MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Building system legislative reform

Discussion paper

APRIL 2019

New Zealand Government

How this discussion paper works

This discussion paper is made up of six parts. Part 1 is an introduction that explains how the five parts of the building system legislative reform programme fit together. Parts 2 to 6 discuss those parts. We encourage you to read Part 1 first.

1

Introduction

Explains the background to the discussion paper and what the proposed changes aim to achieve.

2

Building products and methods

Explains the issues and our proposals to:

- clarify roles and responsibilities for building products and methods
- require manufacturers and suppliers to provide information about building products
- strengthen the framework for product certification
- make consenting easier for modern methods of construction, including off-site manufacture.

3

Occupational regulation

Explains the issues and our proposals to:

- change the licensed building practitioners scheme to raise the competence standards and broaden the definition of restricted building work
- introduce a new licensing scheme for engineers and restrict who can carry out safety-critical engineering work
- remove exemptions that allow unlicensed people to carry out plumbing, gasfitting and drainlaying work.

4

Risk and liability

Explains the issues and our proposals to:

- require a guarantee and insurance product for residential new builds and significant alterations, and allow homeowners to actively opt out of it
- leave the liability settings for building consent authorities unchanged.

5

Building levy

Explains the issues and our proposals to:

- reduce the building levy from $2.01 including GST to $1.50 including GST (per $1,000)
- standardise the building levy threshold at $20,444 including GST
- allow MBIE to spend funds raised by the building levy on broader stewardship of the building sector.

6

Offences, penalties and public notification

Explains the issues and our proposals to:

- increase the maximum financial penalties
- set different maximum penalties for individuals and organisations
- extend the time enforcement agencies can lay a charge from six months to 12 months
- modify the definition of 'publicly notify' in section 7 of the *Building Act*.

How to deliver your feedback

You must get your written submissions to us by **5.00pm on Friday, 16 June 2019.**

See **page 4** of the introduction (Part 1) for details on how to submit your feedback.

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

1

Discussion paper –
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Introduction

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How to have your say

The Ministry of Business, Innovation and Employment (MBIE) invites feedback on proposals to reform the building regulatory system.

Feedback must be in the form of written submissions and you can comment on any of the proposals.

You must get your written submissions to us by **5.00pm on Sunday, 16 June 2019.**

How to deliver your feedback

Fill in the online survey at
www.mbie.govt.nz/building-reform

Email your submission (Microsoft Word or searchable PDF) to **building@mbie.govt.nz**

Post your submission to:
Building Policy
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140

MBIE may publish your feedback unless you ask us not to

Be sure to include your contact details in a covering letter or email.

The Privacy Act 1993 will apply to all submissions. MBIE will publish a consultation report summarising the results of the consultation.

If you don't want your name or any personal information to be included in anything we publish, make this clear in the submission or in your covering letter or email.

Your feedback is subject to the Official Information Act

People will be able to get copies of your submission by making a request under the Official Information Act 1982. If you want us to keep some sections confidential, mark these sections clearly in the comment box for the relevant question and tell us why you'd like it withheld (ie commercial sensitivity, etc). MBIE will take your reasons into account and will consult with you when responding to requests under the Official Information Act.

Further information and updates

If you have any questions, or would like more information, please email **building@mbie.govt.nz**.

You can subscribe for updates at: **www.mbie.govt.nz/building-reform**

Minister's foreword

Building and Construction Minister, Jenny Salesa

The building sector is vitally important to New Zealand's social and economic success. A thriving, productive and sustainable building sector is a key priority for me as the Minister for Building and Construction.

The government is committed to working with the building sector to support the sustained transformation of the industry. The Skills Action Plan launched last year reflects our partnership approach across both government and industry to ensure the sector has the right people and skills it needs to meet industry demand.

Given the significance of the sector, my ministerial colleagues and I have worked closely with industry to define the government and industry accord that sets out the joint response to transform the industry.

To achieve its potential, the building sector needs an efficient building regulatory system that encourages innovation, while ensuring buildings are safe, healthy and durable.

Significant legislative change is required to achieve these goals. The proposed reforms will be the most far-reaching changes since the current *Building Act* was introduced in 2004. The reform package covers five key areas: building products and methods, occupational regulation, risk and liability, the building levy and penalties.

I expect these reforms to deliver:

- Safe and durable buildings
- A high performing building sector
- An efficient regulatory system.

These outcomes are linked and mutually reinforcing.

To achieve our goals, we need input and feedback from across the building and construction sector. I encourage you to participate in the consultation process and help us to get it right.

This discussion paper has been developed to gain feedback on a range of proposed changes to help address some of the long-standing problems that have prevented the sector from reaching its potential.

The responsibility for an efficient building regulatory system doesn't soley rest with the government. Everyone in the sector most work together to lift quality so things go right the first time, and, if they do go wrong, there are fairer outcomes. Please carefully consider the ideas put forward in this document, and give us your feedback.

New Zealand's building regulatory system should deliver safe and durable buildings

A vibrant sector that will build our future

The building sector is made up of:

The building sector builds and maintains the buildings where New Zealanders work and live. It is vital to the country's economic and social success.

The building sector is New Zealand's fourth largest employer, with nearly 10 per cent of the workforce. It contributed nearly $15 billion to the economy in the year ending March 2017. Every $1 invested in construction produces between $2.51 and $3.11 in economic activity.[1] The building sector helps deliver government programmes that include KiwiBuild, public housing and infrastructure. House building – just one part of the building sector picture – is growing to meet demand. Over 31,000 new apartments and houses got building consents in 2017. MBIE expects another 220,000 to get consents by 2023.[2]

New Zealand needs a building sector that builds safe and durable buildings that meet the nation's current and future needs.

1 PWC. (2016). Valuing the role of construction in the New Zealand economy.

2 MBIE. (2018). National construction pipeline report 2018.

Long-standing problems are holding the sector back

The building sector faces a number of long-standing problems. These problems range from low productivity and inefficient practices and processes, to skills and labour shortages, to poor health and safety.

During 2018, MBIE met with nearly 50 organisations that represent stakeholders in the building sector. We met many people who work hard to deliver the best possible results. These discussions helped us get a better understanding of the problems the sector is facing.

MBIE heard concerns about the quality of building products and the lack of information about them. We also heard concerns about whether some people who work in the building sector have the right skills and competencies for the type of work they do. There were concerns that some people avoid responsibility when something goes wrong – meaning the costs fall disproportionately on homeowners and building consent authorities (BCAs).

The concerns fall under three common themes:

- Roles and responsibilities are not clear.
- Information is not available when it is needed.
- It is difficult to hold people accountable for the quality of their work.

This discussion paper sets out changes that aim to address those problems

We've listened to stakeholders and developed proposals for changes to five areas of the building regulatory system.

Building products and methods	Occupational regulation	Risk and liability	Building levy	Offences, penalties and public notification
See part 2	See part 3	See part 4	See part 5	See part 6

These five areas make up what we call the building system legislative reform programme.

Each part of the discussion paper outlines the problems in more detail. They then set out proposed changes that aim to address these problems.

The proposed changes won't address all of the problems we've heard about. They're focused on getting the basics right and filling gaps in the regulatory system. More changes may be needed in the future. MBIE will continue to work with the sector to implement any changes and identify future areas for reform.

MBIE wants your feedback on the building system legislative reform programme

We want feedback from stakeholders involved in every aspect of the building industry and every stage of the building process. You will find questions throughout the discussion paper. We welcome other relevant comments in addition to these questions.

You must get your written submissions to us by **5.00pm on Sunday, 16 June 2019.**

See page 04 of this document for more details on how to submit feedback.

The proposed changes aim to help the building sector deliver the best possible outcomes

People, products, processes and performance

The building regulatory system includes a broad range of participants, legislative tools and standards for regulating building work, buildings and industry occupational groups.

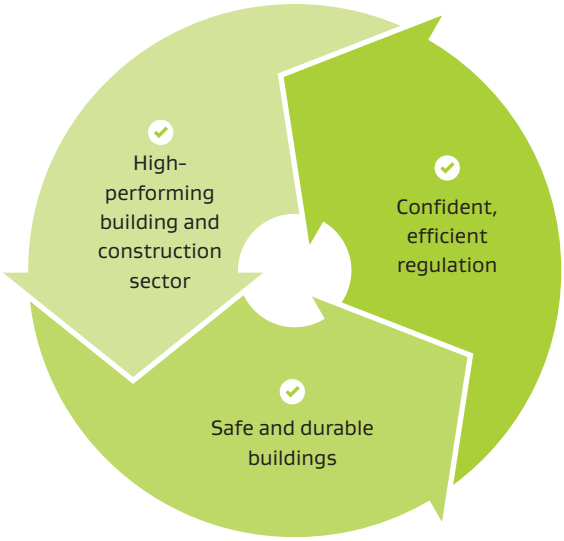
MBIE's framework for thinking about the system as a whole and its interdependencies is intended to ensure the building sector is supported by an effective regulatory system.

There are four key levers in the framework to influence how the building regulatory system operates:

- **People** – the building sector relies on a skilled and accountable workforce, capable building consent officers and informed consumers, including building owners and users.
- **Products** – building products are central to the safety and durability of buildings. Building products should be reliable, fit for purpose, and competitively priced.
- **Processes** – good regulatory and commercial processes are essential for a high-performing building sector. Processes include consenting processes, the accreditation of BCAs and consumer protection measures. Regulatory and commercial processes should be risk-based, appropriate and efficient.
- **Performance** – the building code sets out how a completed building and its parts must perform by setting minimum performance requirements for all new building work. Building performance requirements should be clear, reasonable and future-focused.

The proposals focus on three outcomes

The changes MBIE proposes to the building regulatory system focus on three mutually reinforcing outcomes:



- **Safe and durable buildings.** Buildings are constructed from quality products by a high-performing building sector. The sector is supported by an efficient regulatory system that people trust.
- **An efficient regulatory system that people have confidence in.** The building regulatory system underpins the first two outcomes. The system encourages the behaviours that lead to a high-performing sector. The system sets out clear roles and responsibilities so that people know what they're accountable for, and what they must put right if things go wrong.
- **A high-performing building sector that builds it right the first time.** Efficient and effective processes and practices contribute to quality building work. The sector has high productivity. Skilled and competent people make informed decisions about building design and building products.

Note: By 'builders' we mean 'any person who carries out building work, whether in trade or not', as defined in the *Building Act*. This includes carpenters, plumbers and other tradespeople.

The changes are focused on three areas linked to people's roles

We want the changes to help people work to high standards, and encourage the behaviours that a high-performing sector needs.

The proposed changes are closely linked to people's roles, and focus on three areas:

1	2	3
Setting out clear roles and responsibilities for all participants in the building system.	Making sure that people in all roles have the information they need to work to high standards.	Holding people accountable to the responsibilities of their role.

Make sure things go right, and deliver fairer outcomes if things go wrong

The goal of the proposed changes is to lift quality throughout the building sector and:

- make sure things go right in the building process the first time
- deliver fairer outcomes when things do go wrong.

MBIE used five criteria to assess whether the proposed changes would lead to the desired outcomes

Each part of the building system legislative reform programme has its own topic-related objectives. These objectives are set out in the relevant part of the discussion paper. We have used the five criteria set out below to assess the proposed changes.

Does the proposal meet the specific objectives for this topic?

Would the proposal support the desired behavioural shifts in the building sector?

Would the benefits of the proposal outweigh the costs and risks?

Is the proposal consistent with other parts of the building regulatory system?

Is the proposal consistent with related government policy and regulations?

You will find our assessments in each section of the discussion paper.

Next steps: from feedback to implementation

Feedback must be in the form of written submissions and must get to us by 5.00pm on **Sunday, 16 June 2019**.

See page 04 of this document for more details on how to submit feedback.

MBIE will use the information in submissions to refine the proposals. The Minister for Building and Construction will then decide what changes to recommend to Cabinet.

Parts 2 to 6 of the discussion paper set out proposed changes that require changes to existing laws and regulations.

If the government decides to go ahead with the legislative changes, a Bill will be introduced to Parliament. The public will have a second opportunity to comment on the proposals when the Bill is considered by a Parliamentary select committee.

Any changes to existing laws would be supported by publicity, information and guidance, education and enforcement activities.

