Local Government New Zealand
te pūtahi matakōkiri

Submission to the Local Government and Environment Select Committee on the Building Amendment Bill (No.3)

From *Local Government New Zealand*
4 March 2011

114–118 Lambton Quay, Wellington 6011, PO Box 1214, Wellington 6140, New Zealand | **Phone:** 64 4 924 1200 | **Fax:** 64 4 924 1230 | **www.lgnz.co.nz**

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INTRODUCTION

1. *Local Government New Zealand* thanks the Local Government and Environment Committee for the opportunity to make this submission in relation to Building Amendment Bill (No 3).

2. *Local Government New Zealand* makes this submission on behalf of the National Council, representing the interests of all local authorities of New Zealand.

   It is the only organisation that can speak on behalf of local government in New Zealand. This submission was prepared following consultation with local authorities. Where possible their various comments and views have been synthesised into this submission.

   In addition, some councils will also choose to make individual submissions. The *Local Government New Zealand* submission in no way derogates from these individual submissions.

3. *Local Government New Zealand* prepared this submission following:

   - an analysis of the Building Amendment Bill (No 3)
   - analysis of all feedback from councils.

4. This final submission was endorsed under delegated authority by:

   - Lawrence Yule, President, National Council
   - Celia Wade-Brown, Mayor, Wellington City Council
   - Eugene Bowen, Chief Executive, *Local Government New Zealand.*

5. *Local Government New Zealand* wishes to be heard by the Local Government and Environment Committee to clarify the points made by this written submission as necessary.

RECOMMENDATIONS

6. *Local Government New Zealand* makes the following recommendations:

   - it is not proposed to move to proportionate liability in law. It is our strong preference to amend the law to proportionate liability to effectively achieve the rebalancing of accountabilities this Bill purports to achieve. The warranty system (and surety backstop) are also critical and must be mandatory for new homes and major alterations. We are strongly opposed to any streamlining of consent proposals until the contract, warranty and surety system and proportionate liability are in place

   - the provision 52H(2)(a) indicating building control authorities do not have to look at plans and specifications is ineffective and contrary to provision 52H(2)(b). Interpretation of 52H(2)(a) is arguably even more ambiguous when considered in conjunction with clause 14A which discusses responsibilities under the Act and then states these responsibilities are not definitive and for guidance only. Amend by removing provision 52H(2)(a) or by strengthening the protection from liability provision in 52I(1)(b)

- 52L(1)(b)(ii) says building consent authorities must grant a simple residential consent if "*the building work in the prescribed aspects (the Prescribed aspects) of the plans and specification accompanying the application will comply with the building code."* Clause 52L(2)(a) contradicts this stating a building consent authority "*is not required to consider*" the compliance with the building code. Amend 52L(2)(a) to be consistent with 52L(1)(b)(ii)

- amend 94C with the addition of a new provision similar to that in proposed section 52M(1)(b) (that a BCA incurs no liability to any person by reason only of not making certain inspections)

- insufficient attention has been given to the relationship between the proposed provisions for stepped risk-based consenting and inspection and the Act's existing provisions that apply to all classes of building consent, such as section 112 (alteration of existing buildings) and section 71 (building on land subject to natural hazard). Clarify in regulations

- with implications for accountability and building control authority workloads, it is imperative that local authority experience and expertise is used in the development of the regulations. We strongly recommend that representatives of local authorities are engaged in the development of the regulations for the proposed building consent categories.

LOCAL GOVERNMENT NEW ZEALAND POLICY PRINCIPLES

7. In developing a view on the provisions in this Building Act Amendment Bill No 3 we have drawn on the following high level principles that have been endorsed by the National Council of *Local Government New Zealand*. We would like the Local Government and Environment Committee to take these into account when reading this submission.

    - **Local autonomy and decision-making:** communities should be free to make the decisions directly affecting them, and councils should have autonomy to respond to community needs.

    - **Accountability to local communities:** councils should be accountable to communities, and not to Government, for the decisions they make on the behalf of communities.

    - **Local difference = local solutions:** avoid one-size-fits-all solutions, which are over-engineered to meet all circumstances and create unnecessary costs for many councils. Local diversity reflects differing local needs and priorities.

    - **Equity:** regulatory requirements should be applied fairly and equitably across communities and regions. All councils face common costs and have their costs increased by Government, and government funding should apply, to some extent, to all councils. Systemic, not targeted funding solutions.

