for service, operational review and benefit realisation.

- present a viable option and transition pathway that has been developed and tested ready for implementation (contingent on approval by Cabinet).
- 40 Because of the potentially significant implications of this work for both central and local government, I propose to consult with local government leaders as well as Ministers with an interest including the Ministers of Finance, Land Information, Local Government, and Environment.
- 41 I recommend that officials report back to the Cabinet Economic Growth and Infrastructure Committee by the end of June 2011, with the details of a preferred approach to delivering a nationally consistent regulatory system including advice on how the changes needed would be managed and achieved over time between central and local government. This timing should also allow the work to be informed by the initial scoping and high level principles work of the Minister of Local Government's review of local government structures.

### **Consultation**

- 42 As part of the Building Act review consultation process, a range of views were expressed in submissions on the proposal to explore administrative options including:
- the potential to make better use of scarce technical skills – in particular for complex commercial buildings and fire safety
  - support for change from industry organisations, firms and individuals for the establishment of online building consenting and developing regional or centralised authorities
  - mixed views from local authorities on the benefits of amalgamation of building consenting authorities – some favour it and recognise the potential while others do not see any positive benefits from any change, and favour letting current arrangements 'settle in' further
  - views that larger-scale service provision is not always an indicator of efficiency and some of the smaller authorities are efficient
  - there was also some support for removing local authorities from administration of building controls altogether.
- 43 The Sector Reference Group is supportive of the proposals in this paper and believes that a strategic approach needs to be taken to improve the efficiency of the sector. These proposals have also been discussed with a group of senior local government building control officials who are supportive. These proposals have not been actively discussed with local government chief executives or elected members to date. The Department also consulted with the Department of Internal Affairs, Treasury, Ministry of Economic Development, Ministry for the Environment and Land Information New Zealand.

### **Financial implications**

- 44 It is anticipated that options for a nationally consistent regulatory system will require capital investment from the Crown for information technology infrastructure. There will also be change management expenses to transition to a new system. These implications will be considered in detail during the next stage of work.

## Human rights

45 The proposed amendments appear to be consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. A final view as to whether the proposals will be consistent with the Bill of Rights Act will be possible once the legislation has been drafted.

## Legislative implications

46 Legislative implications are discussed in Paper 1.

## Regulatory impact analysis

47 The regulatory impact is discussed in the overall Building Act review regulatory impact assessment, attached to Paper 1.

## Publicity

48 Plans for publicity are discussed in Paper 1.

## Recommendations

49 I recommend that the Committee:

- 1 **Note** that achieving greater national consistency and efficiency in the administration and delivery of building regulatory requirements is desirable and will contribute to improved sector productivity
- 2 **Agree** that a nationally consistent building regulatory system would have the following attributes:
  - i) accessible and nationally consistent building consent application requirements and processes for consumers
  - ii) consistent interpretation of national building performance requirements and associated building consent decision processes
  - iii) timely, responsive and predictable services for consumers
  - iv) efficient use of scarce specialist skills, capital and other resources
  - v) administratively efficient and cost-effective system performance
  - vi) the ability to quickly and effectively implement and respond to changes in Building Code requirements, and associated building consent and other regulatory requirements
  - vii) effective use of local information on building performance and regulatory compliance to inform and modify national policies, building performance requirements and other regulatory settings
  - viii) seamless integration with resource management and local planning, and other related activities.
- 3 **Note** that officials developed and explored two options (regionalised and centralised) for improving administration of the regulatory system in order to identify opportunities for further reform and to test whether or not the benefits of further administrative reform would justify the costs and risks of achieving it

- 4 **Note** that officials have concluded that further reform of how the building regulatory system is administered is feasible and has the potential to deliver significant net benefits in the form of greater consistency, improved administrative efficiency that would contribute to wider improvements in sector productivity and efficiency
- 5 **Direct** officials from the Department of Building and Housing in consultation with Department of Internal Affairs, the Treasury, the Ministry for the Environment and other agencies as required to report back to EGI Committee by the end of June 2011 on the detail of a preferred approach to improve the performance of how the building regulatory system is administered
- 6 **Note** that the report back in 5 above will include advice on:
  - the detail of functions that would be centralised and those that would need to continue to be provided locally (but not necessarily by local authorities)
  - the design of the overall architecture and user requirements for the proposed consolidated or centralised services at the national and local levels
  - the costs and benefits of the options and individual components against the status quo
  - any issues concerning liability and advise on how these would be addressed
  - any interface issues with other relevant national and local authority systems (e.g. resource consenting, civil defence/emergency management, rating and infrastructure connections)
  - any legislative issues and required changes in relation to the Building Act or other related legislation
  - the level of investment required and funding options
  - a transition plan and timeline for change
  - the impacts on local authorities, including financial impacts and impacts on associated processes
  - the implications for consumers
  - a viable option and transition pathway.

Hon Maurice Williamson

Minister of Building and Construction

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## Regulatory Impact Assessment

### **Building Act review: Proposals and options for reform Agency Disclosure Statement**

This Regulatory Impact Assessment (RIA) has been prepared by the Department of Building and Housing.

It draws together the high level arguments and the options that have been considered as part of the Building Act review. The recommendations have been made after significant consultation and analysis of options.

The critical success factors for the package are whether the proposed changes actually result in positive changes permeating throughout the industry, including positive behavioural changes amongst consumers, building practitioners and building consent authorities. It is the changes to incentives and the dynamic effects that are important. First principles can be drawn upon to inform possible outcomes, but ongoing monitoring and assessment of behaviours are important. The Department is confident that the proposed package will be beneficial overall, even though there is some uncertainty about scale and timing of the net benefits.

Much important detail is not fully developed at this stage. For example, the accessibility and usefulness of planned improvements to the Building Code are important enablers of other parts of the package. Similarly, the regulations to be promulgated (planned to be in 2012) pertaining to stepped consenting are also important. Making progress in areas such as these will determine the ultimate success of the package. Further, and importantly, there is an interaction between various processes. For example, it is important to make sufficient progress on consumer protection (the consumer package) and the development of understanding of the Building Code prior to the promulgation of regulations regarding stepped consenting.

Michael Mills, Programme Director, Building Act Review

July 2010

## Background

The Building Act 2004 was introduced in response to widespread weathertightness failure in the residential housing sector, which resulted from systemic problems including:

- lack of responsibility and accountability for building quality (due to fragmentation, sub-contracting and use of corporate and other tools to avoid risk)
- poorly articulated standards interpreted by poorly skilled regulators
- questions regarding the desirability of competition in the provision of building consent services
- inadequate regulatory oversight by the Building Industry Authority, the then central regulator
- inadequate focus on consumer interests.

The government's response was to tighten regulation of the sector by introducing a series of reforms, notably reinforcing and introducing new input controls, that have progressively been implemented since 2004. Key elements of the reforms included:

- strengthening the role of the central regulator
- reviewing the Building Code, increasing the amount of support of the Code, and providing for bans or particular ways of building in particular circumstances
- ensuring that there is a base of capable (qualified and knowledgeable) people to undertake building design and critical elements of building work and inspection, notably by providing for the licensing of building practitioners and requiring accreditation and audit of building consent authorities
- strengthening the independent scrutiny that plans and construction work receive in the building consent and inspection process
- strengthening support for consumers through mandatory warranty terms implied in all contracts for building work, making builders liable for latent defects in their work (although the reforms did not mandate the means of delivering on warranties).

Key aspects of the 2004 reforms are still being implemented, notably the licensing of building practitioners, accreditation of building consent authorities and the statutory product certification regime. The full impacts of the 2004 reforms are, therefore, yet to be felt. In part due to the reforms, and as a result of changes within the sector, there has been a general improvement in building quality since 2004.