Part 5 of the discussion paper includes proposals to change the building levy rate. A change to the building levy rate would be done through a change to regulations. This change is intended to take place in the second half of 2020. A notice about any change to the building rate would be in the *New Zealand Gazette*.

In addition to the proposed changes in this discussion paper, MBIE identified other changes that don't need a change to existing law. These changes will be progressed through other work streams.

You can subscribe for updates at **www.mbie.govt.nz/building-reform**

List of acronyms

BCA	Building consent authority
BCO	Building consent officer
CPEC	Chartered Professional Engineers Council
CPEng	Chartered Professional Engineer
GIP	Guarantee and insurance product
GST	Goods and services tax
LBP	Licensed building practitioner
LIM	Land information memorandum
MBIE	Ministry of Business, Innovation and Employment
MMC	Modern methods of construction
PCAB	Product certification accreditation body
PCB	Product certification body
PCBU	Person Conducting a Business or Undertaking
PGD	Plumbers, gasfitters and drainlayers
PGD Act	*Plumbers, Gasfitters, and Drainlayers Act 2006*
QA	Quality assurance
RBW	Restricted building work
RFI	Request for information

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2

Discussion paper –
Building system legislative reform

Building products and methods

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Contents

Summary of Part 2: Building products and methods

Useful product information and clearly defined responsibilities support safe and durable buildings

Building products and methods are central to safe and durable buildings. Current building product regulation leaves gaps and has disincentives that create inefficiencies throughout the building regulatory system.

The changes set out in this section address several problems:

- Product information often lacks clear detail on the product's performance.
- The roles and responsibilities for building products and methods are not clear.
- Manufacturers and suppliers have disincentives to provide product information.
- It's common practice to substitute products without applying for a variation to the building consent.
- MBIE has to rely on voluntary cooperation when it investigates building products and methods
- Consenting processes for modern methods of construction, including off-site manufacture, are not always clear or consistent.

We want stakeholders' feedback on seven proposed changes

1	Widen the purpose of the *Building Act* to include the regulation of building products and methods.
2	Provide clear definitions for 'building product' and 'building method'.
3	Require product manufacturers and suppliers to supply information about their building products. Set minimum standards for that information. This would not apply to building methods
4	Clarify responsibilities of manufacturers, suppliers, designers and builders for building products and building methods.
5	Give MBIE the power to compel information to support an investigation into a building product or method.
6	Strengthen the framework for product certification for building products and methods (See page 26.)
7	Enable a regulatory framework for modern methods of construction, including off-site manufacture. (See page 32.)

These changes will help deliver the programme's outcomes

The programme's three key outcomes are safe and durable buildings, an efficient regulatory system and a high-performing building sector.

The proposals set out in this section will help meet these objectives by:

- increasing the quality of information on building products and methods
- allowing people to be held accountable for building products and their use
- reducing the risk of defects in building work.

New Zealand's buildings depend on building products and methods that are fit for purpose

Building products come in many shapes and sizes

Building products are the materials used in building work, building methods are ways products are used in building work. They are central to producing safe and durable buildings. Around 600,000 building products are available in New Zealand.

Building products come in many shapes and sizes.

- From simple to complex. From a nail to a prefabricated panel that's made up of multiple components. Modern methods of construction (MMC) can produce products that range from factory-made bathroom pods, to complete houses produced by 3D concrete printers.
- With single or multiple uses. A product's use determines how it contributes to the overall performance of a building. Identifying and specifying the right product – and using it correctly – requires technical knowledge of the building product and New Zealand's building code.
- From many sources. They can be made in New Zealand or imported by wholesalers, retailers or building owners.
- Building products and methods must be fit for purpose – and the system of building regulation should encourage behaviours that help the building sector to build it right the first time.

The proposed changes focus on four objectives

Building products, methods and building work are changing in ways that nobody expected when the *Building Act* came into effect in 2004. Changes include MMC and a significant increase in imported building products. Regulation needs to be flexible enough to support innovations that increase productivity and ensure that buildings are safe and durable.

The proposed changes to how MBIE regulates building products and methods will help deliver positive outcomes. The objectives of the proposed changes are:

- Clear roles, responsibilities and accountabilities across product lifecycles.
- Risk-based, coherent, adaptable processes for regulation and assurance. The processes must take into account the effect of the failure or non-performance of a building product or method.
- A vibrant, competitive market for building products. Regulation must not be a significant obstacle to bringing innovative products or method to market.
- A product regulation system people have confidence in. People in the industry should be confident that the regulation system works well and building products and methods meet the requirements of the building code.

How building product regulation works today

The building product system has many participants

The system has many participants – from those who design, manufacture and supply the products, to the designers, builders and building owners who specify, install and use them. By 'builders' we mean 'any person who carries out building work, whether in trade or not', as defined in the *Building Act*[1] – this includes carpenters, plumbers and other tradespeople.

People's existing roles and responsibilities for building products are set out in the *Building Act*. They're mostly expressed in terms of how building products relate to building work. Some responsibilities are set out in consumer protection and commercial legislation.

The *Building Act* defines some roles and responsibilities for building products

Building product manufacturers and suppliers are not obligated to provide information about their building products. But if they do provide information, they must ensure it's accurate. Under consumer protection and commercial law, their goods must be fit for purpose.

Designers'[2] plans and specifications must be sufficient to result in building work that complies with the building code. They must ensure that the products and methods they specify comply with the building code.

Builders are responsible for making sure their work complies with the building code, the building consent and the related plans and specifications. This includes making sure they use the specified products, and that all the products they use comply with the building code.

Building owners are responsible for obtaining the necessary consents for the building work.[3] They must also get permission from the building consent authority (BCA) if they want to replace a building product in the signed-off consent with a different product (product substitution). Someone else, such as a builder, can also do this on the owner's behalf. Building owners are responsible for maintaining their buildings – some products may have specific maintenance requirements.

The *Building Act* includes implied warranties for residential building work. These include a warranty that all materials will be fit for purpose and new (unless stated otherwise).[4] Building contractors are required to remedy defects for 10 years, including defective materials.[5] The *Building Act* defines a building contractor as someone who 'agrees with another person (the client) to do building work for the client in relation to a household unit'.

1 Section 14E, *Building Act*.

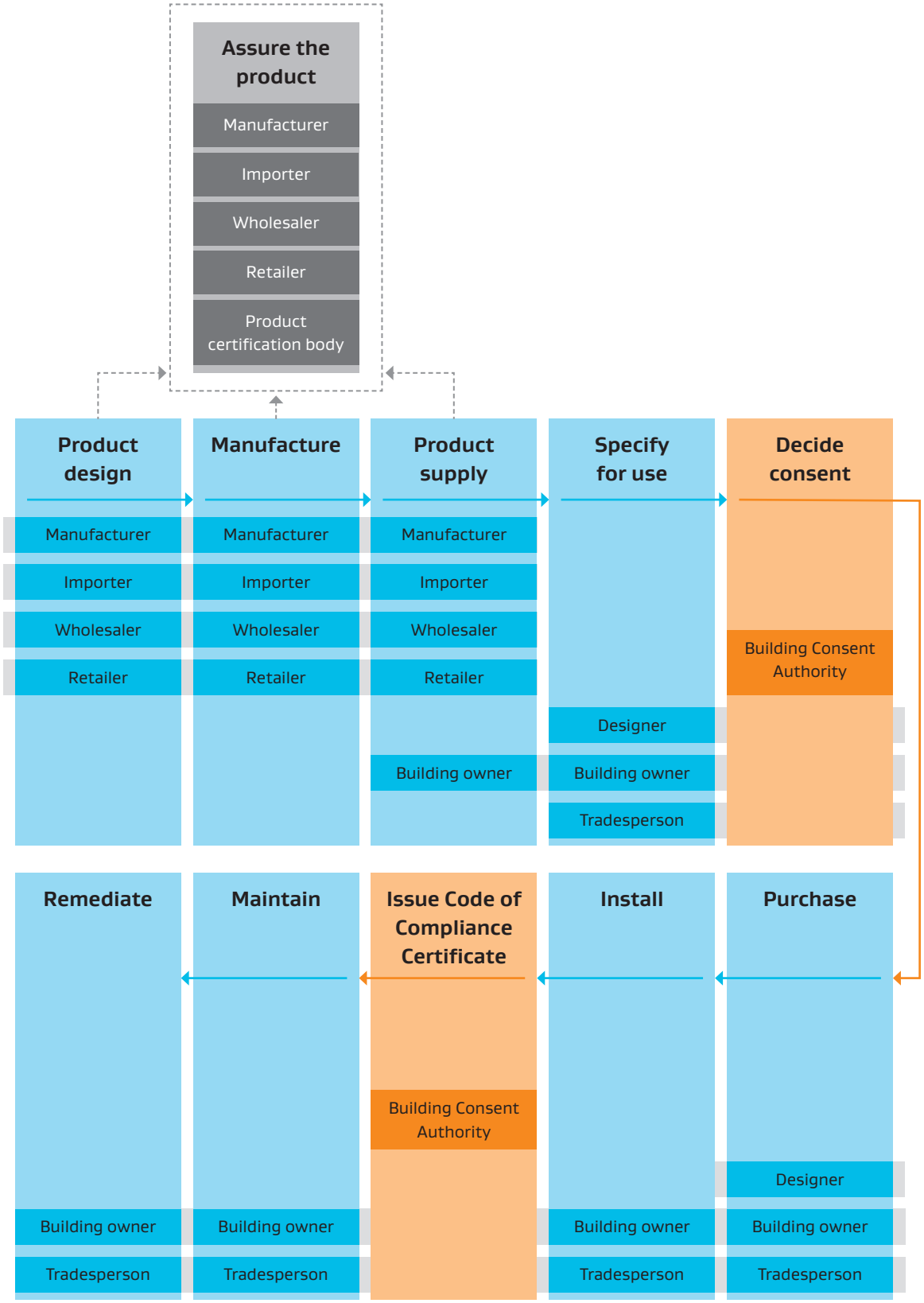
2 A designer is someone who prepares plans and specifications for building work or who gives advice on the compliance of building work with the building code (section 14D, *Building Act*).

3 *Building Act*, section 14B.

4 *Building Act*, section 362I.

5 *Building Act*, sections 362M and 362Q.

Building products interact with multiple parties across their lifecycle



If the defect can't be remedied, builders can be required to compensate homeowners for any reduction in the value caused by the building work and pay damages.[6] Builders must provide homeowners and the relevant territorial authority with information on any warranties for the products used and any maintenance requirements.[7]

MBIE can issue a warning or ban for products and methods

The *Building Act* provides MBIE with powers to issue a warning or ban a building method or product if the chief executive considers on reasonable grounds that the use of a building method or product has resulted, or is likely to result, in a building or building work failing to comply with the building code.[8] To date, MBIE has issued one warning (for loop bars in April 2018) and one ban (for foil insulation in July 2016).

CodeMark certificates state that a product or method complies with the building code

The *Building Act* also provides for voluntary product certification schemes. There is currently one scheme in operation, CodeMark. Under CodeMark, a building product or method is evaluated to determine whether it complies with the building code. Products or methods with a CodeMark product certificate must be accepted by BCAs as being compliant with the building code if the product is specified for use in building work, and installed as set out in the information on the certificate. (See 'Strengthening CodeMark', page 26.)

6 *Building Act*, section 362N.

7 *Building Act*, section 362T and Regulation 9, *Building (Residential Consumer Rights and Remedies) Regulations 2014.*

8 *Building Act*, section 26.

Building product regulation has gaps and disincentives

Product information often lacks clear detail on the product's performance

New Zealand needs buildings that are safe and durable. Buildings must comply with the building code, and high-quality product information is key.

Designers and builders rely on good product information when making design and installation decisions. BCAs rely on product information to understand how it will affect the performance of the building when assessing it against building code requirements.

Product information often lacks important details

We understand that building product information often lacks the detail that designers and builders need when specifying and using products. Stakeholders have told us that product information is often marketing material that doesn't include information on performance, code compliance, installation or maintenance requirements.

Poor quality product information slows down the consent process

The consent process can be slowed down when BCAs don't have the information they need to assess a building consent application. Data from seven BCAs indicates that when requests for information were made about the products being used, consents were placed on hold for an average of 21 working days until information was received.[9]

Manufacturers and suppliers have disincentives to provide product information

Information gaps have arisen from a lack of system incentives for suppliers to provide information on building products. The *Fair Trading Act 1986* and the *Building Act* make a manufacturer or supplier liable for the accuracy of information provided about a product. This can create a disincentive to provide information because there is no penalty for failing to provide information under either the *Fair Trading Act* or the *Building Act*.

