NEW ZEALAND LAW SOCIETY

NZLS EST 1869

BUILDING AMENDMENT BILL

25/10/2018

Submission on the Building Amendment Bill 2018

1 Introduction

1.1 The New Zealand Law Society welcomes the opportunity to comment on the Building Amendment Bill (the Bill).

1.2 The Bill amends the Building Act 2004 (the Act) and proposes new powers to improve the system for managing buildings after an emergency and to provide for investigating building failures. The Law Society suggests some amendments to ensure the Bill is clear and workable in practice.

1.3 The Law Society does not seek to be heard.

2 Meaning of "building"

2.1 The Building Act definition of "building" excludes a number of structures (section 9). Excluding those structures does not appear appropriate in the context of the objectives of the Bill.

2.2 Rather, there is a strong case for including some of the structures listed in section 9 of the Act as "buildings" for the purposes of the new Subpart 6B designations. At least the following appear to be in this category:

(a) network Utility Operator systems (section 9(a));

(b) pylons and power poles etc (section 9(ab));

(c) security fences, oil systems, wind turbines, gantries etc (section 9(ac)); and

(d) cranes (section 9(b)).

2.3 This highlights a further issue concerning the location of the intended legislation in the statute book. Instead of the substantive provisions being in the Building Act because they relate to buildings, the Law Society suggests they should be in the Civil Defence Emergency Management Act 2002 (CDEM Act) because they relate to powers and management decisions in emergencies. While emergencies are typically thought of as earthquakes, floods and perhaps fires, they could also be major gas leaks or even widespread power failures that affect the use of buildings.

2.4 It appears that the choice of statute has been determined by reference to the agency primarily responsible for the legislation, rather than the most appropriate positioning for those affected by and acting under the legislation in what will often be stressful circumstances.

3 New Subpart 6B: consultation issues

3.1 Clause 12 of the Bill inserts new subpart 6B (special provisions for buildings affected by emergency) into Part 2 of the Act. The explanatory note states:

> "The new subpart contains a scheme for the designation of areas affected by emergencies, whether or not a state of emergency or a transition period under the Civil Defence Emergency Management Act 2002 (the CDEM Act) is in place, and for the management of

buildings in a designated area that pose a risk. The new subpart includes provisions that address the scheme's interaction with subparts 6 and 6A of Part 2 and with the CDEM Act."[1]

3.2 Clearly a balancing exercise is required between risks to human life and damage to buildings and infrastructure on the one hand, and the rights of property owners and occupiers on the other. Unquestionably risks to human life must be a paramount consideration; however, it may be argued that the risk of damage to buildings and infrastructure should be weighed equally with the rights of the owners of the affected properties.

3.3 Several proposed provisions in subpart 6B allow for no, or very little, consultation with property owners about work that may be done under the exercise of the new powers. Although the powers will only be exercised in emergency situations, the Law Society considers there should be consultation (where possible) with building owners (and occupiers where appropriate), to ensure a transparent process. This is especially important where the building owner will be financially liable for some or all of the cost of the work.

3.4 The following new sections do not provide for any consultation:

a) Section 133BD: decisions about designation (other than termination).

b) Section 133BH: extension of designation.

c) Section 133BP: post-event assessments. Only the occupier's consent is needed.

d) Section 133BR: measures to keep people at safe distance and protect building. If a cordon is still in place after 3 months, it becomes the cost of the building owner but building owners are not required to be consulted. After 3 months, urgency cannot be said to be a justification for the lack of consultation. The Law Society suggests information should be provided about the cordon, timeframe, work to be done etc.

e) Section 133BS: notices and signs on buildings.

f) Section 133 BT: owner directed to give information. There is no consultation with occupiers. Obtaining information from occupiers about their business and the use to which the building is put may be useful for the management of buildings.

g) Section 133BU: urgent works to remove or reduce risk. Similarly to section 133BR, the costs are on the building owner yet there is no consultation requirement. The Law Society does note there is a requirement to consult with the Minister.

h) Section 133 BW: works for long-term use or occupation of building.

Consult if practicable

3.5 The Bill assumes a degree of knowledge of specific conditions and circumstances that a designation decision-maker simply may not have. Designations may be made, and certainly extended, with variations in the degree of urgency involved. The Law Society recommends that a "consult if practicable" provision be added to new section 133BD(2) (which would then flow through to periodic reviews by virtue of new section 133BG(1)):

[1] Explanatory Note to the Bill, at p5.