    - **Reduced compliance costs:** legislation and regulation should be designed to minimize cost and compliance effort for councils, consistent with local autonomy and accountability. More recognition

needs to be given by Government to the cumulative impacts of regulation on the role, functions and funding of local government.

- **Cost-sharing for national benefit:** where local activities produce benefits at the national level, these benefits should be recognised through contributions of national revenues.

COMMENTS

8. Local authorities carry out administrative functions for the Building Act 2004 (the Act) under delegation from the Crown. Day to day administration of the Act generally occurs under national policy and national building code / standards, not local policy. Administration by local authorities provides service delivery that is locally accessible, and sits alongside related regulatory and property based services.

9. Local authorities were initially supportive of the review of the building regulatory system. The objectives of the review, as outlined in Building Act Review: Cost effective quality-next generation building controls in New Zealand discussion document , is that New Zealanders will have cost effective, quality buildings that:

    - are designed and built by skilled, capable people who stand behind their work
    - meet or exceed minimum requirements that are clear and widely known
    - are constructed according to clear, upfront, contracted agreements between all parties about what is going to be built, how any faults will be fixed and how arguments will be resolved
    - are appropriately maintained by well informed owners.

10. Five elements of a programme of change were identified to deliver on these objectives: the need for a skilled workforce who stand behind their work, minimum requirements that are clear and widely known, clear upfront contracted agreements, well informed owners, and regulatory control targeted to the level of risk.

11. Work is also being undertaken to identify a preferred approach to deliver a nationally consistent and administratively efficient building regulatory system. The two options proposed at this time are central or regionalised administration of building regulation. Department of Building and Housing presentations at sector meetings in February 2010 represent the most extensive and robust consultation to date. The message from representatives at these meetings was clear. Local authorities, across the board, are unequivocally opposed to the specific exclusion of the status quo as an option for administration of the building regulatory system.

12. We note Clause 2 of the Bill to enable different provisions to be brought into force at on different dates. As discussed in the *Local Government New Zealand* submission on the discussion document in April 2010, reform proposals will only achieve the objectives of the review if they are advanced together. It is difficult to respond to the proposed Building Amendment Bill (No 3) in the absence of certainty on the outcomes of discussion on the wider reform, and more specific to this Bill, the detail on

what constitutes low risk building, and simple consents for example, to be developed in regulations.

13. Local authorities strongly support the intent of the proposed amendments to rebalance and more appropriately allocate responsibility and accountability between consumers (homeowners), building consent authorities and building professionals. For too long local authorities have borne an unfair burden and been unfairly relied on to meet homeowner expectations for quality building under the existing regime. We believe that under the proposed amendments, building consent authorities (currently this equates to local authorities) continue to be exposed to potential liability albeit reduced.

Summary of concerns

In brief local authorities concerns can be summarised as follows:

- the piecemeal approach to reform rather than the development of a single draft legislation that deals with all issues in an integrated way. For example, customer protection will be addressed in further amendments to the Building Act and other aspects of reform that are not yet certain; the provision of warranty and surety system and a decision on proportional liability

- the proposed administrative arrangements for building consenting. The apparent exclusion of the status quo as an option for the administration of the Building Act is unequivocally opposed by local authorities. The proposals for regional or central administration, excluding the status quo, violate fundamental principles of good policy development i.e. robust, evidence based problem definition from an analysis of the status quo, and participative processes that recognise the legitimacy of competing interests. Local authorities have invested considerable time and effort in the building consent authority accreditation scheme which was also "*designed to help improve the control of, and encourage better practice and performance in, building design, regulatory building control and building construction."* Given the similarity in the goals of the Department of Building and Housing work, i.e. the current review of administration of the Act and the accreditation scheme, it seems reasonable that any further changes to the administration of the Act should begin with a review of the status quo.

- too much of the detail for this Bill has been deferred for inclusion in regulations. This makes it difficult to accurately gauge the likely impact of the Bill on local authorities consenting and inspection operations. With the introduction of the low risk building category however, it can be safely assumed that there will be a significant reduction in building control authority workloads, with resulting employment implications

- insufficient attention has been given to the relationship between the proposed provisions for stepped risk-based consenting and inspection and the Act's existing provisions that apply to all classes of building consent, such as section 112 (alteration of existing buildings) and section 71 (building on land subject to natural hazard)

- the practical ineffectiveness of the provisions in the Bill intended to signal the accountabilities of the different people involved in building projects,

due to duty of care and hence residual liability, across all consent categories, and the penalty regime for low risk consents in particular.