9 A BCA must make a decision on a building consent application within 20 working days of receiving it. If the BCA requests information from the applicant, however, this deadline can be suspended until the information is provided.

The roles and responsibilities for building products and methods are not clear

Responsibilities are implied rather than clearly set out

Stakeholders have told us that the responsibilities of manufacturers, suppliers, designers and builders for building products and methods are not clearly set out in legislation. Instead they're implied through their relationship to building work. For example, requiring building work to be code compliant implicitly means that the products that go into building work should also be code compliant.

Clear roles and responsibilities would make it easier for people to do their job and enable a fair allocation of risk and liability.

It's common practice to substitute products without applying for a variation

BCAs have told us that building products and methods specified in building consents are often replaced with other products or methods (substitution) without an application to vary the consent (a variation).

Substitutions are often legitimate. For example, substituting one product for another may avoid delays due to availability of materials. But BCAs must be told about any variations to the consent. This provides a check to ensure the building will continue to comply with the building code. A minor variation may only require an informal change to the consent, but BCAs still need to be told about it. BCAs may not be able to spot substituted products when they inspect a building.

MBIE has to rely on voluntary cooperation when we investigate a building product or a building method

When MBIE investigates the performance of a building product or method, we rely on the voluntary cooperation of manufacturers and suppliers. MBIE has no powers to compel a person to provide information or produce documents, such as the results of product testing. Without this information, it may be impossible to decide whether to issue a warning or ban.

Lack of information has forced us to delay investigations or put them on hold.

MBIE proposes seven changes to building product regulation

1. Widen the purpose of the *Building Act* to include the regulation of building products and methods.
2. Provide clear definitions for 'building product' and 'building method'.
3. Require product manufacturers and suppliers to supply information about their building products. Set minimum standards for that information. This does not apply to building methods
4. Clarify responsibilities of manufacturers, suppliers, designers and builders for building products and building methods.
5. Give MBIE the power to compel information to support an investigation into a building product or method.
6. Strengthen the framework for product certification for both products and methods.
(See page 26.)
7. Enable a regulatory framework for modern methods of construction, including off-site manufacture. (See page 32.)

The objectives of these changes are to:

- increase the quality of information on building products
- allow people to be held accountable for building products and methods and their use
- reduce the risk of defects in building work.

1. Widen the purpose of the *Building Act*

Proposal

Widen the purpose of the *Building Act* to include the regulation of building products and building methods.

Including building products and methods in the *Building Act* would recognise their role in building performance

The current purpose of the *Building Act* is to regulate building work, license building practitioners and set performance standards for buildings.[10]

The current purpose doesn't adequately recognise the impact building products and methods have on the performance of buildings. Including the regulation of building products and methods in the purpose of the *Building Act* would reflect the key role they play in building work. It will reinforce the shift from regulating building work, to regulating both building work and the products and methods used in that work.

Questions for stakeholders

2.1	Do you agree with expanding the purpose of the *Building Act* to include the regulation of building products and methods and their use?

2. Clearly define 'building product' and 'building method'

Proposal

Include the following definitions in the *Building Act*:

- A 'building product' is any component or system that could be reasonably expected to be incorporated into building work. A system is a set of at least two components supplied and intended to be used together to be incorporated into building work.
- A 'building method' is a specific way of using a product or system in building work.

Defining 'building product' and 'building method' would clarify what is regulated under the *Building Act*

The current definition doesn't distinguish between a building product and a building method. The *Building Act* only uses 'building product and method' in relation to products that have a CodeMark. We propose separate definitions for building products and building methods.

10 *Building Act*, section 3.

Current definition of 'building method or product' under the *Building Act*

Section 7: building method or product has the meaning given to it by section 20.

Section 20: Regulations may specify that there is only 1 means of complying with building code

(2)(c) Building methods, methods of construction, building design, or building materials (building methods or products) that have a current product certificate issued under section 269.

Section 269: Certification of building methods or products: Issue of product certificate

(1) A product certification body must issue a product certificate if it is satisfied that a building method or product that is the subject of an application under section 268 meets the prescribed criteria and standards for certification.

(2) A product certificate must state whether there are any matters that should be taken into account in the use or application of the building method or product, and if so, what those matters are.

Clearer definitions would allow for innovation

The definitions need to be sufficiently broad to allow for new technologies and building methods in the future. Components and buildings produced through modern methods of construction (MMC) such as off-site manufacture would fall under the definition of 'building product'. See *Modern methods of construction*, page 32 for more information).

Questions for stakeholders

2.2	Do you agree with the proposed definition of 'building product'?
2.3	Do you agree with the proposed definition of 'building method'?
2.4	Do these definitions provide sufficient scope to account for new and emerging technologies?

3. Set minimum standards for information about building products and require manufacturers and suppliers to supply that information

Proposal

Product manufacturers and suppliers (including importers) must provide information about building products that is publicly accessible.

Set minimum information requirements for building products (through regulations).

Minimum standards for information would only apply to building products

We propose to require product manufacturers and suppliers to provide product information about their building products. This requirement would only apply to building products. It would not apply to building methods.

Manufacturers and suppliers would be required to make product information publicly accessible. For example, product information could be provided with the product or be easily accessible on the manufacturers' website.

This approach will allow for alternative ways of making product information publicly accessible. We consider that there is little benefit to requiring information to take a specific form, and it may create new compliance costs for manufacturers and suppliers.

Regulations would specify the minimum level of product information

The proposed minimum requirements are outlined in Box 1.

Many product manufacturers and suppliers already provide information beyond the proposed minimum standards. There is no intention to encourage these groups to reduce the level of information they supply. Rather, it aims to create a level playing field where all manufacturers and suppliers provide a consistent minimum level of product information. It will also give other parties in the system – designers, builders, BCAs – the information they need to carry out their responsibilities.

It would be an offence to fail to provide the minimum level of information

It would be an offence if manufacturers and suppliers fail to make the minimum level of product information publicly accessible. The penalty for this would be a notice to fix, an instant fine (infringement notice) or a court-ordered penalty. The provisions under the *Fair Trading Act* would continue to apply to the accuracy of the information provided.

This proposal would not apply to discontinued products or products no longer for sale and supply in New Zealand when the new requirements come into force. Requiring suppliers to make information publicly accessible for discontinued projects would be unnecessarily onerous.

BOX 1

Proposed minimum information requirements for building products

a. Description of the product	The description may include the product's name, a picture of the product, a unique identifiable code and the date the product information was produced. The product description must be sufficient to avoid it being mistaken for other similar products.
b. Details of the manufacturer/ supplier, including contact details	For imported products, this would be the details of the importing supplier and the retailing supplier. For products manufactured in New Zealand, this would be the details of the manufacturer and the retailing supplier. These details are needed so that people can contact the manufacturer/ supplier if they require any further information or a problem arises with the product.
c. Scope and limitations of use	This is a statement on the building product's scope and limitations. Some products have specific and defined uses, while others may have multiple uses. The scope of use would consider factors that may affect the performance of the product within a building system, including consideration of loading, exposure to fire and exposure to weather.
d. Design and installation requirements	Any information required to ensure that designers correctly specify the product's use (eg required locations or integration with other building products) and builders can install the product correctly.
e. Maintenance requirements	Any work that must be carried out to ensure the product continues to perform as expected once installed. This must include a statement about the expected durability of the product.
f. Declaration if a product is subject to a warning or ban	If the product is subject to a warning or ban under section 26 of the *Building Act*, a declaration about this warning or ban must be included in the product information.

Questions for stakeholders

2.5	Do you support the proposal to require manufacturers and suppliers to supply information about building products?
2.6	**For designers, builders and building consent authorities:** Will the proposed minimum information requirements for building products help you make good decisions about products?
2.7	**For designers, builders and building consent authorities:** Do you need any other information to help you decide whether a building product will result in building work that complies with the building code?
2.8	**For manufacturers and suppliers:** How closely do the proposed minimum information requirements reflect what you already provide?
2.9	**For manufacturers and suppliers:** Will there be an impact on your business to provide the proposed minimum product information for your products?
2.10	**For manufacturers and suppliers:** What is your estimated cost increase? Please include any relevant information on how you calculated your estimate (eg the number of products you produce or supply).

4. Clarify the responsibilities of manufacturers, suppliers, designers and builders for building products and building methods

Clear roles and responsibilities are important

Clear roles and responsibilities set out what's expected of each participant in the building system – and what will happen if they fail to meet these expectations.

Proposal

Create an explicit responsibility on manufacturers and suppliers to ensure that a building product is fit for its intended purpose.

The proposed change would make it clear that manufacturers and suppliers are responsible for building products being fit for purpose

Consumer protection law states that manufacturers and suppliers are responsible for ensuring that consumer goods are fit for purpose. Consumer law may cover building products in some, but not all, circumstances.

We propose to include in the *Building Act* an explicit responsibility on manufacturers and suppliers to ensure that building products are fit for their intended purpose. This responsibility would apply to all products that could reasonably be expected to be incorporated into residential or commercial building work. The responsibility isn't intended to apply to building methods.

Building owners would be able to seek redress through the courts if building products are not fit for purpose.

Manufacturers and suppliers should be held accountable if the product fails due to the way the product was designed or manufactured. Manufacturers and suppliers should not be held responsible for a product if it solely fails because it was:

- used in a way that is outside its intended use
- installed incorrectly.

Proposal

Clarify that builders cannot use a different building product or building method to the product or method specified in the building consent without an appropriate variation to the consent.

The proposal would make it clear that BCAs must be told about product or method substitutions

The building owner is responsible for obtaining the building consent, and appropriate variations to the consent if any are needed. An example of a variation is substituting comparable products, such as substituting one internal lining for a similar internal lining. 'Un-notified' product substitution can result in buildings that don't comply with the building code and can cause serious building defects that may need significant remedial work at the expense of building owners.

Builders are responsible for ensuring that building work complies with the building consent. Any change made to the consented plans is a variation and requires approval from a BCA. Owners are often unaware, however, that a product or method has been substituted or that a variation is needed. BCAs have told us that it's common for product substitution to happen without them being told.

There are two types of variations to a building consent; minor and major.

Minor variations are defined in the *Building (Minor Variations) Regulations 2009* as: 'a minor modification, addition or variation to a building consent that does not deviate significantly from the plans and specifications to which the building consent relates'. Minor variations require informal amendments to the consent file. This may include amended drawings or updated site record information.

A major variation to the consent, such as changing an entire cladding system, must be made as if it were an application for a new building consent and will result in a formal variation to the exisitng consent.

Existing guidance provides a framework for BCAs to consider whether variations are minor or major. We propose to clarify that, where the variation requires a formal variation to the existing consent, builders are not able to substitute a product or method until the variation has been issued.

At this stage, MBIE is not proposing to change the process to vary a consent.

However, MBIE is interested in feedback about:

- the current threshold for minor vs major variations
- the process to apply for a variation.

It's intended that builders would discuss any potential product or method substitutions with the designer[11] and building owner. The building owner, or the builder on their behalf, would then apply for the appropriate variation to the consent before the substitution takes place.

Offences and penalties are in place for carrying out building work that does not comply with the consent. This change would clarify that substituting products or methods without a variation on the building consent, where one is needed, would be captured by those offences. These include a fine for the breach and a notice to fix to ensure compliance of the building work. Substituting a building product or method without a variation to the consent could also be reported to the appropriate occupational regulation body to investigate.

Proposal

Clarify the responsibilities of builders and designers to ensure that the building products and methods specified or used will result in building work that complies with the building code.

Builders and designers would have clear responsibilities for building products

We propose to amend the existing responsibilities for designers and builders, set out in sections 14D and 14E of the *Building Act*, to include responsibilities for building products and methods.

Designers' responsibilities could include: 'ensure that the building products and methods specified result in building work that complies with the building code (where the work is properly completed in accordance with the plans)'.

Builders' responsibilities could include: 'ensure that the building products and methods used result in building work that complies with the building code and the products and methods specified in the consent'.