"(d) the desirability of consulting owners and occupiers of buildings in the area proposed to be designated."

4 Specific Comments

Proposed section 133BN – principles for exercise of powers

4.1 The purpose of the Bill is to provide for the management of buildings located in an area affected by an emergency (new section 133BA(1)). However, it may be useful to draw a distinction between powers used to address risk to life, which should be exercised with urgency, and powers used to deal with buildings and infrastructure, which may not be as time-sensitive and which should be used in consultation with affected property owners (as discussed above at paragraph 3).

4.2 There is considerable emphasis in the Bill on powers and responsible persons being assumed to know all they need to know. Some balance might be appropriate, and that could be achieved by adding to paragraph (d):

"(iii) information obtained from the owners and occupiers of buildings, where that is reasonably able to be obtained."

4.3 As a minor point, the reference in new section 133BN(c) to an "individual" (if meant to distinguish them from corporates) is inappropriate. It should be a reference to the ability of *owners and occupiers* to continue to occupy and use the property.

Proposed section 133BO – exercise of powers in secured buildings

4.4 This provision requires a responsible person exercising powers in relation to "secured buildings" – defence areas, buildings used by intelligence and security agencies, and the Ministry of Foreign Affairs and Trade (MFAT) (new section 133BB(1)) – to do so in accordance with instructions from the "officer in charge of the building".

4.5 That may well be appropriate for defence areas and buildings used by intelligence and security agencies. It is less obviously appropriate for MFAT, which has offices in various parts of New Zealand. In Wellington, for example, MFAT occupy 12 floors of a 25-storey office block also occupied by a law firm, an international bank, and a public car park.

4.6 It is not clear why this provision applies to MFAT buildings, but not police stations, prisons, MPI biosecurity areas, hospitals, CRI laboratories, or any number of other sensitive operations.

4.7 Indeed, there is no obvious reason to confine this provision to public sector buildings. There may be many private sector buildings where the responsible person should be directed or guided by occupiers, and sometimes subject to their direction.

4.8 The Bill is predicated on the responsible person knowing about the buildings, but that will often not be the case. For example, there may be private sector establishments with biosecurity isolation requirements, or energy systems that cannot simply be turned off but must be shut down in a particular order.

4.9 It is not clear how these new provisions will fit with the rest of the Building Act, but some of the existing provisions in the Act are instructive. For example, section 121, relating to

dangerous buildings, says that a territorial authority deciding whether a building is dangerous can seek advice from Fire and Emergency New Zealand. The further requirement to have due regard to that advice is useful and could appropriately be extended to these new provisions, and include advice from owners and occupiers (who are more likely than officials to know the particular circumstances of their buildings).

4.10 For these reasons, it is recommended the select committee look carefully at the concept of "secured building", its extension to other necessarily secure publicly owned buildings, and categories of buildings in the private sector.

Proposed section 133BP – Post-event assessments

4.11 New section 133BP(3) requires a responsible person to take reasonable steps in the circumstances to obtain the occupier's consent to entry, for making the post-event assessment of a building. It may also be appropriate to require that the building owner's consent be obtained.

4.12 In an apartment building, the body corporate might be the occupier of common areas, but not the household units. A household unit is a person's home regardless of whether it is in a simple-unit building or a multi-unit building, and it is not clear why the rules for entry with or without consent should be different.

4.13 There does not appear to be any requirement for the building owner or occupier to be informed of the findings from the post-event assessment. This has been problematic in the past. The interests of owners (as landlords) and occupiers (as tenants) can diverge. It should be made clear whether the assessment information is available as of right, on OIA/LGOIMA request, or not at all.

Proposed section 133BQ – Evacuation

4.14 New section 133BQ highlights a lack of alignment between the Bill and the CDEM Act in a number of areas:

(a) New section 133BQ replicates in slightly different terms but with the same practical effect, the "evacuation of premises and places" provisions in section 94K of the CDEM Act.

(b) Sometimes the CDEM Act will apply; sometimes the Building Act (as amended by the Bill) will apply; sometimes both will apply. New section 133BL means that if both Acts apply, the Building Act prevails.