Rebalancing accountability

14. Local authorities note that the streamlined proposals in the bill are reliant on competent building professionals who accept greater accountability and liability for their work at the design and construction stages. While a streamlined risk based approach is supported to ensure cost effective quality buildings, a streamlined approach should only be put in place alongside proposals for contracting and warranties, and a proportionate liability system. Without these changes in law, there is no reality to the rebalancing of responsibility and accountability.

15. Clauses 14B to 14F outline the responsibilities of owners, owner-builders, designers, builders, and building consent authorities. Clause 14A however states that clauses 14B to 14F
    (a) "are not a definitive and inclusive statement of the responsibilities of the parties but are an outline only:
    (b) are for guidance only, and in the event of any conflict between any of those sections and any other provision of this Act, the latter prevails: ..." .
    Clause 14A confirms that clauses 14B to 14F are not definitive, are for guidance only, and do not reflect legal responsibilities.

16. Under the existing joint and several liability regime, the injured party need not prove what contribution each wrongdoer made in causing the damage and he/she is not prejudiced if not all parties responsible for the loss are to be found, or are found to be insolvent or uninsured. Where two or more wrongdoers cause the same damage to the one person, the person suffering the loss can recover their entire loss in full from all, or any, of those liable. What this means for local authorities, is that they are often the only party available to sue or able to pay compensation.

17. Under a proportionate liability regime, the injured party can only recover from each liable person compensation of an amount that reflects that persons respective responsibility for the damage. The risk that one or more of the persons responsible for the loss are unavailable to sue rests on those who have suffered the harm and not any other party.

18. The Supreme Court has confirmed local authorities (as those issuing consent compliance certificates) duty of care in relation to the functions of issuing a building consent, conducting inspections of building work, and issuing a code compliance certificate (or consent completion certificate).

19. Local authorities do not believe there are sufficient practitioners with the necessary skills and knowledge to take on the responsibility of managing their own work without third party review. Given this and local authorities continued role in issuing compliance certification we strongly recommend an exception to the common law principle of joint and several liability to ensure Councils, and their communities, bear only their fair share of accountability.

20. Alternatively, a warranty system and surety backstop should be mandatory, particularly for new homes and major alterations. Providing such a system will ensure that local authorities are not subject to defective

building claims in the event of building contractors winding up their company. There are group housing companies that already offer warranties and may therefore be willing to accept this responsibility. They also have the longevity to be able to honour a warranty.

21. It is noted that this Bill is the first of two Bills to implement the Building Act review policy decisions. However, local authorities strongly support the inclusion in this Bill of either proportionate liability or a warranty system (with surety backstop) for builders carrying out major work.

Reorganised building consent provisions

22. In line with the objectives of the review of the Building Act, the Bill digest states the aim of the Bill is to change or clarify:

- building consent and inspection requirements
- building design and construction requirements
- the licensed building practitioners regime
- the law relating to DIY projects.

23. The Bill extends the requirement that a licensed building practitioner must carry out restricted building work to the categories of low-risk and simple residential building work.

24. Clause 46 outlines when an owner must apply for a building consent with clause 46(2) adding that *"an owner may make a series of applications for building consents for stages of the proposed building work."* Care must be taken to specify in the regulations, works that are clearly identifiable and low risk. Potentially owners could submit a series of consents to avoid meeting more stringent application of the building code. For example, how many separate additions do you exempt before it is a rebuild or significant alteration.

Low risk building consents

25. Building consent authorities will continue to issue consent compliance certificates, even for low risk building consents. It is assumed that the intention of the proposed amendments for the low risk building consent, is for consent completion certificates to be issued without inspection (although this is somewhat ambiguous in the legislation).

26. The Bill leaves the substantive question of what constitutes a low risk building consent to regulations. This creates a degree of uncertainty that is reflected in the previous discussion on rebalancing accountability.

27. The proposed amendments to the Act state that a building consent authority must grant a low risk building consent if:
Clause 52H(1) *"(a) the application complies with the requirements set out in Schedule 1A."*
(Schedule 1A outlines the requirements for application for low-risk building consent. Applications must:
Schedule 1A *"(d) contain or be accompanied by any other information that the building consent authority reasonably requires.")*

52H(2) says *"in considering an application for a low risk building work a building consent authority":*

> *"(a)is not required to consider whether the building work in all aspects of the plans and specifications accompanying the application will comply with the building code; but*
> *(b) may refuse to grant the consent if it considers that the building work may endanger the safety of a person or result in a significant building quality failure."*

28. In short the functions of a building consent authority are to:

- check that building consent application contains all prescribed information as per Schedule 1A
- confirm proposed building comes within the *"low-risk"* definition
- verify licensing status of licensed building practitioners identified in the application
- check that consent completion certificate application is complete
- verify there are no outstanding notices to fix
- determine that specified systems will meet performance standards in the consent, arguably, with no inspection requirement.