The proposal clarifies existing responsibilities – it does not create new liabilities

This proposal is intended to better clarify the existing responsibilities of builders and designers for building products and methods. It's not intended to create any new liabilities or add to the existing common law liabilities. It's not intended to provide any new penalties or alter the existing enforcement mechanisms should the building work not comply with the building code.

Questions for stakeholders

2.11	Do you support the proposals to clarify roles and responsibilities for manufacturers, suppliers, designers and builders?
2.12	Is the current threshold and process for variations appropriate for all circumstances?

11 Where the designer is still contracted as part of the building project.

5. Give MBIE the power to compel information to support an investigation

Proposal

For building products and methods, provide MBIE's chief executive with the power to require a person, by written notice, to provide information, product documents or both if:

- the chief executive has cause to consider issuing a warning or ban under section 26 of the *Building Act*
- the information is necessary to make that decision
- the information to inform this decision is not readily or publicly accessible.

Provide MBIE with the ability to share that information with other regulators.

MBIE currently relies on voluntary cooperation during investigations

MBIE's role as steward of the building regulatory system relies on its ability to confidently execute powers under the *Building Act*. The powers to warn or ban are a key mechanism for regulating building products and methods. Yet, being unable to compel information during an investigation limits our ability to exercise such powers.

This proposal would give MBIE the power to require people or companies to provide us with information to inform an investigation into building products and methods. MBIE also proposes to share that information with other regulators if there is evidence that another act or regulation has been breached. For example, if MBIE discovered evidence that a manufacturer or supplier had made a false or misleading statement about a building product or methodon; it would be desirable to share that information with the Commerce Commission so it could investigate potential breaches under the *Fair Trading Act*.

It would be an offence not to comply with a request for information

Failing to supply information on, or hindering an investigation into, a building product or method would be an offence.

The penalty would be an instant fine (infringement notice) or a court-ordered penalty. The amount of the penalty would align with similar offences in the *Building Act*.

Questions for stakeholders

2.13	Do you support the proposal to give MBIE the power to compel information to support investigations?
2.14	Would MBIE's ability to compel information about building products or methods and share this with other regulators have unintended consequences? If so, what might these unintended consequences be?

How the proposed changes measure up to our five assessment criteria

Does the proposal meet the objectives for building products and methods?

The proposed changes are intended to improve the regulation of building products and methods and allow for better decision-making and, in turn, improve the quality of building work. The proposals meet the four objectives for building products by:

- making clear the roles and responsibilities for building products and methods
- making it easier to hold people accountable
- helping to provide greater confidence to all the participants in the building system about the performance of building products
- being designed in a way that allows for flexibility and addresses the most urgent gaps in the regulatory settings where evidence shows that changes are needed.

Does the proposal support the desired behavioural shifts in the building sector?

The proposals support the desired behavioural shifts in the building sector by increasing the information needed to support good decision-making and creating offences that reinforce roles.

They would send a clear signal about the important role building products and methods play in how buildings perform, and clarify the responsibilities of manufacturers, suppliers, designers and builders.

The requirement for product information would provide consistent information on all building products.

Would the benefits of the proposal outweigh the risks and costs?

Further work is needed to quantify the costs and benefits of the proposals. Our initial assessment is that improved efficiencies would likely offset any cost increases. The requirements proposed to be placed on manufacturers and suppliers are designed to minimise any increased costs or barriers to new building products entering the market. The proposals would support more efficient consenting processes, as BCAs would need to make fewer information requests.

The new requirements to provide product information and ensure a product is fit for purpose may be tested through the courts. Parties who are involved in court cases may face additional costs in the short to medium term as the law is clarified. Two possible court-case scenarios are:

- a dispute about whether a product is a building product
- a dispute about the factors that contributed to the failure of a building product.

Is the proposal consistent with other elements of the building regulatory system?

The focus on providing clear roles and responsibilities and filling information gaps is consistent with other parts of the building system legislative reform programme.

The proposals will help people manage risks and make it clear who is accountable. They also let BCAs rely on others to play their part in the system.

Is the proposal consistent with related government policy and regulations?

The proposals are consistent with other government policies, such as the commitment to improve housing, by ensuring building products and methods contribute to the construction of safe and durable homes for New Zealanders.

Potential impacts of the proposed changes

Manufacturers and suppliers

Increased regulation. This increase is intended to create a level playing field for manufacturers and suppliers. Regulation would clarify their responsibilities and provide a way to hold them accountable.

Consistent product information may make people more aware of a product's competitive edge – and incentivise the production and supply of quality building products.

Manufacturers and suppliers may face increased compliance costs that they then pass on to consumers. Allowing for flexibility in how information is provided would allow manufacturers and suppliers to find the most appropriate and cost-efficient way to provide that information. Such flexibility would also let them take advantage of new technology that enables innovative ways to provide product information.

Suppliers who import products may need to undertake greater due diligence of manufacturers to ensure that they have the product information they need and can be confident that the product will perform as the manufacturer claims.

Designers

Easy access to the product information they need when designing buildings. This would enable informed decisions on what products to use and how to use them with other products. Designers would know any limitations on a product's use (including any warning or ban on its use). Designers would also know what their existing responsibilities are in relation to building products and methods. The proposed changes are expected to reduce inefficiencies in the design process because more information will be available to designers. Designers may become more risk averse when choosing building products if there is uncertainty about how that might impact on their liability or insurance.

Builders

Easy access to the product information they need would make it easier to install building products correctly. They would also know what their existing responsibilities are in relation to building products and methods and could be held to account if they fail to adequately fulfil their roles and responsibilities. The proposed changes are expected to reduce building inspection failures or instances where remediation of work is required.

Building consent authorities (BCAs)

Easy access to product information when assessing an application for a building consent. They should see more applications to vary consents because the responsibilities for getting a variation for product substitutions would be clearer. The proposed changes are expected to reduce inefficiencies in the consenting and inspecting processes.

Building owners

Easy access to product information would help them to maintain their buildings. They should have greater confidence that those involved in building work have made good decisions about the products used. It's intended that building owners would be able to seek redress from manufacturers and suppliers if their products are not fit for their intended purpose. However, it may be hard to prove that a defect was the result of a faulty product rather than some other factor.

MBIE

Increased role in enforcing building products and methods. We would have access to the information we need to make decisions on the performance of a building product or method. Increased complaints about the quality of products and the accuracy of product information.

Occupational registration bodies

Allow them to hold designers and builders accountable for their work with building products and methods.

Questions for stakeholders

2.15	Do you think the impact of the proposed changes to the regulation of building products and building methods would be positive or negative? What do you think the impact might be?
2.16	How do you think the proposed changes to the regulation of building products and building methods would change how you and your business/organisation operates?

A two-year transition period for product information, six months for other proposed changes

Regulations would need to be put in place setting out the minimum requirements for product information. Manufacturers and suppliers would need time to produce product information that meets these requirements. We consider that a two-year transition period is needed. This period would commence once the regulations are in place. We're interested to get your feedback on the proposed length of this transition period.

We consider that the proposed changes to roles and responsibilities and the power to require information don't need a long transition period. We propose that these changes should come into force six months after the legislation is amended.

The changes would be supported by information and education campaigns to ensure manufacturers, suppliers, designers and builders are aware of the new requirements.

Questions for stakeholders

2.17	How long do you think the transition period for product information needs to be to ensure manufacturers and suppliers are prepared for the changes?
2.18	How long do you think the transition period for the changes to responsibilities needs to be so that people are prepared for the changes?
2.19	If the clarified roles and responsibilities came into force before the minimum requirements for product information, what would be the impact?

Options we considered but don't recommend

A minimum level of product assurance

MBIE has no evidence to justify requiring a minimum level of product assurance (that is, third-party testing) for particular types of products. Different levels of assurance are needed depending on the complexity of the products, their use and the types of testing they have undergone.

We consider that the requirement that building products are fit for their intended purpose would provide sufficient incentives for manufacturers and suppliers to undertake appropriate levels of assurance for that particular product.

Mandating assurance for particular products on an individual basis

We considered introducing the power to require mandating a particular level of assurance if an investigation identified a systemic issue with a particular product group. The risk associated with a product depends on the use of a product within building work, in the context of the performance requirements of that building, and should not be applied to a generic class of products. For example, requiring all cladding products to have some level of assurance, irrespective of use, would impose compliance costs that are difficult to justify.

We consider MBIE's existing powers to issue guidance, and warnings and bans, are sufficient to manage risks to the specification and use of building products and the code compliance of building work. The proposed power to compel information would enable MBIE to use warnings more often.

A national register or database of building products

Product databases for building products already exist in New Zealand. The cost of setting up and maintaining a government-led product register is significant. Further, no evidence suggests any wider benefits from doing so.

The proposal to require minimum information about building products would support good decision-making about products and support greater consistency and expansion of existing databases.

A requirement to pass on information about a building product

Queensland recently introduced a requirement to pass building product information down the building product supply chain. We don't propose to introduce a similar requirement at this time.

We consider that the requirement for public access to product information means that everyone would be able to easily access it. This access mitigates the need for passing on that information.

Strengthening the framework for product certification

A voluntary certification scheme that relies on accredited product certification bodies

MBIE has a voluntary building product certification scheme that was jointly established with Australia in 2008. This scheme (currently known as CodeMark) has operated separately in New Zealand since Australia established CodeMark Australia in 2016. This scheme includes both building products and methods.

MBIE appoints a Product Certification Accreditation Body (PCAB), currently JAS-ANZ, to undertake accreditation and audits of Product Certification Bodies (PCBs) against standards and criteria set out in the *Building (Product Certification) Regulations 2008* (the 2008 regulations).

BCAs must accept that building products with a CodeMark certificate comply with the building code

A product manufacturer or supplier can apply to an accredited PCB to have their product or method evaluated. The PCB evaluates the product or method against the standards and criteria set out in the 2008 regulations. The requirements for the content of product certificates are also set out in the 2008 regulations.

If a PCB believes a product or method meets these criteria it can issue a product a CodeMark certificate.

BCAs must then accept that the product or method complies with the building code, as long as it's installed according to the information on the certificate.

Roles and responsibilities in the CodeMark scheme

The table lists the expected actions of each participant in the CodeMark scheme. That participant is also responsible for its listed actions.

Scheme owner	**MBIE administers CodeMark in New Zealand and maintains the online product register** ■ Administer CodeMark in New Zealand. ■ Maintains an online public product register listing all current CodeMark certificates.
Product certification accreditation body	**The PCAB accredits and audits product certification bodies** ■ Accredits product certification bodies in line with the standards and criteria set out in the *Building (Product Certification) Regulations*. ■ Audits product certification bodies once a year (or more often if required).

Product certification body	**Six product certification bodies operate in New Zealand** ■ Evaluates products and methods against the building code. ■ Issues and audits product certificates. (Note: The PCAB has suspended one product certification body; another no longer accepts new applications).
Certificate holders	**Certificate holders must comply with the product certificate** ■ Ensure their product or method complies with the product certificate (and the building code). (Note: As at 1 February 2019, 176 CodeMark certificates are on the certificate register).
Building consent authorities	**69 BCAs issue building consents** ■ Accepts a CodeMark product or method as code compliant if the product or method is specified for use and installed correctly. ■ Ensures building work as a whole is compliant with the building code.

An effective product certification scheme has a key role in the building regulatory system

Product certification provides a compliance pathway for building products and methods that can lead to more efficient consenting applications. Manufacturers can demonstrate to BCAs and potential users that, when used as specified, a product or method will be code compliant. Product certification is suitable for any building product but is particularly beneficial to manufacturers and suppliers of products and methods that are innovative, new to the market or would have serious consequences if they failed.

MBIE doesn't have the tools we need to be an effective scheme owner

MBIE doesn't have the tools needed to ensure that the product certification scheme is fit for purpose. MBIE can't give stakeholders confidence that certified building products or building methods will perform as stated on their certificates.

This situation is the result of several factors:

- MBIE is unable to set new rules for the product certification scheme, even though existing rules are no longer fit for purpose.
- MBIE is unable to set the policies, procedures and systems that a PCB must have to adequately assure products and methods and their compliance with the building code.
- An accreditation process that doesn't fully assess whether a PCB is competent to assess a product and methods across all aspects of the building code.
- A legislative and regulatory framework that lacks a clear and structured process for taking timely action to address poor performance and poor quality product certificates.
- Product evaluations that are inconsistent and of variable quality.
- Poor quality certificates can be registered despite containing errors.