- With regard to weathertightness, there have been significant changes in building design and construction practice such that most new dwellings are constructed with a good prospect of performing well (for example drainage cavities within the external wall are a common feature of new dwelling construction). There have

been few claims through the Weathertight Homes Resolution service for houses built since 2004<sup>1</sup>.

- Since 2004, volume builders have increased their market share from around 22% in 1997 to approximately 35% in 2009. While all builders have incentives to ensure quality construction, volume builders have a particularly strong interest in maintaining their brand. Further, most volume builders are members of the Registered Master Builders Federation or the Certified Builders Association, and offer home warranty insurance products that provide limited 'first resort' cover. These insurance products, which have been estimated at covering around one third of residential building work, help to ensure these builders face the economic consequences of poor building work subject to the scope of cover provided.

Nevertheless, there remain significant issues with the economic performance of the system of building controls (described further below), which impacts negatively on productivity in the construction sector, ultimately raising the costs of building work. Because the construction sector is large (representing approximately 4% of GDP) and is an important intermediate input into other sectors of the economy, the economic performance of the sector is important for the performance of the wider economy.

### Concerns with the status quo

Information gathered during the course of this review, supported by previous research and analysis, highlights a number of concerns.<sup>2</sup>

#### 1. *Institutional characteristics of the market for building services*

While consumer support was emphasised in the Building Act 2004, through a purpose statement and implied warranties, no specific measures were included to assist consumers to understand their rights, enforce their rights, or hold practitioners to account other than through the disputes tribunal (for small claims) and the courts.

Some non-regulatory initiatives have been undertaken since the passage of the Act to strengthen consumer support, notably the provision of consumer guidance and information through, for example, the ConsumerBuild website.

However, consumers continue to face considerable risk and there is a gap between what was intended by Parliament in the 2004 Act and the outcomes that have resulted in practice. This gap is a function of several factors.

- Building is a complex process – it is characterised by a large number of small firms, extensive sub-contracting arrangements, and sometimes ill defined supply chains – and consumers therefore face difficulties in making informed decisions.
- Residential consumers contract infrequently for building work and lack experience in contracting relative to building contractors.

<sup>1</sup> Pricewaterhouse Coopers recently reported that homes constructed after 2005 have a low failure rate of 0.2%, implying less than 150 homes built between 2006 and 2008 are likely to be leaky.

<sup>2</sup> There is perceived to be an underlying weakness in the skill levels of many building practitioners (e.g. this was commented on in many submissions). This is a problem in terms of effect on building quality and efficiency of the sector – and is a symptom of a policy problem. The policy proposals are designed to mitigate (and ideally eliminate) the policy problems.

- Frequently there is no formal written contract setting out the nature of the agreement and the rights and obligations of each party – many consumers and builders are unaware of implicit warranties.
- It is difficult and costly for consumers to hold practitioners to account – the consumer has little leverage over the practitioner once building work has been paid for.
- There is little incentive for a practitioner to repair defective work or pay compensation, as doing so is costly and practitioners often face little risk of sanction.
- Residential consumers have limited access to timely, cost effective mechanisms to help them resolve disputes.
- Residential consumers have limited knowledge of risks, and limited options for managing their risks through products such as home warranty insurance (although such products are increasingly available).

These issues are exacerbated by the fact that some developers, designers and builders actively manage or mitigate (and in some cases avoid) their risks, for example through the use of ‘development specific’ and ‘limited life’ company structures.

## 2. *Allocation of risk and responsibility in the market for building services*

A combination of the above factors means that there is an unbalanced allocation of risk and responsibility in practice.

- Residential consumers and building consent authorities bear the brunt of the risk associated with building work that fails to perform, despite having the least control over the quality of that work.
- Building practitioners, on the other hand, are able to manage and mitigate risks through the quality of their work, and in some cases have tools to avoid risks, for example, through the use of limited life companies.
- While building consent authorities face high risk they do not realise any benefits from risk-taking within the context of a building project, thus creating incentives for building consent authorities to be risk averse.

As a result:

- a negative dynamic is created whereby those best placed to manage risk (i.e. building practitioners) are less likely to actively manage it
- incentives for good practitioner performance are relatively weak with potential implications for the rate of defective building work, the costs of the inspection process, and incentives for practitioners to improve skill levels
- risk averse behaviour on the part of building consent authorities, which has been exacerbated by their liability for legacy weathertightness issues, adds direct and indirect costs to the building process which are ultimately borne by consumers
- rates of innovation are likely to be lower because the costs associated with the building control system are higher where new, novel or innovative products, systems or designs are used.

Despite the above problems, the overall conclusion reached by this review is that the building regulatory system is broadly aligned with international best practice and is not 'broken'. Although the system is not missing critical elements, there are weaknesses in certain parts of the system, and the relationship between certain system components is 'out of balance'.

### 3. *Matching effort with implicit risks*

Current regulatory settings are based on a low tolerance for risk and a strong emphasis on the role of government in protecting home owners from risks of building defects and failures.

There is a heavy reliance placed on the building controls system in protecting consumers from defective building work. This heavy reliance results from a combination of:

- the statutory role played by building consent authorities (i.e. issuing consents, undertaking inspections, and issuing code compliance certificates)
- the duty of care imposed by the courts on local authority building consent authorities in respect of residential homeowners combined with the rule of joint and several liability, which increases building consent authorities' exposure to losses where building work is subsequently found to be defective
- the use of risk avoidance techniques by developers and builders (eg. limited life companies), and
- the fact that local authority building consent authorities are 'deep pockets' backed by the power to rate with limited options to effectively manage that risk.

The heavy reliance on building consent authorities is misplaced because their control over final building quality is limited and because it has a number of perverse effects.

- Building consent authorities take an unduly risk-averse approach to regulatory decision making, which has resulted in a general increase in compliance costs (e.g. documentation requirements, number of inspections etc) and over-regulation of low-risk building work. Common concerns relate to:
  - perceptions that documentation requested to support consent applications is onerous and excessive
  - a large number of on-site inspections that are required in the course of construction, and time wasted arranging inspections and waiting for building officials to complete inspections before work can proceed.
- While around 83% of building consents are issued within statutory timeframes, there is a widespread perception amongst builders and developers that timeframes are not always met, and that there are significant costs associated with delay due to stopping the clock while additional information is sought.
- Innovation is also hampered by this approach because there are lower compliance costs associated with low-risk building designs and building systems that comply with Compliance Documents (acceptable 'stock' solutions rather than alternative 'design-led' solutions). There is also productive-efficiency enhancing innovation, in

the form of standardisation and mass production, which can be hampered by inconsistent interpretations across local authorities.

#### 4. *Implications of a multiple-jurisdiction building control system*

Currently, 75 local authorities process around 70,000 consents per year, representing an average of less than 1,000 per authority. Further, the average annual number of consents processed outside of the metropolitan territorial authorities is considerably lower than this.<sup>3</sup>

Each authority must be accredited by International Accreditation New Zealand (IANZ), and registered and monitored by the Department of Building and Housing (DBH). Almost all separately establish and manage their own systems and processes, and they compete in the labour market to maintain sufficient capacity and capability to carry out their functions. Each must also meet any costs of litigation. All of these costs are passed on to building consent applicants and recovered through a system of fees and charges, with any shortfall borne by ratepayers.

While efforts have been made to consolidate building consent functions in some areas, overall the pace of consolidation is slow. Given the low volume of consents processed in some centres, and the nationally standardised process involved, there may be significant economies of scale in a more consolidated approach. That is because the consenting and inspection workload at a local level is likely to be lumpier than at a national level. The economics of investing in productivity-enhancing technologies, systems and processes may also improve with scale. These potential efficiencies are being forgone under the status quo.