(c) There is a defence in section 99 of the CDEM Act that is not replicated here.

(d) The maximum monetary penalties on conviction are similar, but imprisonment is an option under the CDEM Act only.

4.15 There is no obvious reason why the provisions should not be aligned on these matters.

4.16 There is also probably a good case for amending the CDEM Act provisions to provide that they are subject to the Building Act. That may assist those trying to administer the Acts in stressful times.

Proposed section 133BT – owner directed to give information

4.17 There is no reference in new section 133BT to the timing of obtaining any detailed engineering assessment. Delays in obtaining detailed engineering reports in a timely fashion can often occur in New Zealand, owing to a lack of engineers and typically a high degree of earthquake assessment needed. Owners may find themselves in a position of not being able to obtain a detailed engineering assessment for a period of months, so the timing of obtaining assessments should be addressed in this section.

4.18 New section 133BT also refers only to "information" about the land/building that the owner is required to provide. The section should be recast so that subsection (1) makes it clear that the purposes apply both to existing information and information that the owner is required to generate:

(a) Information already held, such as plans, technical drawings and as-built reports. (Often the information may be held by professional advisers, and perhaps lodged with the local authority. In the case of older buildings there might be building reports prepared at the time of purchase, but the original plans may not be under the control of the current owner.)

(b) New information through structural and other assessments, after damage has occurred.

Proposed section 133BU – urgent works to remove or reduce risk

4.19 If there is a ground lease it may not be appropriate for the land owner to be subject to a charge over the land for the costs associated with the building (which is under different ownership).

Clause 19 – Investigations of building failures

4.20 The proposed sections 207C – 207S (clause 19) relate to a different situation from that of immediate reaction to events and actual or imminent damage.

4.21 These new sections recognise that an emergency event may highlight a need to examine and perhaps carry out work on similar buildings all over the country, lest a similar emergency occur.

4.22 The NZ Herald news report of 26 September 2013[2] clearly illustrates the situation that arose with buildings similar to the CTV building that collapsed catastrophically in the February 2011 earthquake. Originally, up to 242 buildings were thought to be similar.

4.23 The actual number was much less. MBIE's report of 31 January 2012 "Technical investigation into the Structural Performance of Buildings in Christchurch – Final Report" discusses the CTV, PGC, Forsyth Barr and Grand Chancellor buildings. It seems reasonable to assume they were not all bespoke designs and could have been repeated elsewhere, if not exactly and in full, then in respect of some design and construction aspects. To this we can now perhaps

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[2] *Engineers clear half of buildings with flaws similar to CTV building*, 26 September 2013: https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11130564 (copy **attached**).

add other events such as the failure of Statistics House in Wellington and the Genoa motorway bridge failure.

4.24 The relevant considerations in investigating building failure are different to those that arise in the 'immediate response' provisions in proposed sections 133BA to 133BZ.

4.25 In these earlier provisions, prevention, death or injury and immediate response to prevent further death or injury, and property damage, are paramount. This context justifies restrictions on freedoms and unilateral actions by those with specific roles in those situations.

4.26 When it comes to assessing similar buildings over an indefinite timeframe, different considerations apply. The overall purpose is to prevent death, injury or property damage in future events. However, owners and occupiers have reasonable expectations of greater involvement in the absence of imminent harm.

4.27 The interests of owners and occupiers are also not necessarily the same:

(a) An owner may well want the building to remain habitable, fit for purpose etc so that the occupier remains and continues to pay rent.

(b) The occupier may well have health and safety obligations to its staff, and argue that it cannot be sure it is meeting them unless it has all the information on the building that is held by the owner or generated by the chief executive's investigations.

4.28 Access to information has been problematic in the past, complicated by the economic interests involved, and the fact that an occupier of an uninspected building may seek information about a similar inspected building so that it can assess its responsibilities and draw its own conclusions.

4.29 These matters are not discussed in any depth in the DDS or RISs, and the Law Society considers they require further consideration.

Proposed section 207D – Limited purpose of investigation

4.30 The powers can only be exercised for the purpose of learning about the failure and informing decisions. It is not, however, clear whether that limits the use to which investigative findings can be put. For example, if the investigation finds a clear breach of a building consent (such as use of uncertified mesh in concrete, or no mesh at all), it is uncertain whether a prosecution for manslaughter or lesser offences could be brought based on that information.