Overall, MBIE's powers and role under the current legislative framework is too narrow and passive to improve the scheme. The *Building Act* doesn't enable us to act in a way that is consistent with good practice as a regulator. We don't have the powers we need to take action against poorly performing PCBs or certificates of poor quality.

Once the PCAB accredits a PCB, the chief executive must enter the PCB on the PCB register. It's good practice for the regulator to control the register for schemes like CodeMark. They're best placed to understand the regulatory intent of the scheme. Under current settings, a PCB can issue product certificates as soon as the PCAB accredits the PCB and MBIE has little power to intervene in the process.

The existing regulation-making power in the *Building Act* only enables regulations to specify standards and criteria that PCBs must apply in determining applications for a product certificate. This is a narrow power, and doesn't enable regulations to clearly establish performance standards (including having procedures, policies and systems in place) that PCBs must meet to carry out product evaluations.

MBIE is responsible for maintaining the product certificate register. Yet, the grounds for suspending or revoking a product certificate are limited. For example, existing legislation doesn't let us suspend a certificate with errors in it, or require that those errors are resolved. Further, a certificate has no expiry date and can remain valid as long as a PCB audits it each year.

Under the current legislative settings, MBIE is not authorised to make new rules that set out expectations for the processes the PCAB and PCBs would follow to carry out their tasks and that govern the interactions and information flows between us, the PCAB, PCBs and certificate owners.

Proposed changes to the product certification framework

MBIE commissioned Deloitte to review CodeMark in 2016. They made several recommendations to both improve the way the scheme operates and the way we manage it. We've responded to those recommendations by improving our monitoring of the scheme. The government has also agreed to changes to the existing regulations that set accreditation standards for PCBs and the content of product certificates. These changes are intended to come into effect in 2019. The proposals in this discussion paper address the remaining recommendations, which require legislative amendments to progress.

MBIE is responsible for how CodeMark performs and should manage it consistently with the principles of good regulatory stewardship. Good practice for a regulator includes, for example:

- ensuring strong monitoring and oversight arrangements to ensure effectiveness, efficiencies and accountability in the way that the scheme operates
- maintaining public confidence in product certification
- having coherent risk-based processes and clear roles and responsibilities
- ensuring effective enforcement and intervention to make sure that the scheme operates and works as intended.

6. Strengthen MBIE's role as the product certification owner and regulator

Proposal

Allow for regulations to set requirements on product certification bodies and for the accreditation and registration of product certification bodies.

Allow for regulations to set out the process and requirements for registering a product certificate.

Allow MBIE to set rules for the interactions between participants in the product certification schemes.

Provide MBIE with the powers needed to administer the registers of product certification bodies and product certificates.

As the owner and regulator of product certification schemes, MBIE should be able to:

- specify the policies, procedures and systems a PCB should have
- assess whether PCBs are operating as intended under the *Building Act*
- ensure that the quality of certificates is maintained.

We propose to amend the *Building Act* to enable regulations to prescribe:

- the process and requirements for applying to us for registration as a PCB
- the requirements for maintaining registration as a PCB
- the process and requirements for registering a product certificate
- the policies, procedures and systems that PCBs must have in place
- the qualifications and competencies of those in technical roles.

In addition, MBIE would gain the power to:

- make rules that govern the interactions between the PCAB and PCBs, PCBs and product certificate owners, and PCBs and external contractors
- suspend or revoke a PCB's registration if it no longer meets the requirements of being registered
- decline to register, suspend or revoke a product certificate that has errors (including if the certificate was issued incorrectly).

The proposals would not change the role of the PCAB in accrediting and auditing PCBs. They would, however, provide MBIE with the ability to set out what the PCAB must examine when accrediting and auditing a PCB.

Enabling more active management of the scheme would enable us to be an effective scheme owner. The following table shows potential changes to requirements placed on different parties in the scheme. The scheme's rules and regulations would set out these requirements.

Proposed roles and responsibilities in the product certification schemes

The table lists the expected actions of each participant in the product certification schemes. Each participant is also responsible for its listed actions.

Registration of PCBs	The PCB: ■ is accredited by the PCAB ■ meets the fit and proper person test ■ declares the scope of the certificates they can issue ■ meets minimum competency requirements ■ has liability cover ■ notifies who will be signing certificates ■ meets specified reporting requirements ■ does not bring the scheme into disrepute.
Registration of certificates	The certificate: ■ is completed as set out in the 2008 regulations ■ references the correct building code clauses for the intended use of the product ■ describes clearly the intended use of the product or method ■ fits within the intent of the product certification scheme.
Policies, procedures and systems	Policies and procedures are in place to: ■ identify and maintain staff technical competence requirements ■ facilitate the bringing in of contractors or other technical experts, as needed ■ handle complaints ■ evaluate products, including identifying external resources where necessary ■ train staff. Systems are in place to record decisions and the reasons for those decisions.
Rules	Rules are in place to: ■ govern the interaction between the PCAB and PCBs ■ govern the interaction between PCBs and certificate owners, and PCBs and external contractors ■ prescribe the processes that the PCAB and PCBs must follow in carrying out their activities.

Potential impacts of enacting these proposals

These proposals should give stakeholders greater confidence in the quality of product certificates.

The proposed changes would enable us to set clear processes and procedures that PCBs must follow. In turn, this would enable us to hold PCBs accountable if they don't operate as intended.

The proposed requirements for PCBs, such as minimum competency requirements and ongoing staff training, should improve the quality of product evaluations and decision-making about whether to certify a product or method.

With the proposed requirements, we would be better placed to intervene to manage potential risks to the scheme, in the event that poor quality or inappropriate product certificates are issued.

The proposals would place more requirements on PCBs. This increased burden may reduce the number of PCBs willing to operate under the scheme.

PCBs would need to ensure that appropriate policies and procedures are in place to meet the new requirements, which may incur costs if they need to develop new policies and procedures. These costs would likely be passed on to product manufacturers or suppliers applying for product certificates. MBIE is also likely to incur higher costs, through the need for additional resourcing to effectively monitor the scheme.

Questions for stakeholders

2.20	**For product manufacturers and suppliers:** Would the changes proposed to the framework for product certification make product certification a more attractive compliance pathway for your products?
2.21	**For designers:** How would the proposed settings to the framework for product certification impact your product or method specification in building designs?
2.22	**For building consent authorities:** Would the changes to the product certification scheme's settings increase your confidence that a product or method with a product certificate will perform as intended?

Enabling a regulatory framework for modern methods of construction, including off-site manufacture

Modern methods of construction (MMC) can increase productivity in the building and construction sector

Building work is not always done by people on a building site

The building and construction industry is innovating by making use of manufacturing technology and processes to increase its productivity. This approach is referred to as modern methods of construction (MMC). MMC includes activities like off-site manufacturing of panels, pods, or whole buildings. It can also include manufacturing processes that happen on a building site, like using a brick-laying robot or a concrete 3D printer. We need to future-proof the building regulatory system to recognise what makes MMC special and to ensure we're not placing unnecessary regulatory barriers on it.

MMC processes are closer to manufacturing methods than traditional building work

These processes use automation, technology and assembly-line methodology. Components and buildings produced using modern methods of construction can be seen as both building products and building work.

MMC processes can create parts of buildings – or even complete buildings – in a factory or on a building site. Examples include:

- panels made in a factory and then assembled into a building on site
- bathroom pods made in a factory and then integrated into a hotel on site
- precast concrete and steel elements based on an architect's design for an office building fabricated off-site by a manufacturer and then integrated into construction
- complete houses 3D printed on-site using concrete.

The consenting process doesn't acknowledge the unique properties of MMC

Consenting processes still treat MMC like traditional building work

The current consenting system isn't very clear about how to treat the things about MMC that are different from traditional building work. MMC tends to use processes that are precise, repeatable and consistent. This is how MMC delivers productivity gains. It can also mean that each product can reasonably be expected to be produced to the same quality as the previous product. Despite this, MMC manufacturers who follow industry best practice, and use robust quality assurance (QA) systems that ensure that each component is compliant and manufactured correctly, are still required to give BCAs assurance of the compliance of their work every time.

The *Building Act* requires BCAs to make 'reasonable grounds' judgements about compliance. For traditional building work, BCAs are able to rely on in-person site inspections. For MMC, in-person inspections are impractical. BCAs can't always see inside MMC as the manufacturing work is often done far from the eventual installation site, and items like wall panels may be closed by the time they arrive on site.

BCAs are allowed to base their judgements on a range of mechanisms used by other parties, but different BCAs vary on what they will accept. These other assurance mechanisms, like CodeMark or producer statements, are required for each individual product, even when the process producing all the products is the same and a robust QA system is in place.

Many other countries have certification schemes that allow manufacturers to demonstrate the quality of their manufacturing and QA processes to a third-party certifier, who performs random audits. The manufacturer is then entitled to attach a sticker to their work that BCAs must accept as meaning the work will comply with the building code.

Roles and responsibilities for MMC can be unclear

Proposal 4 from the previous section of this document, 'Clarify the responsibilities of manufacturers, suppliers, designers and builders for building products and building methods', would apply to MMC. It would make it clear that manufacturers and suppliers are responsible for building products being fit for purpose, including products produced using MMC.

Because MMC can produce complex products that fall under the definition of 'building work' as well as that of 'building product', sometimes roles and responsibilities are unclear. For example, someone manufacturing an entire house in a factory setting could be seen both as the 'product manufacturer' and as a 'builder' doing building work. These roles hold different responsibilities.

Consenting processes for MMC can be unclear and inconsistent

Because the production of a full building is seen as 'building work' under the *Building Act* even when it occurs in a factory environment, some manufacturers report that two building consents are being required for the same building – one in the region where their factory is, and another where the building is going to be installed on site.

The treatment of MMC across BCAs varies significantly, making it difficult for manufacturers and people seeking to use MMC-produced components to get clarity about what they should do to demonstrate compliance, or certainty that their building work will be consented.

This lack of clarity, consistency and certainty can limit the viability of MMC in New Zealand, and add time and costs for building owners.

7. Enable a regulatory framework for MMC, including off-site manufacture

Proposal

Amend the *Building Act* to enable a regulatory framework that would future-proof the building regulatory system for MMC. Features of this framework include:

- enabling a manufacturer certification scheme for repeatable manufacture processes used to produce building work
- clarifying what roles and responsibilities for MMC will be when the new framework is in place
- minimising duplication of effort by:
  - not requiring two consents for the same building work
  - considering whether to require BCAs to accept each other's consents and Code Compliance Certificates.

Proposals that will enable a regulatory framework for MMC

MBIE proposes to enable a regulatory framework for MMC. This is intended to help future-proof the building regulatory system by providing clarity about how MMC should be treated and ensuring there are clear compliance pathways that work well for MMC.

These proposals are intended to take an enabling approach in legislation. The proposals outlined in this section are still being developed; they seek feedback on the core design elements of a regulatory framework for MMC. This will enable us to work with the sector to design the elements in more detail.

Enabling a manufacturer certification scheme would allow for a way to certify the repeatable processes used in MMC

MBIE proposes to amend the Building Act to allow regulations that provide for a voluntary manufacturer certification scheme. This scheme would be designed specifically for MMC, with a focus on assuring the robust processes and quality assurance that the manufacturer uses for all of its products.

Unlike guidance, product technical statements or producer statements, the manufacturer certification would be 'deemed to comply', meaning all BCAs would be legally required to accept all the work covered by the certification as compliant, every time. Unlike CodeMark, the manufacturer certification would be specifically intended to cover everything a manufacturer produced with just one certification – this is because it would be focused on assuring the robust processes and quality assurance that the manufacturer uses for all of its products, rather than checking each product.