There are inconsistencies in the interpretation of regulatory requirements across building consent authorities, which can cause frustration to consumers and building practitioners and increase the costs in doing business on a national basis. While in absolute terms the incidence of these costs are relatively low, they are borne disproportionately by individuals and firms that deal in new or novel products, building systems, and designs. This may also result in a potential loss of innovation, by encouraging businesses to rely on acceptable or prescribed means of construction.<sup>4</sup> Inconsistencies can also be a barrier to increased standardisation, factory production and national-scale operations.

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<sup>3</sup> Based on data for 2008/09, 17 building consent authorities issued less than 500 consents, 21 building consent authorities issued between 500 and 1,000 consents, and 26 building consent authorities issued between 1,000 and 2,000 consents. Only nine building consent authorities issued more than 2,000 consents.

<sup>4</sup> Inconsistency was a strong theme in submissions, particularly a lack of clarity in the Act and the Building Code. Some submitters noted a lack of guidance and no provisions for national forms, processes and overall systems, to support consistency.

## **Problem Definition**

The foregoing discussion suggests that the market for building services is characterised by market failure due to:

- limits to and asymmetries of information
- misallocation of risks and responsibilities, and the level of effort undertaken not being commensurate with the level of risk involved, and
- institutional (both private and government institutions) failure to efficiently correct these imperfections.

The combination of these factors means that there is suboptimal competition on quality and price from suppliers, and hence suboptimal consumer welfare. There is, therefore, a prima facie case for intervention.

## **Objectives**

Specific objectives of the package are therefore to:

- ensure that owners can make informed and effective choices in purchasing building work
- ensure that building contractors can efficiently be held to account in practice
- ensure that defects are effectively and efficiently identified, reported and repaired as quickly as possible
- increase the number of owners who obtain financial redress
- assist subsequent owners to hold contractors to account
- improve the efficiency of the building consent and inspection process

### **Regulatory impact assessment: Key elements of the package**

The reform package identified falls into two categories, being:

- provision of a more balanced accountability model with a supporting consumer package (the consumer package), and the
- introduction of a more efficient approach to consenting (a stepped system).

The first of these key elements is needed for the second although the opposite is not true. Ultimately, the package will be successful if the dynamics in the industry adjust and the overall workmanship and professionalism of the industry improves.<sup>5</sup> The consumer package is pivotal to this. The introduction of a more stepped consenting approach is primarily a streamlining and compliance reduction exercise, although productivity benefits are also expected to ensue.

Further work is planned to explore a preferred approach to achieving improvements in the administration of the building regulatory system, including potentially consolidating or centralising building regulatory functions. The work would be subject to an impact assessment if a decision is made to make changes in this area.

These elements are designed to address (or set in train processes that will address) the problems that have been identified, and contribute to the objectives outlined above.

The material in the Regulatory Impact Assessment is split into 3 sections. Section 1 discusses the consumer package (this deals with consumer support and allocation of risk) while Section 2 discusses other parts of the policy initiative, with most focus being on the streamlining of consents. Section 2 also discusses ongoing work around improvements to the Building Code (Part 2) and possibilities to centralise or consolidate consenting functions (Part 3). These items are not part of the package analysed in this RIS (decisions on these items are not being sought at this stage) but are included for context and completeness. Section 3 draws together the package overall and discusses consultation and implementation issues and the like.

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<sup>5</sup> It is worth noting that submissions suggested near universal concerns about current industry skill levels.

## **Section One: The consumer package**

### **Options to rebalance risk and responsibility and address weaknesses in the system of residential consumer support**

Building consent authorities currently face significant risks associated with building regulatory decision-making but none of the benefits from risk-taking within the context of a building project. As such, they tend to be unduly risk averse. The risk averse approach adopted by building consent authorities manifests as compliance costs in the form of:

- significant documentation requirements and frequent requests for further information
- over-inspection of relatively low-risk work
- a general reluctance to approve novel building designs, systems and products
- slower processing of consents, with consequent indirect costs for consumers

In terms of analysing the issue, options considered, effects, benefits and costs of those options, this section:

- identifies the proposed package (Table 1 below)
- discusses the effects of the proposed approach
- discusses net benefits, costs and impacts of the proposed approach; and
- discusses, at a high level, alternative options and the balance of the package.

### **The proposed package**

The composition of the proposed package is based on a comparison between the elements of the package and options. Department of Building and Housing used the criteria set out above under 'Objectives' to assess alternative options, as well as standard economic criteria including impacts on static and dynamic efficiency. Our comparisons were informed by New Zealand and overseas experience. The proposed package consists of those options expected to provide the highest net benefit.

**Table 1: Outline of consumer package**

Item	Proposal	Comment
Information provision	Significant initiatives to better inform consumers, including requiring building contractors to give the consumer a published checklist with questions to ask, information on the risks of paying ahead of completion, various parties' legal obligations, dispute resolution options and sources for further advice.	There is no perfect amount of information to provide but, in this case, more is better than less. A high level of understanding is necessary to ensure stakeholders are aware of their rights and responsibilities.
Disclosure and specific information	Mandatory	Disclosure with specific information such as building history is critical to ensuring consumers can make well-informed choices.
Complete written contracts	Mandatory	Written contracts are essential to ensure rights and responsibilities are clear, and disputes can be resolved more promptly and easily than at present. Mandating this is critical to ensuring that written contracts are forthcoming.
Dispute resolution	<p>Mandatory process for dispute resolution set in contract. Make clear that Construction Contracts Act applies to residential building.</p> <p>New conciliation and mediation services to fill gaps to complement existing public and private services.</p>	<p>Research suggests the importance of specific dispute resolution advice (with an emphasis on early resolution).</p> <p>The costs and duplication of effort of developing a specialist tribunal hard to justify. As such, ensuring that parties are made aware of relevant services, and that there are mediation services actually available, is considered most desirable.</p>
Surety	Mandatory disclosure of whether there is surety	A requirement to disclose whether there is mandatory surety will (most likely) lead to increased take-up of surety products, but will also assist consumers in making informed choices. An alternative option of mandating surety is still on the table for consideration (see below).

The package of options is intended to reduce these costs by addressing the underlying cause of this risk aversion including the high exposure of building consent authorities

to financial liability, and improving the performance of the building industry. Relevant changes are:

- clearer contracts between consumers and building contractors with written warranties and an expectation that 'first resort' will be speedy resolution of defective building work by building contractors
- where a building contractor defaults, next resort would flow from the financial backing of warranties through any requirement for private insurance or a surety provider/fidelity fund
- It is also likely that the courts may reinterpret the duty of care owed by building consent authorities to home owners in light of their lesser role and increased provision for disputes to be resolved through contract and warranties
- building consent authorities being involved in fewer consents and inspections and, hence, being a 'lesser party' to building work transactions.

Building consent authorities would still face appropriate incentives to perform their statutory functions well, as they will still be able to be sued in tort for negligence.

## Effects of the proposed approach

The proposed approach, and its desired effects, is set out in Table 2 below.