29. The intention of the amendments is complicated however, by the provision of a power for the building consent authority to decline to issue a low-risk building consent where it considers that the proposed building work may endanger the safety of a person or result in a significant building quality failure.

30. Because it is not part of a building consent authority's functions to determine code compliance issues, the risk of exposure to liability of the kind currently experienced in relation to leaky buildings is significantly reduced. A duty of care remains however, regardless of Clause 52I(1)(b) which states that a building consent authority that has issued a low risk building consent " incurs no liability to any person by reason only of not inspecting the building work in question at any time before the issue of a consent completion certificate."

31. Given that the Building Act review identified the risk adverse behaviour of local authorities (due to weathertight homes litigation) as a factor in increasing compliance costs, the ambiguity of clause 52I(1)(b) must be addressed.

Decision sought

32. The provision 52H(2)(a) indicating building control authorities do not have to look at plans and specifications is ineffective and contrary to provision 52H(2)(b). Interpretation of 52H(2)(a) is arguably even more ambiguous when considered in conjunction with clause 14A which discusses responsibilities under the Act and then states these responsibilities are not definitive and for guidance only.

    Amend by removing provision 52H(2)(a) or by strengthening the protection from liability provision in 52I(1)(b).

Simple residential building consents

33. As for the low risk building consent category, the Bill leaves the substantive question of what constitutes a simple residential building consent to regulation. The primary difference is that the building consent authority *"must , in accordance with regulations made under this Act, inspect building work to which the consent relates; but Incurs no liability to any person by reason only that the authority did not make inspections of the building work over and above the prescribed inspections" (*clause 52M(1)(a)).

    The prescribed inspections will also be determined in regulations.

34. Again, the building consent authority will owe a duty of care in relation to each of their functions. The ramifications of a finding of liability where a function is performed (or omitted) negligently are slightly greater than is the case for low-risk building consents, as the building consent authority will have a code compliance assessment and inspection role as part of this process.

35. 52L(1)(b)(ii) says building consent authorities must grant a simple residential consent if "*the building work in the prescribed aspects (the Prescribed aspects) of the plans and specification accompanying the application will comply with the building code."* Clause 52L(2)(a) contradicts this stating a building consent authority "*is <u>not</u> required to consider*" the compliance with the building code.

Decision sought

36. Amend 52L(2)(a) to be consistent with 52L(1)(b)(ii).

Commercial building consents

37. Clause 52X and 90(4) suggest that it is not mandatory for a building control authority to inspect under section 90, and carry out any sampling, testing, auditing and observation for a commercial building consent. However, section 94C(1)(b) indicates that it is mandatory *"that the requirements of the quality assurance system in relation to the observation and inspection of the building work have been complied with".*

38. Local authorities cannot assess whether this is a reasonable imposition because there is no information of what will be required in a quality assurance system, what might be required in relation to sampling, testing and inspection, and it is not clear what auditing is required which is mentioned in section 52X but not section 94C.

39. Furthermore the safety systems referred to in section 94(1)(c) are again to be defined in regulations.

Decision sought

40. Amend 94C with the addition of a new provision similar to that in proposed section 52M(1)(b) (that a BCA incurs no liability to any person by reason only of not making certain inspections).

CONCLUSION

41. It is unacceptable for local authorities to be submitting on a Bill when the requirements being placed on them are largely unknown. We again reiterate the need to progress all elements of the reform package together.

42. We acknowledge that the regulations for building consent categories will also be available for consultation but with implications for accountability and building control authority workloads, it is imperative that local authority experience and expertise is utilised in the development of the regulations.

43. The provisions in the Bill intended to signal the accountabilities of the different people involved in building projects, are practically ineffective due to residual liability (duty of care), across all consent categories. Local authorities continue to be exposed to liability risk.

44. Attention must be given to the relationship between the proposed provisions for stepped risk-based consenting and inspection and the Act's existing provisions that apply to all classes of building consent, such as section 112 (alteration of existing buildings) and section 71 (building on land subject to natural hazard).

45. *Local Government New Zealand* thanks Local Government and Environment Committee for the opportunity to comment on this Building Amendment Bill (No 3).