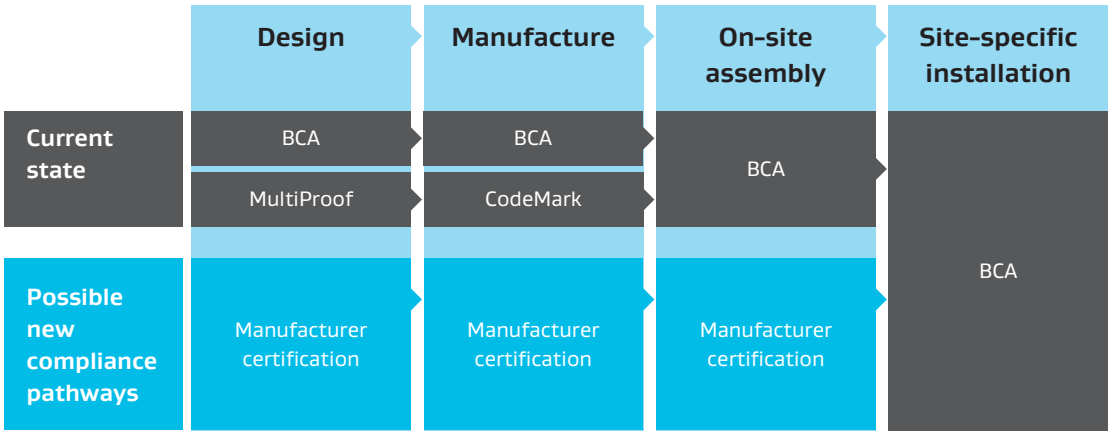
Based on similar overseas schemes, the features of the scheme are likely to include:

- checking of processes and QA by an accredited third-party certifier to determine eligibility for certification
- audits by a third party to ensure processes and QA are being consistently followed
- the ability for certification to be revoked based on unsuccessful audits or concerns about compliance.

For manufacturers who design and manufacture entire buildings, the scheme may also be able to certify the compliance of the designs, as well as their construction in accordance with designs and in compliance with performance requirements. This would mean that the BCA's checking would be focused only on the site-specific elements of the build that were not covered by the certification – foundations, for example.

Like with CodeMark, certification would be by an accredited third party – however, the third party would need to have specific expertise in certifying MMC processes. This is a different skill-set from most current Product Certification Bodies. MBIE will do further work to determine the accreditation requirements for a third party certifier.

The diagram below shows the existing pathways for MMC, and the possible new ones, across the stages of the building process:



Clear roles and responsibilities would support better consenting for MMC

We propose to do further work to clarify the roles and responsibilities of parties to the building process for MMC, once the new regulatory framework was in place.

Clear roles and responsibilities would help give manufacturers, builders and building owners clarity and certainty on when and how they need to show that MMC products and buildings comply with the building code.

MBIE will investigate how to minimise duplication of effort in consenting for MMC

We have identified that there are some situations where effort is being duplicated – for example, where a consent is being required for a building in the region where it is manufactured, and then again in the region where it is installed. We intend to develop options to minimise this duplication of effort. This could include requiring BCAs to accept each other's consents for the same design or building work.

This would include accepting a Code Compliance Certificate issued by a different BCA. For example, bathroom pods made in another BCAs region.

Potential impacts of the proposals

These proposals are still being developed. Detailed design work is required in order to ensure the proposed changes will have the desired impact. This section presents a view of the potential impacts, based on what is known so far.

These proposals should give the industry a way to demonstrate that their work will comply with the building code across their range of products, rather than requiring a certificate for each product (as with CodeMark). This should speed up the consenting process.

The manufacturer certification would provide manufacturers, developers, homeowners, and the finance industry with certainty that the consent process would be limited only to work not covered by the manufacturer certification. This may help mitigate some of the commercial risks associated with MMC.

When the new framework was implemented, there would be an impact on BCA processes to reflect their role and responsibilities with regards to the new framework and the manufacturer certification scheme. Requiring BCAs to accept each other's consents would also impact BCA processes.

Compliance costs would be associated with the manufacture certification scheme. Some manufacturers might find these hard to bear, particularly small manufacturers just starting out. Compliance costs could also be passed on to consumers. These compliance costs would be balanced against the greater certainty and consistency for the sector.

These proposals should remove the time loss, uncertainty and duplication of effort caused by the occasional requirement of two building consents for the same building work. This would benefit even those without the manufacturer certification. The clarity about roles and responsibilities with regards to MMC should further improve consenting efficiency, and encourage all parties to take appropriate responsibility for their role in the building process.

The impacts of these proposals will be explored more fully as development of the proposals continues.

Questions for stakeholders	
2.23	Are these the correct features for a future-proofed regulatory framework for MMC?
2.24	What would be the impact of such a regulatory framework for MMC?
2.25	**For manufacturers of MMC, including off-site manufacture:** How would the proposed framework impact your business?
2.26	**For manufacturers of MMC, including off-site manufacture:** Would you use the manufacturer certification scheme, and how would it need to be designed to work for you?
2.27	**For building consent authorities:** What would be the impact of a requirement for BCAs to accept one another's consents and Code Compliance Certificates?

Recap of questions

Part 2 – Building products

2.1	Do you agree with expanding the purpose of the *Building Act* to include the regulation of building products and methods and their use?
2.2	Do you agree with the proposed definition of 'building product'?
2.3	Do you agree with the proposed definition of 'building method'?
2.4	Do these definitions provide sufficient scope to account for new and emerging technologies?
2.5	Do you support the proposal to require manufacturers and suppliers to supply information about building products?
2.6	**For designers, builders and building consent authorities:** Will the proposed minimum information requirements for building products help you make good decisions about products?
2.7	**For designers, builders and building consent authorities:** Do you need any other information to help you decide whether a building product will result in building work that complies with the building code?
2.8	**For manufacturers and suppliers:** How closely do the proposed minimum information requirements reflect what you already provide?
2.9	**For manufacturers and suppliers:** Will there be an impact on your business to provide the proposed minimum product information for your products?
2.10	**For manufacturers and suppliers:** What is your estimated cost increase? Please include any relevant information on how you calculated your estimate (eg the number of products you produce or supply).
2.11	Do you support the proposals to clarify roles and responsibilities for manufacturers, suppliers, designers and builders?
2.12	Is the current threshold and process for variations appropriate for all circumstances?

2.13	Do you support the proposal to give MBIE the power to compel information to support investigations?
2.14	Would MBIE's ability to compel information about building products or methods and share this with other regulators have unintended consequences? If so, what might these unintended consequences be?
2.15	Do you think the impact of the proposed changes to the regulation of building products and building methods would be positive or negative? What do you think the impact might be?
2.16	How do you think the proposed changes to the regulation of building products and building methods would change how you and your business/organisation operates?
2.17	How long do you think the transition period for product information needs to be to ensure manufacturers and suppliers are prepared for the changes?
2.18	How long do you think the transition period for the changes to responsibilities needs to be so that people are prepared for the changes?
2.19	If the clarified roles and responsibilities came into force before the minimum requirements for product information, what would be the impact?
2.20	**For product manufacturers and suppliers:** Would the changes proposed to the framework for product certification make product certification a more attractive compliance pathway for your products?
2.21	**For designers:** How would the proposed settings to the framework for product certification impact your product specification in building designs?
2.22	**For building consent authorities:** Would the changes to the product certification scheme's settings increase your confidence that a product with a product certificate will perform as intended?
2.23	Are these the correct features for a future-proofed regulatory framework for MMC?
2.24	What would be the impact of such a regulatory framework for MMC?
2.25	**For manufacturers of MMC, including off-site manufacture:** How would the proposed framework impact your business?
2.26	**For manufacturers of MMC, including off-site manufacture:** Would you use the manufacturer certification scheme, and how would it need to be designed to work for you?

2.27 **For building consent authorities:**
What would be the impact of a requirement for BCAs to accept one another's consents and Code Compliance Certificates?

List of acronyms

BCA	Building consent authority
JAS-ANZ	Joint Accreditation System of Australia and New Zealand
MBIE	Ministry of Business, Innovation and Employment
MMC	Modern methods of construction
PCAB	Product certification accreditation body
PCB	Product certification body
PGD	Plumbers, gasfitters and drainlayers
QA	Quality assurance
RFI	Request for information

Have your say

See **page 4** of the introduction (Part 1) for details on how to submit your feedback.

16 **Submissions close on 16 June 2019**

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

3

Discussion paper –
Building system legislative reform

Occupational regulation

APRIL 2019

New Zealand Government

Contents

Summary of part 3: Occupational regulation

Occupational regulation aims to protect the public from harm by ensuring services are performed with reasonable care and skill.

Regulating who can do certain kinds of work (licensing) aims to protect the public from harm by ensuring only appropriately skilled and competent people carry out specific work.

Occupational regulation should make sure that:

- regulation is proportionate to the risks to public safety
- registered or licensed practitioners have the right skills or qualifications
- practitioners are held to account for substandard work.

Six types of jobs in the building process are currently regulated occupations[1]:

- Architects are regulated by the New Zealand Registered Architects Board.
- Electrical workers are regulated by the Electrical Workers Registration Board.
- Engineering associates are regulated by the Engineering Associates Registration Board.
- Engineers are regulated by Engineering New Zealand as the Registration Authority for professional engineers, which is monitored by the Chartered Professional Engineers Council.
- Licensed Building Practitioners (LBPs) are regulated by the Building Practitioners Board (BPB).
- Plumbers, gasfitters and drainlayers are regulated by the Plumbers, Gasfitters and Drainlayers Board (PGD Board).

The changes set out in this section will address three priority areas where there are problems with the current occupational regulation schemes

These three areas offer the best opportunities to move the regimes towards best practice, and meet the desired outcomes for occupational regulation.

The LBP scheme

The definition of restricted building work (RBW) in the Licensed Building Practitioners (LBP) scheme is too narrow. The definition of RBW only includes houses and small apartments. This means that builders working on other buildings, including multi-storey apartments and office buildings, and schools, hospitals and stadiums, are not required to be LBPs. Yet these buildings are generally more complex to design and build and present greater risk to public safety than a house or small apartment building.

1 Licensed or registered people make up about 64,000 of the estimated 241,700 people working in the construction industry (as at June 2018). The remainder are still carrying out work that is regulated under the Building Act and general business law, and may be working under the supervision of someone who is licensed or registered.

Engineers

Few restrictions are placed on who can carry out engineering work on buildings; the Chartered Professional Engineer title does not provide sufficient assurance of competence. Chartered Professional Engineers (CPEng) are automatically deemed to meet the design licensing requirements for restricted work under the LBP scheme. Engineers and BCAs have raised concerns about the usefulness of CPEng in providing assurance of an engineer's competence to carry out very complex or specialised work.

Plumbers, gasfitters and drainlayers

Exemptions allow unqualified people to carry out plumbing, gasfitting and drainlaying work. The *Plumbers, Gasfitters, and Drainlayers Act 2006* (PGD Act) provides 11 exemptions that allow people to perform specific work without meeting the PGD Board's registration and licensing requirements. Exemption holders are still required to meet the requirements of the building code and meet any building consent requirements. There is a risk to public health and safety when unqualified people carry out restricted work.

We want stakeholders' feedback on seven proposals

1	Broaden the definition of RBW to include more complex non-residential building work.
2	Raise the competence standard for LBPs to enter and remain in the LBP scheme. This includes proposals to: ■ Introduce a tiered licensing system for LBPs to establish a progression pathway, including a specific licence for supervision. ■ Simplify the licence class categories. ■ Introduce behavioural competence requirements for LBPs.
3	Establish a new voluntary certification scheme that provides assurance of an engineer's professionalism and general competence and phase out CPEng.
4	Restrict who can carry out or supervise safety-critical structural, geotechnical and fire-safety engineering work within the building sector. This would cover all medium-to-high complexity work and be triggered by factors such as building size, use and location.
5	Establish a new licensing scheme to regulate who can carry out or supervise engineering work that has been restricted.
6	Repeal sanitary plumbing exemptions for householders in specified areas and for rural districts.
7	Repeal exemptions for restricted sanitary plumbing, gasfitting and drainlaying work under supervision.

These changes will help deliver the programme's outcomes

The objectives of the proposed changes are to address regulatory gaps in the system of occupational regulation and make sure that:

- restrictions on building work are proportionate to the risks to public safety
- those who are licensed to undertake restricted work have the right level of competence, and are held accountable for substandard work.

The proposals will:

- rebalance risk in the building process by making sure that those who are best able to manage risks will be held to account for substandard work
- give the public and those involved in the building process greater assurance that building work has been carried out by competent people with reasonable care and skill
- enable a more efficient consenting process.

Review of complaints and discipline across the regulated occupations in the building sector is a future phase of work

The review of the occupational regulation of LBPs, engineers, and plumbers, gasfitters and drainlayers has highlighted issues related to complaints, discipline and prosecution that cut across all six regulated occupations in the building sector. There are opportunities to align the regimes with best practice, improve information sharing across the sector, achieve greater consistency and efficiency, and ensure penalties are sufficient to ensure compliance with the rules and standards.