**Table 2: Matching desired objectives, proposed measures and desired effects<sup>6</sup>**

Objective	Proposed measures	Effects
<i>Ensure that owners can make informed and effective choices</i>	<p>Building contractors to disclose critical information</p> <p>Building contractors to give the owner a simple checklist</p>	<p>Owners can distinguish between building contractors' and practitioners' records</p> <p>Over time, more difficult for poor performers to get work and stay in the market. Leads to improved building quality</p>
<i>Ensure that build contractors can efficiently be held to account in practice</i>	<p>Mandatory written contracts</p> <p>Information on the risks of paying for work ahead of completion</p> <p>Advice on dispute resolution</p> <p>An 'early intervention' dispute resolution service - mediation by telephone or face-to-face</p>	<p>Fewer disputes - as both parties have clear expectations and the same understanding of what has been agreed</p> <p>Disputes that do arise are resolved quickly</p> <p>Less court litigation</p> <p>Stronger incentives on building contractors to perform</p>
<i>Ensure that defects are efficiently and effectively identified, reported and repaired as quickly as possible</i>	<p>New legal remedies available to the owner</p> <p>A new legal obligation for build contractor to fix any defects within 12 months after completion</p> <p>Reciprocal obligations on owners</p> <p>Guidance to help owners, build contractors and adjudicators to understand the new remedies and obligations</p>	<p>Defects are identified quickly</p> <p>Builders are not accountable, where the owner caused (or contributed to) the problem</p> <p>Early defects (within 12 months) are fixed promptly</p> <p>Latent defects are more likely to be remedied by the building contractor</p> <p>The extent of damage (resulting from building defects) is lower</p> <p>The costs of repair are lower</p>
<i>Increase the number of owners who obtain financial redress</i>	<p>Disclosure by building contractor of whether financial backing is available (such as a guarantee or insurance)</p> <p>An appropriate regulatory framework for guarantee products and services</p>	<p>A greater number of owners purchase a guarantee or insurance product</p> <p>More owners obtain financial compensation when there is a defect and the building contractor defaults</p> <p>The choice of products in the market increases over time</p> <p>Owners can make an informed choice among</p>

<sup>6</sup> If these objectives are met then the overall result should be improved buildings. The incidence of the last of the objectives (managing defects, financial redress and assisting subsequent owners) should not be frequent.

		guarantee or insurance products, and owners are protected from purchasing unsound guarantee products
<i>Assist subsequent owners to hold contractors to account</i>	Ensure that critical information is available to subsequent owners on the Land Information Memorandum	Subsequent owners are protected Accountability is reinforced

### Net benefits and costs, and the impacts of the package on key parties

Although the package is perceived to be beneficial overall, there are clear benefits and costs on various parties (and uncertainties implicit). These are discussed below, along with impacts.

#### *Benefits and impacts - consumers*

The package is intended to better equip consumers to recognise risks associated with building work and to take responsibility for the decisions they make to contract for building work, while simultaneously strengthening mechanisms for their protection.

The benefits to consumers are expected to include:

- Consumers will be better supported, and face stronger incentives, to make informed decisions about building work and to properly contract for that work
- The provision of explicit warranties in building contracts will make consumers more aware of their rights and obligations, better able to seek remedy for warranted defects, and will make consumers more aware of legal remedies
- Access to a more effective dispute resolution service would further enable consumers to enforce a producer's obligation to perform warranty service and thereby support prompt remedy of defect, as well as providing an efficient mechanism for resolving disputes outside the scope of the warranty
- Any provision for surety arrangements as a financial backstop would cover the risks of non-performance of the producer's warranty service obligations
- Better decision making by consumers, since possible limits on warranties and reduced recourse to councils when things go wrong will incentivise a more careful selection of building practitioners and, potentially, greater use of agents who are qualified to manage risk on their behalf.<sup>7</sup>

Stronger consumer supports are expected to strengthen building practitioners' incentives to perform work right first time and to quickly remedy defective work without cost to the consumer. If a building practitioner defaults on those obligations, or dies,

<sup>7</sup> There are likely to be limitations on surety products, as there are with all surety products. Possible limitations may involve time as well as scope limitations. Having said that, the consumer package is intended to raise awareness and increase demand for surety which in turn is likely to contribute to development of this market in terms of both providers and the products on offer.

disappears or becomes insolvent, the strengthened mechanisms provide more effective and efficient means of remedy for consumers.

These benefits will involve some additional costs in the short-run, as warranties, dispute resolution mechanisms, and surety arrangements all involve costs. The net impact of the package on consumers depends on the interaction of a number of factors including:

- The reduction in compliance costs associated with simplifying, streamlining and consolidation the building controls system
- The extent to which building producers take responsibility for the quality of their work, including promptly fixing defective work under warranty without cost to the consumer
- The cost of purchasing warranties and obtaining surety backing
- The costs associated with dispute resolution where necessary

#### *Benefits and Impacts - building professionals and trades people*

The package of options would be expected to result in building professionals and trades people facing greater risk overall (than at present). This is efficient since they are best placed to manage the risk that building work fails to perform and they have a range of options for managing those risks.

As a consequence of facing greater risk, we would expect building professionals and trades people (and insurers and surety providers) to react cautiously, and it is expected there may be up front increases in costs to consumers with medium to long term benefits from improved quality and performance by building producers.

Over time we would expect building professionals and trades people to adapt to the changed conditions by:

- taking a risk-based view about what work they undertake to do, taking into account their knowledge and level of competency
- a stronger focus on their contracting practice, both with consumers and suppliers (e.g. sub-contractors)
- More explicit recognition of the costs of standing behind their work, and pricing accordingly
- investing in their own professional development to extend their scope of work and overall level of competence

It is likely that the changes will affect different classes of building professionals and trades people in different ways. One class that will be particularly impacted is licensed building practitioners. Many of the reform options will either only apply where licensed building practitioners are involved (e.g. streamlining consent processes where simple buildings are involved) or may advantage licensed building practitioners over non-licensed practitioners (e.g. where licensed building practitioner status results in lower surety premiums). The package of changes is therefore expected to further encourage

the take-up of licensing. Greater uptake of licensing would have additional benefits including:

- preventing and discouraging insufficiently skilled practitioners from carrying out critical building work without adequate supervision
- sharpening incentives to put work right if it is not done correctly
- strengthening incentives to upgrade and maintain knowledge and skills
- creating better conditions for improvements in building quality and labour productivity
- improving signalling of builder quality in the market for building practitioners.

Ultimately, the building stock of New Zealand will be improved by an improvement in the dynamics within the building industry.

Anecdotally, the building control system deters and raises the costs of innovation and risk-taking in the building sector, although gathering hard evidence on this is difficult. Innovation is a key means of improving welfare, whether through improving building quality or the introduction of productivity-enhancing new building designs, systems and techniques. It is difficult to estimate the impacts of changes on the rate of innovation, but theoretically, by better allocating risk and responsibility to those best placed to manage it, overall rates of innovation should increase.<sup>8</sup>

The package is designed to increase incentives for building professionals and trades people to upgrade and maintain the relevance of their skills. This is critical since the overall skill level of the workforce is central to the achievement of the ultimate goal of the reforms, namely to reduce the costs of the building regulatory system without compromising quality.

#### *Benefits and impacts - building consent authorities*

The package of options is intended to reduce the reliance on building consent authorities in the building regulatory system and, by reducing their exposure to liability in the event of building failure, enable them to take a less risk-averse approach in performing their statutory functions. This is expected to improve the efficiency and quality of regulatory decision making, while ensuring building consent authorities continue to face appropriate incentives to perform their statutory role well.

#### **Costs and uncertainties**

The package of options to rebalance risk and responsibility and address weaknesses in the system of residential consumer support will result in costs as well as benefits.

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<sup>8</sup> Innovation in building can refer to the types of materials used, or alternatively, to the ways in which buildings are designed. It also has a productivity element in that builders innovate to build quality product more efficiently. It is possible that there is some move towards conservatism in regard to things like types of building materials as some practitioners seek to reduce their risk exposure. While this may result in some lack of innovation around building products, this is not necessarily a bad thing.

- Requirements for written contracts between consumers and building producers for residential building work, and producer disclosure requirements, will impose compliance costs – even though it is expected that standard contracts and disclosures will become common and will be incorporated into standard business practice. The costs to individual consumers and building producers are therefore expected to be insignificant, although there will be one-off and transition costs associated with these changes.
- The clearer legal remedies proposed are designed to motivate contractors to repair defective work and to produce higher quality work in the first place. The result could be an increase in costs to affected producers, a decrease in costs to affected consumers
- There should be a decrease in overall system costs (because the remedies will reinforce incentives for good building quality and performance, and because defects will be repaired more quickly), even though there is an increase in initial costs faced by consumers (as producers pass on costs of surety products etc).
- While consumers will have increased information available to them, there will be increased costs – including compliance costs – on consumers.
- There will also be costs associated with the implementation of regulation of private surety funds, the operation of an alternative dispute resolution service, and providing consumer education and information.
- To the extent that a new dispute resolution service makes it easier for consumers to seek remedies for defective work, the direct costs associated with such disputes may increase.
- Costs will be involved in providing more clarity and guidance in becoming familiar with changes in systems and regulatory tools.