Proposed section 207H – Power of entry

4.31 The power of entry should only be able to be exercised without notice if the chief executive reasonably believes that giving notice would defeat the purpose of the investigation.

4.32 Commercial tenant occupiers, and households, should not be subject to entry without notice in circumstances (such as the reinforcing mesh example) where they have no ability, and no interest in, tampering with evidence to thwart the investigation of the building that has already failed or not performed as expected.

Proposed section 207I – Entry to household units

4.33 New section 207I applies to all household units. The background papers to the Bill do not mention an age of consent for allowing access.

4.34 Presumably, persons occupying the household unit are not in imminent danger or they would have been ordered to evacuate under other provisions for their own safety.

4.35 The Law Society believes that it is not appropriate that consent for the chief executive (in reality a contractor) to enter a household should be able to be given by a minor. There is little else that the law allows a person under the age of 16 to consent to. It is suggested the age should be set at 16 or 18.

Proposed section 207J – Power to take samples and evidence

4.36 Proposed section 207J allows the taking of "evidence" (in addition to samples). If the investigator finds plans or drawings on site, that is evidence that can be taken without notice under section 207J. This could compromise the position of owners and occupiers. The section should be amended to require that where practicable evidence taken under section 207J is to be copied and returned.

4.37 By contrast, if the investigator has to ask for these documents (either because they cannot be found on site, or are off site) under proposed section 207M, then notice has to be given and reasonable deadlines provided.

Proposed section 207N – Restrictions on access to information

4.38 The chief executive is ordinarily subject to the Official Information Act 1982. The Official Information Act is "another enactment" for the purposes of giving access to evidence or information collected in the investigation of a building failure (new section 207N(e)). As such, owners and occupiers of similar buildings will be able to request information obtained by the chief executive, including information generated such as test results on samples.

4.39 The fact that the background papers to the Bill do not mention consultation with the Chief Ombudsman (or the Privacy Commissioner) may mean that the statutes are intended to apply in the usual way, which is appropriate. It is not clear however whether that was the intention. If it was not, and it is intended that changes will be made to the Bill to restrict the use of the Official Information Act and the Ombudsman's powers under it, then that should be discussed with the Chief Ombudsman.

Proposed section 207P – Reports of investigations

4.40 One further point relating to OIA disclosure needs to be considered. Under the Official Information Act, drafts can sometimes be accessed. If changes are to be made to the policy under section 207N(e) (as discussed at paragraph 4.40), some change may also be needed in relation to new section 207P.

Section 207O – Sharing information with occupational bodies

4.41 The definition of "occupational body" (new section 207O(6)) may produce unintended results.

4.42 This is because section 207O(6)(a) says the occupational body must be "established by or under an enactment". In a general sense, every entity (except a trust) will be established under an enactment. It may for example be a very specific statute such as the Chartered Professional Engineers of New Zealand Act 2002, although the Registration Authority (IPENZ) is not established by or under that Act.[3]

4.43 The Law Society suggests that a policy decision needs to be made about which bodies are intended to be potential recipients of evidence or information under section 207O. If the group is intended to be wide, then the reference to "established by or under an enactment" may be appropriate, but only because every non-natural person is established by or under some enactment; it might be a specific statute, or it could be the Incorporated Societies Act, or even the Companies Act. If the type of recipient is intended to be restricted on policy grounds, then section 2070(6)(a) should define this more clearly.

Proposed sections 207Q and 207R – Offence to interfere with, or access, investigation site

4.44 The Law Society considers that these new offence provisions are drafted more widely than is necessary or appropriate.

4.45 The section 207Q offence applies even if there has been no notification (i.e. no notice has been put up on the site or given to the person) under section 207G(2). Even if some notice had been given (for example, to the owner), a tenant with a legal right to occupy could well intentionally do something that interfered with the site without knowing that it is an investigation site. Their only option, having been brought before a court, would be to plead that these circumstances amounted to "other reasonable excuse" (section 207Q).

4.46 The Law Society considers it should be an element of the section 207Q offence that the person knew or reasonably ought to have known that the place was an investigation site.

4.47 The same concerns apply to the section 207R offence. The notification under section 207G imposing conditions might or might not have been given to a person. Even if they have been given to a tenant, it may take time to tell the tenant's employees that the investigation site has been created at their place of work.