3.1: The LBP scheme

The LBP scheme makes a crucial contribution to safe and durable buildings

The LBP scheme aims to manage public safety, health and financial risks facing building owners and occupants. The LBP scheme is the primary way in which the building regulatory system ensures the construction workforce is competent, skilled and held accountable.

How the LBP scheme works today

The definition of restricted building work (RBW) determines what type of building work is regulated under the LBP scheme, and underpins the scheme's licensing classes. The licensing of building practitioners intends to provide assurance that building practitioners carrying out or supervising RBW have the right skills and competence.

RBW is currently defined in regulations [Building (Definition of Restricted Building Work) Order 2011] as:

- construction and alteration or design of the primary structure of a house or a small-to-medium apartment building (s5.2(a)(i))
- the external moisture-management system of a house or a small-to-medium apartment building (s5(2)(ii))
- design of fire safety systems for small to medium apartments proposed to be constructed or altered (s7).

This means that, under the current RBW definition, building practitioners aren't regulated by the scheme when they carry out work on:

- commercial buildings
- mixed-use buildings
- high-rise residential buildings.

The result is that the scheme doesn't manage risk proportionately. High-rise buildings are more complex designs than houses, and require a higher level of competence to construct.

An updated scheme will manage risks proportionately and support a productive building sector

The proposed changes to the LBP scheme will more proportionately manage risks to life safety, and make sure that New Zealand's building sector work force is competent and productive.

An updated and improved scheme is critical to the success of the building regulatory system reform programme. The reform programme involves wider changes:

- The fairer allocation of risk in the building process. The proposal to require guarantee and insurance products for new residential builds and significant alterations would require builders to meet some minimum standards in order to get insurance cover. Lifting the competence standards in the LBP scheme will help builders to meet requirements from guarantee and insurance product providers.
- Builders will have clearer responsibilities in relation to building products.
- The licensing of engineers for safety critical work.

MBIE aims to raise the competence bar for entry to the LBP scheme. LBPs will be expected to have higher technical competence and meet ethical behavioural standards. The scheme will signal to consumers and other parties which LBPs have the right skills to carry different types of work, and more complex work.

The construction sector has changed significantly since the scheme was introduced

The definition of RBW was driven by assumptions that are no longer valid:

- that residential builds were most vulnerable to the systemic weaknesses of the building system
- that commercial developments had more sophisticated quality assurance systems for managing risks.

Building Consent Authorities (BCAs) previously only had a duty of care towards residential builds. In 2012, the BCA duty of care was extended to cover complex multi-storey apartment buildings and other commercial construction with the *Spencer on Byron* decision.[2] Oversight on construction sites has also changed over time, moving away from experienced building professionals such as clerks of work, towards project managers.

Commercial building work risk management practices don't always manage risk adequately

Stakeholders have told us that contracting processes in the commercial sector have a stronger focus on the allocation and pricing of risk rather than on quality assurance of the work. Commercial risk management practices are voluntary, with approaches on the level of due diligence left to the discretion of building companies.

2 BODY CORPORATE NO. 207624 v NORTH SHORE CITY COUNCIL [*Spencer on Byron*] [2012] NZSC 83 **https://www.courtsofnz.govt.nz/cases/body-corporate-no.-207624-v-north-shore-city-council-1/@@images/fileMediaNotes?r=33.6908305432**

Inspection failure rates highlight that commercial building work risk management practices are no better than those for residential building work. Data from seven BCAs[3] indicates comparable building inspection failures between residential and commercial building work.
One-third of commercial building inspections fail. This highlights the anomaly between building practitioner accountability in the residential building sector and the commercial building sector.
BRANZ[4] surveyed industry experts on their experience of compliance failures for new buildings (residential and non-residential). Compliance failures relating to weathertightness were identified as a particular issue for multi-unit housing.

Building work on larger apartment buildings faces at least as many risks as work on houses

Owners and occupants of apartments in high-rise or multi-use buildings are equally vulnerable to the risks of something going wrong in the build process as owners of stand-alone homes. Large multi-storey apartment buildings and non-residential buildings are likely to be more complex in terms of structure, weathertightness and fire-safety – but building work on these buildings is currently excluded from the LBP scheme.

The competence standards for entry to the LBP scheme are too low

Builders must meet competency standards established by the Building Practitioners Board (BPB) to become and remain licensed. The BPB sets minimum standards of competence for each licensing class under the Licensed Building Practitioners Rules 2007. A building practitioner who wants to become an LBP must meet these standards. People can become LBPs through either a qualification-based pathway or an experience-based pathway.

One of the original policy intentions of the LBP scheme was to provide incentives for upskilling the workforce. The scheme was intended to shift over time to a more qualifications-based scheme.[5] Feedback from stakeholders indicates the entry level to the LBP scheme was intended to be raised over time. However, the focus in the original implementation was to get existing building practitioners licensed. The entry level has not changed since the LBP scheme was introduced.

Competence in the LBP scheme has been identified as a key area of concern

Builders, BCAs and industry groups don't have confidence in the LBP scheme:

- Many believe the entry level to the scheme is set too low to be a reliable standard of skill.
- Qualifications are not required for entry to the scheme.
- The scheme's licensing structure doesn't recognise different levels of competence.
- LBPs don't value the scheme as it does not clearly signal a high level of competence. LBPs notice other LBPs with low competence.
- Many builders rely on BCAs to identify non-compliant building work and ensure buildings have been constructed to the consented plans. Relying on BCAs to identify issues and defects is not an appropriate method of ensuring that building work is completed competently.

3 MBIE data search, GoGet data - Inspection failures from January 2012 to June 2017 across 7 BCAs.

4 Page, I. & Gordon, G. (2017). *What is quality in buildings?* BRANZ Study Report SR380. Judgeford, New Zealand: BRANZ Ltd

5 Cabinet Economic Growth and Infrastructure Committee. 2009. Licensing of Building Practitioners.

Research MBIE carried out in 2018 found that levels of competency are an issue.[6] Research participants were concerned that the competence level to enter the scheme was too low.

Complaints against 128 LBPs were upheld by the BPB in the 2017/2018 year.[7] Key themes in complaints included LBPs failing to build in accordance with the building consent, LBPs carrying out RBW without a building consent, proceeding with non-compliant work, failing to comply with contractor obligations, and poor application of supervision.

BRANZ (2018) has identified several New Zealand surveys into residential building quality that have reported defects in new homes. In 2014, 8 per cent of new houses had what could be considered 'serious defects'. Most of these defects were due to poor workmanship.[8]

Licence classes need to be changed to address supervision and site management issues

The *Building Act* 2004 specifies that an LBP must carry out or supervise RBW. Unlicensed builders can carry out RBW under supervision. Supervision is a critical component of the LBP scheme to ensure the construction workforce has flexibility and can operate productively, while ensuring buildings are safe and durable. Supervision ensures that RBW not being done directly by LBPs is still being done competently and in compliance with building consents and the building code.[9]

An LBP can carry out supervision without any supervision experience or training

Anyone who gains a licence under the LBP scheme can immediately carry out and supervise RBW. Inexperienced LBPs taking on supervision are likely to be taking on more risk than they realise, without having sufficient supervision competence to manage risk. Our 2018 research report of stakeholder views found that some entry-level builders didn't consider themselves competent enough to become licensed as they weren't ready to supervise others and be accountable for the building work of others.[10] All builders are liable for the building work they do, but are not all accountable under the LBP scheme.

Applying effective supervision requires technical skills and judgement, but no competency requirements for supervision are in place (MBIE has issued guidance on how to apply the appropriate type of supervision.)[11] LBPs are required to judge the appropriate application of supervision based on the type and complexity of the work, the experience of the people being supervised, and the geographic spread of the work.

Supervision of unlicensed builders is not working well

BCAs, builders and complaints data have all indicated a proportion of LBPs are not adequately supervising unlicensed builders carrying out RBW. We've heard that some LBPs are supervising across a high number of sites without applying the appropriate judgement about the level of required supervision. BCAs have told us that they're not confident in the level of supervision by LBPs.

6 **https://www.lbp.govt.nz/assets/documents/lbp-stakeholder-research-report-september-2018.pdf**

7 **https://www.lbp.govt.nz/assets/documents/annual-reports/annual-report-2018.pdf** Page 26.

8 BRANZ 2018, "Building quality issues: a literature review." SR375. **https://www.branz.co.nz/cms_show_download.php?id=8748debf21c48edf999affc9f484b99a190010d9**

9 **https://www.lbp.govt.nz/assets/documents/lbp-stakeholder-research-report-september-2018.pdf**

10 **https://www.lbp.govt.nz/assets/documents/lbp-stakeholder-research-report-september-2018.pdf**

11 **https://www.lbp.govt.nz/assets/documents/Practice-note-supervision.pdf**

Who can carry out restricted building work?

Licensed building practitioner

- Can carry out restricted building work
- Can supervise unlicensed builders carrying out restricted building work

Unlicensed builder under supervision

- Can carry out restricted building work

Unlicensed builder

- Can't carry out restricted building work without supervision

Our 2018 stakeholder research report found that Building Consenting Officials (BCOs) have identified many instances when the LBP is not present during building inspections. BCOs aren't able to discuss the building work or the appropriateness of supervision with the LBP. This doesn't give BCOs confidence that the level of supervision is appropriate.[12]

Inspection failure rates are an additional indication that supervision hasn't been applied adequately. On average 31 per cent of BCA inspections of residential homes failed between January 2012 and June 2017. This failure rate has remained relatively constant between 2014 and 2017.

The site licence is not providing the intended value in the building process

The site licence in the LBP scheme was intended for competent professionals in their chosen fields to aspire to, reflecting a change of role from being solely on the tools to being responsible for coordinating and overseeing the building construction or alterations. Its original intention was to remedy the lack of integration across the different elements of a building that was seen to have contributed to the leaky homes crisis.

We've heard feedback from builders that the site licence is not providing value. Site licence holders aren't able to supervise RBW under this licence class. When the scheme was being established in 2007, there was concern that the site lead role could create unintended new liabilities. It was found that site leads might face liability for construction defects on the grounds that they had a general duty of care for a construction project as a whole. This liability arose in part from having legal responsibility to certify that construction meets the building consent. This would have conflicted with implied warranties in the *Building Act*, which places duties on all builders and owners to ensure construction meets building consent requirements. It would also have conflicted with BCA responsibilities.[13] The site licence is the only licence class that has supervision competencies, even though other licence class holders are able to both do and supervise work. Uptake of the licence is relatively low and is decreasing, with 4,758 site licence holders as at 30 June 2018.[14]

12 **https://www.lbp.govt.nz/assets/documents/lbp-stakeholder-research-report-september-2018.pdf**

13 Cabinet Business Committee (07) 55, 20 April 2007 "Changes to the Building Practitioner Licensing Regime".

14 **https://www.mbie.govt.nz/assets/d89e8ad463/national-construction-pipeline-report-2018.pdf**

The licence classes need to be updated

Licence classes – see table 3.1.1 below – are defined in regulations under the Building (Designation of Building Work Licensing Classes) Order 2010. They directly relate to the definition of RBW.

We've heard concerns from builders and BCAs that:

- builders are required to get multiple licences due to the licence class structure
- licence classes don't clearly signal areas and levels of competence to others in the system
- licence classes are not well linked to sector training programmes
- there are regulatory gaps between the licence classes.

TABLE 3.1.1

Licence classes and types in the current LBP scheme

Licence Class	Licence Class Type
Design Site	General
Carpentry Roofing External plastering Bricklaying and blocklaying Foundations	Trade

The LBP scheme does not have the full range of tools it needs to hold LBPs to account

The scheme requires LBPs to have sufficient technical competence to carry out or supervise RBW. But no requirement is in place to ensure that LBPs don't cut corners or carry out poor quality building work – the scheme does not have behavioural competence standards.

Under the current scheme, the BPB may consider the previous conduct, including criminal convictions, of LBPs as part of the complaint process. An LBP can have their licence suspended or removed on the basis of a previous or new criminal conviction if a complaint is made.

LBPs don't need to meet any character or behavioural standard in the licensing application process. This means that building owners may only find out about their LBP's poor ethical behaviour when something goes wrong. This means that building owners aren't able to make fully informed decisions about the LBPs they choose to engage.