A key cost – were it to eventuate – would be if the building sector were to adopt particularly risk-averse building practices, and / or, if there were to be significant and unproductive changes to the industry as a result. It is not clear that this will be the case; the building industry is already exposed to risk and liability and while the package proposed includes some re-balancing of the risks and accountabilities, much of the package merely formalises existing practices. As such, it is not clear that there will be large and unintended consequences – but it does mean that monitoring programmes are important.

There is an element of uncertainty about whether all of the benefits and costs that have been estimated (and discussed) will materialise. As noted, the key issue is the dynamic that is created, and it is not possible to fully predict how different groups will react in the face of changes to their operating environment. Having said this, officials are confident that the proposed package will result in an improved set of incentives at the very minimum.

It is also worth noting that some of the benefits that were anticipated earlier in the process are now somewhat smaller due to changes in the proposals as a result of feedback from consultation etc. This is most obvious in the area of stepped

consenting where – upon further analysis – the proportion of building activity that is proposed to be classed as “simple” is smaller than previously anticipated.

### **Alternative options and the balance of the package**

The consumer package essentially consists of a balance of information provision, mandating certain practices and information sharing, facilitating more effective dispute resolution, and ensuring better contracting procedures. It is a package with various elements designed to work together to achieve the desired result.

It would be possible to construct a package with less onerous contracting and disclosure requirements around both the ‘history’ of the building contractor, and the surety involved (more of a ‘tweak to’ than an ‘enhancement of’ the status quo).

Such an approach is not favoured. The requirement for written contracts to be in place – with strong disclosure provisions – is seen as a key element in ensuring that the right incentives are in place for the behavioural changes in the construction industry to occur. It is also seen as being an important plank in ensuring that consumers make better choices.<sup>9</sup> Mandatory written contracts – with disclosure provisions – are unlikely to occur in all cases in the absence of a regulatory requirement.

Alternatively, it would be possible to design a package that is tougher (i.e. a stronger regulatory intervention). Such a package would imply a change to the joint and several liability framework to a proportional liability framework, combined (most likely) with a move to mandatory surety.<sup>10</sup> At this stage, this approach is not favoured.

Mandatory surety was considered in some detail and significant costs and risks were identified including:

- likely increases in the upfront direct costs of building in the order of 1% of the total cost of building
- risks of provider failure, as evidenced by recent experience of insurer failure as well as providers exiting the market for home warranty insurance in Australia
- the potential to erect barriers to entry, which would potentially come at a high economic cost because of the need for industry capacity to respond to changes in demand
- risks of curbing innovation in the sector, as surety providers may take very cautious approach when writing and pricing surety products
- risks that surety providers may act as de facto regulators of builder competence and building quality, overlapping with the role of building consent authorities and licensing boards.

<sup>9</sup> It is worth noting that in the case of areas that potentially have a high cost to the Crown and wider economy (dispute resolution and surety), the package proposes a ‘middle way’ rather than the strongest possible intervention.

<sup>10</sup> Currently, approximately 50% of new builds are covered by the surety products available in the market. It is likely that proportion will increase assuming the proposed policy changes are promulgated.

In addition, certain critical precursors to full market provision of surety are not in place:

- comprehensive licensing of building practitioners
- a building regulatory environment that continues to change, increasing uncertainty for potential product providers
- the absence of good data on practitioner competence and building quality, making it difficult for surety providers to design and price product, and
- the absence of an effective framework for prudential and market conduct regulation for surety products.

Officials have also considered arguments for shifting to proportionate liability, which would be a major change to the liability framework. While not without benefit, it would also have drawbacks including likely requiring mandatory surety (see Box 1 below).

In terms of the final element of Table 1, the provision of information, there is no 'perfect amount', although a significant effort is warranted. It is important that there is sufficient funding to ensure that all parties involved have a clear understanding of their respective rights and obligations (noting that it is not practicable, for example, to ensure every consumer is fully informed).

**Box 1: Joint and Several vs Proportionate Liability**

Under joint and several liability all of the parties who contribute to any given building defect through their negligence are jointly and severally liable to the plaintiff for the costs of the defect. When more than one party has contributed to the defect, the costs of the defect are initially apportioned taking into account the role each party played in contributing to the damage.

In the event that one or more of the negligent parties is unable to meet its share of the costs, these costs are apportioned between the remaining parties. Some parties, such as local authorities, can become 'deep pockets' when other parties cannot be held to account, because of their key roles in building work and their strong capital positions or (in the case of local authorities) because of their statutory presence and power to rate. In practice in weathertightness cases, this has seen local authorities carrying between 40 and 70 percent of the total cost of settlements. It has also seen other parties pursued and found liable for amounts that they perceive as out of proportion to their actions.

The following comments were received through submissions concerning the operation of joint and several liability:

- i) That it is incompatible with the general principle that each party should be accountable for what it does
- ii) That it is contributing to high costs and restricted supply of professional indemnity insurance that professions and others consider critical to managing their risks if they are to be held accountable. This is because a person with professional indemnity insurance can become a 'deep pocket'; in the event that other parties have ceased to trade
- iii) That it is creating perverse incentives for building professions, contractors and trades to structure their affairs and operate in ways that minimise their exposure to the costs of joint and several liability, by for instance the use of project specific companies or by limiting the scope of their roles and exposure to building work, and that these practices are not to the general benefit of consumers
- iv) That it is contributing to defensive and risk averse behaviour by local authorities, because they are deep pockets, that is resulting in more inspections and greater compliance costs than are necessary.

The issue in replacing joint and several liability with proportionate liability is that while there can be greater certainty for designers, builders, regulators and others involved in building work, there is less certainty and potentially greater costs for consumers when things go wrong. In Australia, home warranty insurance has been mandated as the states changed from joint and several to proportionate liability. Recent experience with mandatory insurance in Australia indicates that mandatory home warranty insurance is expensive and that direct government underwriting or provision can be necessary to ensure continued supply.

## **Section Two: Streamlining consent procedures, setting clear rules and expectations (improving the Building Code) and improvements to the effectiveness and efficiency of how the system is administered**

### **Part 1: Streamlining consent procedures**

The proposals are to exempt some building work from consenting and inspections completely – through the addition of particular building activities to Schedule 1 - and to introduce a stepped risk-based system that would see consenting and inspection effort by building consent authorities more tightly focussed on that building work where the greatest risk exists.

The key elements of the proposed stepped consenting system involve:

- no building consent requirements for a broader range of the most low-risk work with consequential benefits in terms of reduced compliance costs
- a streamlined building consenting process for some low-risk work that checks that certain conditions are met (for example the work is undertaken by a licensed building practitioner) but involves almost automatic consent and no inspections
- a simplified and more prescribed consenting process for certain simple residential building work at the lower-risk end of the spectrum (e.g. simple single-storey buildings with low structural and weathertightness risks), putting more reliance on the skills and experience of licensed building practitioners but retaining some limited involvement of building consent authorities in compliance checking
- existing consenting and inspection requirements for moderate- to high-risk residential building work, and for lower-risk building work not involving a suitably qualified building practitioner, until such time that it is clear that regulatory oversight could be further reduced without compromising quality, and
- new building consenting processes and requirements for commercial buildings, to provide for reliance on third-party (non-building consent authority) review and quality assurance processes as an alternative to the current consenting and inspection requirements provided certain conditions are met.