4.48 The offence is also arguably too wide in the sense that access, for example to deliver goods, might not interfere with the investigation in any way but would still technically be an offence.

4.49 The Law Society considers that it is not appropriate to create wide-ranging offences and then rely on the reasonableness of officials as to whether or not individuals are prosecuted.

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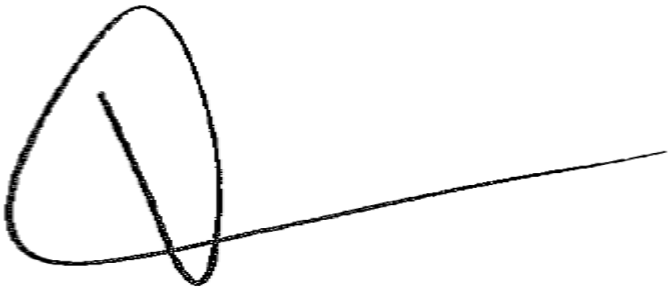
[3] It is, presumably, established under the Incorporated Societies Act 1908, and merely referred to in the 2002 Act as the Registration Authority. There is also a Chartered Professional Engineers Council, established under section 44 of the 2002 Act. The Registered Architects Act 2005 establishes the New Zealand Registered Architects' Board, and it has disciplinary powers. The New Zealand Institute of Architects Incorporated also has disciplinary powers, but is incorporated under the Incorporated Societies Act 1908, not the Registered Architects Act 2005.

Clause 25 – Immunity from civil proceedings

4.50 The Law Society considers that it is wrong as a matter of principle to give full immunity to public servants and their contractors acting under the Act. It therefore opposes the extension of section 390 by this clause.

4.51 The effect of immunity is that proceedings cannot be initiated, and if they are, they will be struck out. This removes an important incentive for people to act reasonably in exercise of powers under the Act. The courts can be expected to acknowledge the emergency nature of the circumstances in which actions and decisions are taken, when resolving liability questions. The Law Society considers that a blanket immunity in this context is unnecessary and lacks adequate justification.



Andrew Logan
Vice President
25 October 2018

Encl: New Zealand Herald, 26 September 2013, *Engineers clear half of buildings with flaws similar to CTV building*

https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11130564

Engineers clear half of buildings with flaws similar to CTV building

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2 minutes to read

The CTV building. Photo / NZ Herald

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Half of the New Zealand buildings suspected to have design flaws similar to the Canterbury Television Building, which collapsed in the February 2011 earthquake and killed 115 people, have been cleared by engineers.

Building and Construction Minister Maurice Williamson today announced that a Ministry of Business, Innovation and Employment-led review of 242 buildings with non-ductile columns has cleared 111 buildings, with excluded a further 62 so far.

Two North Island buildings have been vacated due to a number of issues, Mr Williamson said.

Another one building in Christchurch has been upgraded and its structural issues resolved.

The review so far has seen 79 buildings in Auckland being assessed by engineers and cleared, along with 18 in Wellington.

In Christchurch, 13 buildings were originally in scope.

But 12 have now been deemed out of scope because they have been demolished, acquired for demolition or did not have non-ductile columns.

The one building in scope has been upgraded and its previous structural issues resolved.

In other areas, excluding Christchurch, 13 buildings have been assessed and cleared.

Mr Williams said another 62 buildings (including the 12 Christchurch buildings) have been ruled out of scope because they don't meet the review criteria - they either didn't have non-ductile columns, weren't consented in the timeframe non-ductile columns were allowed, were under three storeys, have been demolished or will be demolished.

"I'm advised there are a further 128 building engineering assessments booked and that councils are following up with the remaining 39 building owners to check when assessments are to be done," he said.

"The two building owners in Auckland who had refused to get an engineering assessment have now changed their minds. This is very pleasing as the review is being done for reasons of public safety."

Mr Williamson stressed that just because a building has non-ductile columns it does not mean it is unsafe.

"If such buildings are balanced out by other design features they pose no greater danger than other buildings," he said.

"It's important to reiterate the CTV building failed catastrophically due to many more issues than just non-ductile columns, including a flawed design."

Given that the review is on-going, Mr Williamson said it would be "inappropriate" for details of the buildings involved, especially those that have been cleared, to be released.