Increasing the scope of exempt building work, through Schedule 1, is (very) conservatively expected to reduce consenting volumes by approximately 5%.<sup>11</sup> Streamlining the consenting process for non-Schedule 1 simple buildings is also expected to generate a significant reduction in the consenting and inspections workload of building consent authorities.<sup>12</sup>

<sup>11</sup> Schedule 1 refers to construction of relatively basic structures for example carports and low decks).

<sup>12</sup> It is not entirely clear how many buildings will fall into each category. It is estimated that of the 70,000 building consents issued annually for works of more than \$5,000; 3,000 fall into Schedule 1, 20,000 are simple buildings, 16,500 are commercial buildings, and 30,500 fall into the other category. There are also approximately 20,000 consents issued per year for work of less than \$5,000. These will predominantly fall into either the simple building category or Schedule 1.

A reduction in consents and inspections not only reduces the direct costs of building work, in the form of reduced fees and charges, but also reduces the indirect compliance costs associated with time delays caused by the consenting and inspection process. Modelling by NZIER suggests that introducing an accelerated and more streamlined consenting process for simple buildings would generate large savings for consumers (approximately \$118m per annum once streamlining of consents is fully implemented).<sup>13</sup> While there are benefits in terms of administrative efficiency, the bulk of the savings would come from reduced time delays and associated 'deadweight costs' incurred by households. These deadweight costs include home owners having to rearrange their affairs while building work is completed (e.g. rent alternative accommodation) as well as holding costs.

Reducing consenting and inspection workloads has knock-on effects for building consent authorities. One likely impact of the proposed streamlined consent processes is that building consent authorities will focus principally on higher risk work, where the consent and inspection system currently adds most value. By specialising in this work, the quality of regulatory decision-making would be expected to increase, and there may be further gains in administrative efficiency as a result.

Proposals to develop a streamlined consenting process for commercial buildings could further reduce consenting volumes for high value projects, although any gains in administrative efficiency are expected to be minor as this building work represents a low proportion of consents, and most building consent authorities contract out third-party review functions because of the complexities and specialised skills involved.

The proposals to require an up-front risk assessment of the development for commercial buildings, leading to a quality assurance plan agreed by the building consent authority and the owner, are designed to support and facilitate effective business practice. For many owners and developers, there will be little change from the present; the commercial risk currently lies with developers and owners so they currently have incentives to ensure that quality assurance systems for building construction are appropriate. There is no evidence of systematic poor performance in this sector. The proposals to allow building consent authority checks to use independent third parties around the implementation of agreed quality assurance plans are essentially a formalisation of existing practice.

A consequential impact of the reduction in workload and the associated building fees and charges is that some building consent authorities may need to reduce their building inspection workforce. As a result, the changes will not result in building consent authorities having surplus capacity. Further, it is possible building consent authority revenue may decline by proportionately more than the reduction in consenting and inspection volumes, since there is a fixed cost element to building consent authority cost structures.<sup>14</sup> Consequential increases in building consent fees for the 'other' category building work, and other building controls work that remains with the building consent authorities, may therefore occur following the changes.

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<sup>13</sup> See [www.dbh.govt.nz](http://www.dbh.govt.nz) for details.

<sup>14</sup> The building consent and inspection fees on low value work tend to represent a higher proportion of the value of work than the fees on higher value work.

Significant reductions in consenting volumes are likely to raise questions about the viability of the current distribution of building control functions across 75 local authority building consent authorities. Each building consent authority incurs fixed costs associated with accreditation, registration and monitoring by Department of Building and Housing and the maintenance of their own systems and processes. Further, the small scale of building consent authorities mean there may be savings associated with alternative institutional arrangements for building control administration.

Other compliance costs associated with the fragmentation of building control functions relate to inconsistent decision-making across building consent authorities. This increases transaction costs for producers operating across multiple jurisdictions (e.g. national operators) particularly where novel designs, building systems or products are involved. In particular, manufacturers and distributors of certain types of building products incur significant costs because of the need to 'educate' each building consent authority about their product's scope of use and its relationship to the requirements of the Building Code. There are potentially significant reductions in compliance costs associated with a more nationally consistent approach. The ongoing work around possible consolidation and centralisation of building regulation is important in this regard. This is discussed later in this document.

A number of the options are designed to clarify the purpose of building regulation, improve the specificity of building performance standards and their presentation (e.g. around building types), and improve accessibility to the Building Code, Compliance Documents, Standards and other supporting information. These changes will benefit both producers and building officials and are expected to reduce transaction costs associated with establishing Code compliance. These benefits have not been quantified.

The package of options to simplify, streamline and consolidate the system of building controls is expected to have economic benefits beyond the saving in compliance costs. Many of these wider benefits are dependent on the interactions between elements of the whole package, including those elements relating to the rebalancing of risk and responsibility, and the strengthening of consumer supports.

The key to ensuring that reduced inspections and consenting processes do not result in decreases in building quality in Schedule 1 and simple building projects is the effectiveness of the consumer package, and in particular, the effectiveness of the contracting and disclosure arrangements. In addition to the consumer package, and in order to minimise risk, it is proposed that building work for the vast majority of these projects can only be carried out by licensed building practitioners (LBPs).<sup>15</sup> A key element in the reduction of associated risks is to ensure that the regulations pertaining

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<sup>15</sup> A significant process has been underway for some time to ensure that building practitioners are appropriately licensed. There is a move to making the scheme – the Licensed Building Practitioners (LBP) Scheme – qualification based (it is currently competency based). There is also an accountability element implicit via a complaints procedure. See <http://www.dbh.govt.nz/lbp> for information on Licensed Building Practitioners.

to the streamlining of consents are not promulgated until sufficient progress has been made with other elements of the package.<sup>16</sup>

### **Judgements and Options**

The key judgements, and options considered are not around the conceptual underpinnings of these proposals, but rather around the balances implicit. One option that was considered was to increase the types of building activities added to Schedule 1, albeit that some of the buildings may have some conditions attached (i.e. that the work must be undertaken by a licensed building practitioner). Essentially, the ultimate recommendation to require at least a level of consenting (albeit with lower levels of inspections than present) on most building activities reflects a judgement around the risks implicit.

As alluded to above, the important future judgement in this area will be around the promulgation of the regulations that essentially 'turns on' the stepped consenting regime. It would not be appropriate to press on with stepped consenting until the appropriate pre-requisites have been met. While this may reduce some of the possible efficiency benefits discussed in this document (especially those quantified by NZIER), it would be the appropriate course of action so that there are not undue risks on building quantity going forward.

### **Benefits and Costs**

In addition to the benefits discussed above, there are costs associated with further development of the package of options, consultation on those options, and their implementation. Some or all of these costs would be passed on to consumers, and may fall disproportionately on those consumers who undertake higher risk building work. However, the overall reduction in compliance costs is expected to more than offset these costs. Overall the greatest benefits are likely to be realised by those classes of consumers that are currently facing the highest risks and costs of defects and disputes.

Many of the costs and benefits have been quantified. This is set out in Table 3 below (where quantification has not been possible, some comment has been made). The quantified benefits easily outweigh the quantified costs but, as noted above, will only accrue if stepped consenting is 'turned on' – and stepped consenting should only be turned on if the risks associated with stepped consenting can be appropriately managed.

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<sup>16</sup> The recommended report to the Minister of Building and Housing that will comment on progress around developing a better understanding of the Building Code, greater practitioner competence, improved consumer support arrangement, and an effective monitoring regime to ensure building quality is maintained or improved is pivotal in this regard. Essentially, these factors are pre-requisites to promulgation of the stepped consenting regime.

**Table 3: Benefits and costs of stepped consenting**

	Implementation costs	Ongoing costs (\$m/yr)	Benefits (\$m/yr)	Comment
<b>Schedule 1 consenting changes</b>				
Time savings (owner benefits)			\$1.3 m (time savings)	Estimated by NZIER
Consent fee and inspection fee savings (owner benefits). Assumed that owners still face costs of lodging.		\$0.1 m (enforcement increase)	\$1.4 m (reduced consent fees) \$0.7 m (reduced inspection fees)	Possible costs of smaller Building Consent Authorities running unsustainable units. E.g. higher consent fees elsewhere or increase in rates.
<b>Targeted residential consenting (simple buildings)</b>				
Time savings			\$118 m (time savings)	Estimated by NZIER
Reduced fees	\$1.15 m (Building consent authority restructuring costs)		\$4.4 - \$7.1m <sup>17</sup>	May take time to realise savings as restructuring and information costs will need to be recovered
Reduced inspections	\$5.4 m (Building consent authority system changes)		\$7.0 - \$11.3m	
Reallocation of responsibility	\$5 m (Sector spending time learning about code, adjusting to new responsibilities etc)	Ongoing skills maintenance – costs already part of occupational regimes.		Although it is intended that there is an increase in building quality <sup>18</sup> , it is possible there is some reduction in building quality in short term for non-critical work
Homeowners		\$0.1 - \$0.3 m (private building inspections) <sup>19</sup>		
Monitoring system for	\$0.7 m	\$0.6 m	Better building quality	

<sup>17</sup> Fees for smaller building consent authorities areas may not reduce as overheads could be spread over smaller numbers of consents. Indeed, it has been noted through analysis of submissions that territorial authorities (TAs) would have fewer building consent authority staff (with less work and little revenue stream from simple work). Some may find it hard to maintain a viable building consent authority team without increased costs to remaining consent applicants or rates/other subsidy. Territorial authorities would spend more time answering enquiries around what is exempt work, about whether work been carried out under an exemption, who is a licensed building practitioner, what to do when things are going wrong etc. Much of this additional work would be funded out of rates, not consents, unless an alternative is devised.

<sup>18</sup> From increase in knowledge (from implementation training) and from sector wanting to minimise their own liability from risk of failure for work not checked by Building consent authority.

<sup>19</sup> Some homeowners may choose private inspections because of reduced building consent authority role.

## Appendix 1

targeted consenting			outcomes from targeted interventions.  Early warning system to detect failures <sup>20</sup> .	
Department of Building and Housing implementation costs (guidance, roadshows, education Licensed Building Practitioners)	\$1.0 m			
<b>Complex commercial building work</b>				
Building owners	Cost of developing quality assurance system if not one already <sup>21</sup>	Increase in peer review costs (transfer from regulator to building contractor). Risk profile development	Improvement in building quality outcomes. Better commercial outcomes. Significant reduction in level of rework. Reduced regulator costs.	

<sup>20</sup> This monitoring regime does not include systems to detect systemic failure. It solely examines whether targeted consenting is working as expected and if the policy settings (e.g. scope and nature of checks) are needed.

<sup>21</sup> Research shows significant commercial benefits from a quality assurance system, such as significant reductions in rework and on time delivery. An Australian study showed the failure (rework costs) changed from 10 to 2% of project cost representing an economic savings of 7 percent.

## **Part 2: Setting clear rules and expectations (improving the Building Code)**

Submissions to the Building Act review and other feedback show that, while the framework supporting the Building Code (the Code) is conceptually sound and in accordance with international best practice, building professionals, trades people, and building consent authorities sometimes have difficulty accessing and understanding the Code and other documents that make up the Code framework. A separate RIS would be needed if any of these options were to be pursued.

Significant work is underway (and proposed to continue) to improve the specification of parts of the Code, especially where performance requirements are unclear. This is designed to reduce the costs of design and improve efficiency of the interface between building professionals, building consent authorities and other parties (e.g., Fire Service Commission Design Review Unit).

The work will include:

- investigating the feasibility of establishing an expert advisory service to provide advice about Code compliance where it is unclear whether an innovative design meets Code performance requirements
- developing an education programme for building practitioners, working with existing education providers to address knowledge gaps and to ensure that more resources are devoted to education.
- developing protocols and guidance to improve the interface between the building regulatory system and the New Zealand Standards system
- developing a detailed business case with options for the integration of the information contained in the various documents, including New Zealand Standards, that make up the Code system so that it can be accessed, or sorted, according to building type, location and/or the different parties involved in the building process; this will include options for making better use of information technology and will be integrated with the work on consolidating the administration of building regulatory requirements.

It is anticipated that improved clarity and accessibility of the Code and related documents will improve compliance with the Code and reduce costs for building practitioners. It should also aid the development of a more consistent approach nationally.

Improved specification of, and accessibility to the Code is a fundamental prerequisite for an effective and efficient performance-based regulation. It is anticipated that the benefits, especially in problem areas such as fire, will outweigh the costs involved.<sup>22</sup> Accessibility to the Code is an important enabler of the benefits of other aspects of the reforms, particularly the stepped consenting system.

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<sup>22</sup> This has not been quantified.

### **Part 3: Improvements to the effectiveness and efficiency of how the system is administered**

The proposal is to seek agreement on the attributes of a nationally consistent and administratively efficient building regulatory system that would then provide the basis for further work on a preferred approach to improving the performance of the building regulatory system. As such, no regulatory policy decisions are currently sought and the following analysis of costs, benefits and risks is preliminary only.

Officials have developed and explored two options for improving building regulatory system administration, for the purposes of testing at a high level whether or not the benefits of administrative reform would justify the costs and risks of achieving it.

Two specific options<sup>23</sup> were considered in some depth:

- a regionalised option – that would result in the establishment of a small number of regional hubs that would provide management and back office support for the local delivery of building consent inspection and enforcement services, and
- a centralised option – that would result in delivery of building consent functions by a single national entity supported by its own regional service centres. This option would see central government assuming greater responsibility. It would require the development of a national consenting capability, which would be supported by regional processing centres, along with national specialisation for specific consenting categories or issues such as those involved with complex commercial buildings.

Both options are enabled by developments in, and reductions in the cost of information technology. Both options would retain and build on the current national regulatory functions performed by the Department of Building and Housing.

The options analysis confirms there both options have the potential to generate significant savings and productivity improvements and would:

- improve the consistency of consumer experience and the quality of decision-making
- reduce costs of consent production by an estimated 40%
- achieve estimated consumer benefits and operational savings around \$250m over five years (i.e. one years total operating costs every five years)
- decrease the costs of building consent and inspection services for consumers
- translate to time and money savings that reduce drag on sector productivity.

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<sup>23</sup> The Building Act Review Discussion Document (February 2010) mentioned that “this work will consider a wide range of alternative arrangements, including clustering options that could, for example, see building consent authorities operating on a regional rather than district basis, providing building control functions across several territorial authority districts. It will also explore the costs and benefits of greater consolidation of building consent functions nationally and the scope for private provision of building regulatory services.”

Both options would require central government investment, as well as leadership, legislative change, and coordination of the development of a national system. Both options have associated impacts and risks. In particular, local government operations would potentially be significantly impacted, particularly under the centralised option. Both options would involve financial impacts on local government. Change may also affect how local authorities operate associated functions such as resource management consenting. There is a risk, largely controllable through the approach to implementation, that this proposal could result in a less customer-centric approach to the overall development (land and building) process.

## **Section 3: Risks, conclusions and related matters**

### **Risks of the overall package**

The overall dynamic effects of the package are based on assumptions that the package will result in significant changes in behaviour by consumers, building practitioners and building consent authorities. In short, residential consumers and building practitioners will take more responsibility for their roles in the building process, and less reliance will be played on the system of building controls to manage and safeguard quality in the building process. The package also introduces a greater role for insurers and surety providers in the identification and management of risk, which is expected to significantly alter the dynamics in the sector around risk management.

One risk of the package is that practitioners and their backers, faced by greater exposure to risk and liability, may adopt a very conservative approach. In effect, the highly risk averse approach taken by building consent authorities may transfer to other parties in the system. The design of warranties and any surety arrangements, and striking the right balance in the overall package, is key to ensuring the costs of the package do not outweigh the benefits.

A further risk of the package is its potential to raise barriers to entry and/or raise the costs of participating in industry. In particular, there are concerns about how new entrants to the industry, small operators, and DIYers will be affected by the changes. It is possible that certain classes of people may be 'priced out' of the industry, which can be seen as both beneficial (e.g. for practitioners whose skills are not sufficient for the work they are doing) and costly (e.g. if this impedes the ability of the industry to respond to increases in demand). The ability of the construction sector to expand in response to increases in demand is an important factor in the overall supply-side responsiveness of the housing market, with implications for the cost of building and housing affordability. Of course, even though times may be 'good' in the construction sector at any given moment, there is no reason to drop building standards.

One specific risk in this regard relates to the way in which the structure of the building sector evolves. Currently, the building sector is predominantly made up of sole traders and small and medium enterprises (SMEs). If there were to be a significant number of SMEs drop out of business – and transfer to larger firms (and if those larger firms were to be more expensive for little/no added value) – then the reforms would not be beneficial overall.

It is not clear that this will be the case however. While there will be some increased costs, to a large extent the changes proposed are an attempt to codify – and make mandatory – practices that are occurring in many cases at present. For many of the better building practitioners, the changes to operating practices to comply with the proposed reforms are likely to be relatively small. There are good reasons, around specialisation of skills, why the existing industry structure has evolved.

Many of the changes to simplify and streamline the consenting process assume that there will be a sufficient supply of competent practitioners to access the new

processes, and that these practitioners will have sufficient incentives and abilities to ensure work is performed to a high level. In other words, the changes rely on the entry requirements for the Licensed Building Practitioner Scheme being sufficient to ensure licensed building practitioners have the skills necessary to perform simple building work with a lesser degree of third party review, while not being so onerous that there is an insufficient supply of licensed building practitioners when the restricted work scheme comes into effect. If these assumptions are incorrect, then there are risks that the benefits of streamlining will be overstated. The interface between the licensed building practitioner scheme and other package elements will be a key focus in monitoring initiatives, and potentially, in future policy development work.

## Consultation

A Sector Reference Group and Sector Working Groups made up of members of the building industry, local authorities and consumer advocates have provided strategic and operational input into the review, ensuring that the sector's issues and concerns are addressed by the options under consideration, and that the Department's analysis is robust when viewed from the sector's perspective. The Sector Reference Group has provided input into regulatory impacts of the options.

An Officials Reference Group has been consulted throughout the review process and have seen and commented on drafts of this assessment. Relevant departments have been consulted on the Cabinet paper developments.

Further to this, the Department of Building and Housing analysed the 381 submissions that were received on the Building Act review discussion document (February 2010), as well as the comments received through the public meetings (approximately 1000 people attended meetings around the country to discuss the proposals). Significant differences exist between the proposals set out in the discussion document and those currently proposed, particularly in the areas of moving towards more a stepped consenting approach (both Schedule 1 and simple building work).<sup>24</sup> This is as a result of submissions received, ongoing discussions with the Sector Reference Group, and further analysis that was undertaken. A submissions summary is to be published.

Key findings from the consultation exercise are as follows:

- i) there are gaps in designers and builders knowledge and understanding of the minimum requirements set out in the Building Code
- ii) designers, builders, consumers and building consent authorities are not always clear on who is accountable for meeting Building Code requirements and what they can rely on others for. For instance, many designers believe that they should be able to rely on builders to construct their designs to meet Building Code requirements without the designer needing to specify all of the necessary detail, while many builders do not believe they need to know relevant Building Code clauses. Both believe that they can rely on

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<sup>24</sup> The changes have essentially added more checks and balances to, and reduced the scope of, the previous proposals in order to reduce risks implicit.

building consent authorities to identify and correct inadequacies in their work

- iii) there is a heavy reliance, especially since the weathertightness crisis, on building consent authorities by consumers, designers and builders to provide quality assurance and to ultimately underwrite the quality of residential building work when things go wrong.
- iv) designers and builders are unwilling to accept accountability for the quality of their work if it means them being exposed to all of the costs of building defects (including those attributable to any other parties that cannot be brought to account)
- v) there are gaps and weaknesses in the measures in place to support consumers in their purchase of building work, to resolve disagreements or disputes with building contractors, and to hold building contractors to account for the quality of their building work; and
- vi) skill deficits are a major concern for many people, across all areas (building consent authorities, designers and builders, and consumers), and are a constraint on reducing the role of building consent authorities.

### **Conclusions and recommendations**

Officials are of the view that the overall direction and balance of the package is sound. The package is quite nuanced, particularly the consumer package. Significant consideration has been given to ensuring that the correct incentives are created on the various players in the sector. It will be important to ensure that industry progress is sufficiently monitored as it is not possible to be entirely confident as to the way in which a complex industry will react in the face of changes to the regulatory system.

The package will take time to bed in, and the benefits are likely to accrue gradually. It will take time to develop the strength of the sector, and a strong and vibrant building sector lies at the heart of a highly-performing industry.

In particular, the package of measures is crucially dependent on the nature of the dynamics that develop, and the extent to which the proposed package leads to positive innovation. There is a risk that some players react in a very risk-averse manner, and that opportunities for improvement are lost.

The specific dynamics in the industry that are most important relate to the response of the building industry to the changes. The package is intended to incentivise poorer performers to improve their game, or if this is not possible, to, at the extreme, exit the industry. Additional costs will be created in terms of an increased reliance on surety products etc, and the balance of these costs have to be weighed against the benefits to be gained.

There are judgements around the margin of the policy, and future decisions – and the extent to which implementation challenges are met – will influence the effectiveness of the policy. Officials are of the view that the overall benefits outweigh the costs when compared to alternatives. While there can be debate around the margins of the policy proposed – and there are important decisions to come, the policy package is superior to others available.

## **Implementation**

A key part of the implementation of the package (in addition to proposed legislative changes) relates to the communication of the changes involved. Activities are planned to work with the construction industry, building consent authorities and consumers around both the consumer package and the streamlining of consent processes.

Many of the changes sought are behavioural and attitudinal as opposed to structural. For this reason, much of the implementation of the programme is focused on communication. Having said this, support is planned for the development of a broader market for relevant insurance products and facilitating improved dispute resolution.

The sequencing of promulgation of the various elements of the package is important. In particular, while there should be relatively quick progress made in terms of the introduction of mandatory contracts with disclosure requirements, consumer information, and dispute resolution procedures, it would be unwise to progress strongly with a move to more streamlined consenting until a number of pre-requisites are in place.

The reduction in the volumes of consent and inspection work for building consent authorities is likely to strengthen the case for moving towards a more consolidated / centralised model for managing the consent process. This is not a given however; there are significant costs involved (and a number of options exist), so evaluation of the alternatives is desirable.

A further implementation requirement relates to ensuring compliance with the new requirements related to contracting, disclosure and checklists. This has not yet been developed but will be subject to a report to Ministers.

## **Monitoring, evaluation and review**

The changes are complex and in a number of cases implementation is dependent on certain pre-conditions being in place. There is a need for an effective monitoring and evaluation strategy, to assess impact as changes are rolled out and to help in informing decisions about when to bring certain regulatory changes into force. The Department has work underway to develop its evaluation and monitoring approach, building on existing monitoring strategy for the sector. This will include but not be limited to:

- monitoring sector capability and building practitioner competence
- monitoring building quality and defects

- monitoring development of the market for surety products
- monitoring the overall efficiency and effectiveness of the system of building control administration, including compliance with changes to the consenting and inspection system and consent processing times
- ongoing monitoring of building consent authority capability related to the accreditation programme, with particular emphasis on smaller building consent authorities because of the disproportionate impacts of the stepped consenting proposals on them.