Of the six occupational groups in the building and construction sector that are currently regulated, all but the LBP scheme have a code of ethics or a fit and proper person requirement for registration and/or membership.

The *Building Act* currently has provisions for a code of ethics to be prescribed by Order in Council for minimum standards of ethical conduct for LBPs.

MBIE proposes two changes to the LBP scheme

1 Broaden the definition of RBW to include more complex non-residential building work

2 Raise the competence standard for LBPs to enter and remain in the LBP scheme. This includes proposals to:

- Introduce a tiered licensing system for LBPs to establish a progression pathway, including a specific licence for supervision.
- Simplify the licence class categories.
- Introduce behavioural competence requirements for LBPs.

The objectives of these changes are to:

- ensure that restrictions on building work are proportionate to the risks to public safety
- ensure that those who are licensed to undertake restricted work have the right level of competence, and are held accountable for substandard work.

1. A broader definition of RBW will help manage risk

Proposal

Broaden the definition of RBW to include more complex non-residential building work.

This proposal aims to ensure the regulation of building work is more proportionate with risks to public safety and recognises that apartment owners are equally financially vulnerable to building failure as house owners.

MBIE is proposing to broaden the definition of RBW to better manage risks to public safety, and better protect building owners and users by ensuring builders have the right skills and knowledge and are held accountable for their work. The LBP scheme can better manage risks to public safety and better protect vulnerable building occupants, such as older persons, children and people who are disabled or have poor health.

We are also proposing to use the risk aspects set out in the Building Importance levels in the building code to inform the definition of RBW.[15] Building Importance levels have been determined by risk to human life, the environment, economic cost and other risk factors in relation to building use. Buildings with a high capacity of building users present a high risk to public safety should a building failure occur. Higher capacity buildings are also usually more complex to design and build. Failing to build complex high-rise buildings to the agreed and consented design greatly affects public safety.

Building use and occupancy are key considerations in the proposal

High numbers of vulnerable occupants such as older persons, children and people who are disabled or have poor health face a higher risk to their safety if a building fails. Vulnerable occupants are unable to escape buildings quickly, particularly buildings with high capacity. MBIE wants to expand the definition of RBW to capture higher risks. We don't want to capture lower-risk commercial and industrial buildings which are more straight forward designs to construct, and may not usually be occupied.

Other jurisdictions also regulate building practitioners in the commercial sector

Many other jurisdictions regulate building practitioners across both residential and commercial sectors. This occurs in all but two Australian jurisdictions. Several jurisdictions link practitioner licensing to the complexity of building work rather than the use of a building, with the inclusion of licensing for medium- and high-rise buildings.

15 A building is given an importance level between 1 (low risk) and 5 (catastrophic risk) as determined by risk to human life, the environment, economic cost and other risk factors in relation to its use. See Clause A of the Building Act: **https://www.building.govt.nz/building-code-compliance/a-general-provisions/a3-building-importance-levels/**. Also see Clause A of the building code: **http://www.legislation.govt.nz/regulation/public/1992/0150/latest/DLM162576.html#DLM4417717**

An expanded RBW will include more building types

MBIE proposes that primary structure, weathertightness and fire safety systems remain the core elements of RBW under an updated definition. These three elements are critical to the safety and durability of a building and require an appropriately skilled and competent person to design or construct them. They also pose the highest risk to building owners and occupants from safety, health and financial perspectives. Failure of weathertightness in buildings creates safety risks for building owners and users because water damage to buildings can result in structural damage to the building. Water damage to timber can also result in toxic fungal growth that presents health risks.[16]

The proposed definition of RBW focuses on structural, weathertightness and fire safety work and is expanded to include:

- all residential building work, including simple houses and mixed use residential/commercial buildings and apartments
- commercial and communal buildings currently defined as:
  - Importance Level 2 buildings with a height of 12 metres or more **or** capacity over 200 persons. This is only a subset of Importance Level 2 buildings. Building capacity will be determined by a licensed fire engineer.
  - Level 3 and above.

The definition of RBW will exclude restricted engineering work, but may include some engineering work that doesn't meet the threshold for restricted engineering work.

Questions for stakeholders	
3.1.1	How effective do you think expanding the scope of RBW will be in managing risks to public safety in the building sector?
3.1.2	Do you agree with the proposed threshold for the definition of RBW?
3.1.3	**For builders:** What impacts do you think the proposals for RBW will have on you and your business (including type of work, recruitment, training and costs)?
3.1.4	What impacts do you think the proposals for RBW will have on homeowners, building owners and building occupants?
3.1.5	How do you think the proposed changes for the LBP scheme would affect the behaviour of LBPs?
3.1.6	What impact do you think expanding the scope of RBW will have on the construction sector skill shortage?

16 The Hunn report, the report summarising the inquiry into leaky homes, noted that water-damaged timber will become structurally unsound and fail if undetected. See "Report of the overview group on the weathertightness of buildings to the Building Industry Authority." 31 August 2002 **https://www.stepupgroup.co.nz/wp-content/uploads/2011/09/32682.pdf**

2. Higher competence requirements will increase confidence in the LBP scheme

Proposals

Raise the technical competence standard for LBPs to enter and remain in the LBP scheme.

Introduce a tiered licensing system for LBPs to establish a progression pathway, including a specific licence for supervision.

Simplify the licence class categories.

Introduce behavioural competence requirements for LBPs.

MBIE proposes raising the competence standards required of licensed builders in response to concerns that the current standards of competence are set too low.

To change these standards, the BPB must develop new competency standards in the LBP rules. The process will include a consultation process with the construction sector to identify the right levels of technical competence. MBIE will need to draft changes to the rules and the BPB will need to approve those changes. The Minister for Building and Construction will then also need to approve them.[17] Skills maintenance requirements for LBPs will be aligned with the new competence standards.

A redesigned tiered licensing system would recognise different skill levels

We propose redesigning the LBP scheme licence class structure to shift to a tiered licensing class structure from the current specialised licensing class structure. A tiered approach to licence classes would recognise different levels of skill and seek to encourage more builders to become LBPs. It would achieve this by providing a pathway to upskill and progress through the industry. Licences would be tiered based on the level of skill required to undertake or supervise RBW. The existing seven specialised licence classes would be simplified.

The proposal will complement the Government Skills Strategy and Skills Action Plan by supporting career pathways for new and existing building practitioners. The first Skills Action Plan focuses on getting people into the construction industry. The expectation is that up to 4,000 more people will choose construction-related careers and qualifications (including apprenticeships) in the next three years.[18]

Introducing a supervision licence would recognise higher levels of skills and ease pressure on less experienced LBPs

MBIE proposes a supervision licence tier. Standards of competence for supervising RBW would be set at a higher level than the standard of competence for someone carrying out RBW. Holders of a supervision licence would be able to both carry out and supervise RBW in their area of competence. LBPs without a supervision licence would only be able to carry out RBW in their area of competence.

17 This process is prescribed in section 360 of the *Building Act 2004*. **http://www.legislation.govt.nz/act/public/2004/0072/latest/DLM308691.html?search=sw_096be8ed817f9e65_360_25_se&p=1&sr=1**

18 See Cabinet paper at **https://www.mbie.govt.nz/assets/7b96257cf6/cabinet-paper-action-plan-construction-skills-strategy.pdf**

A supervision licence tier would ease pressure on new LBPs to provide supervision as soon as they become licensed, and help recognise the higher level of skills of more experienced LBPs.

Internationally, supervision is commonly recognised as an additional competence to carrying out building work. Australian states have different regulatory approaches to practitioners, but most recognise supervision as a competency.

TABLE 3.1.2

Proposed Licence Class Tiers and Overall Competence Requirements

Licence Class Tier	Competence Requirements
LBP 1	Technical competence to carry out building work of that licence class type. Must follow code of ethics and meet requirements for fit and proper person
LBP 2	Technical competence to carry out building work of that licence class type. Supervision competence and using judgement to apply the appropriate level of supervision. Must follow code of ethics and meet requirements for fit and proper person.

As part of changes to competence standards and licence class redesign, we will consider how often licences should be renewed

Licences under the LBP scheme are currently required to be renewed each year. MBIE wants to make the licensing renewal process more meaningful, and less frequent than it is currently.

MBIE will review site licence requirements when redesigning the overall licence classes

MBIE proposes reviewing the site licence in the LBP scheme as part of redesigning the overall licence classes. This review will take into account the need to ensure:

- oversight of building work on a site is provided
- the oversight contributes to the overall building quality
- the oversight role is carried out by people best placed in the building process to be responsible for this work.

Introducing behavioural standards will improve public confidence in the LBP scheme

MBIE proposes introducing behavioural standards for LBPs. These standards would be implemented alongside improvements to technical competence standards to improve the quality of building work. Their shared goal would be to cement public confidence in the LBP scheme. It would provide confidence for consumers that the practitioner not only has the technical skills for the job, but can also be expected to perform their job with integrity.

If the behavioural requirements are clear, then this would provide clear grounds for the BPB to take any necessary disciplinary action. Clarifying behavioural requirements can be achieved by:

- raising the entry bar for the scheme, which will provide more assurance that builders presenting a high risk of poor behaviour don't become licensed, and will reduce the risk to consumers
- setting clear standards of behaviour for LBPs, which will provide a clear signal to LBPs and consumers about how LBPs should conduct themselves.

A fit and proper person requirement would raise the bar for entry to the LBP scheme

MBIE proposes implementing a fit and proper person test to raise the bar for entry to the scheme, and to provide the grounds for discipline specified in the *Building Act*. This could include if the applicant has:

- a conviction by any court in New Zealand or elsewhere of any offence punishable by imprisonment for a term or six months or more, and the carrying out of the offence reflects adversely on the person's fitness to carry out or supervise building work
- a conviction for an offence under the *Building Act*
- held themselves as being licensed to carry out or supervise building work of a type that, at that time, they weren't licensed to carry out or supervise
- for the purpose of becoming licensed, made a false declaration or representation
- behaved in any way or done anything that brings, or is likely to bring, the scheme into disrepute
- breached the code of ethics prescribed in the Act.

In conducting a fit and proper person assessment, the BPB would apply the principles of natural justice in coming to its decision. They could also consider other relevant issues, such as the seriousness of the incident, how long ago it occurred, its consequences, whether it was a one-off action and the applicant's attitude toward the incident.

A code of ethics would support the fit and proper person requirement

MBIE proposes implementing an accompanying code of ethics for LBPs, as specified in section 314A of the Building Act.[19] A code of ethics would support the fit and proper test and could include provisions that require the LBP to:

- abide by laws
- conduct their professional activities honestly and fairly and with reasonable skill, care and diligence
- take reasonable steps to safeguard health and safety
- avoid significant conflicts of interest
- report any breaches of the code of ethics
- maintain confidentiality
- uphold the reputation of the profession.

19 The code of ethics for licensed building practitioners states: The Governor-General may, by Order in Council made on the recommendation of the Minister, prescribe a code or codes of minimum standards of ethical conduct for licensed building practitioners or classes of licensed building practitioners'. See **http://www.legislation.govt.nz/act/public/2004/0072/latest/DLM4358305.html?search=sw_096be8ed817f9e65_ethics_25_se&p=1#DLM4358305**

LBPs will have clarity of what behavioural standards builders must meet. Builders who don't meet fit and proper person requirements (as determined by the BPB) cannot be licensed. The BPB can currently only take disciplinary action about behavioural misconduct if it brings the LBP scheme into disrepute. This is a high threshold and complaints of behavioural misconduct are rarely upheld. Introducing a code of ethics establishes a clearer standard against which to measure LBP behaviour.

Increased support to the Building Practitioners Board would help it manage the broader scope of the LBP scheme

MBIE will consider consequential changes to amend and support the roles and functions of the BPB, to manage the broader scope of the LBP scheme and changes in competency standards. The BPB may need new members to manage a broader LBP scheme with a different focus. This may include expertise on ethical conduct standards.

Questions for stakeholders	
3.1.7	How effective do you think raising the competence standards for the LBP scheme would be in increasing confidence in the LBP scheme?
3.1.8	What impact would changing the competence standards for the LBP scheme have on builders, building companies, building sector associations and training organisations?
3.1.9	**For builders:** Would the introduction of tiered licence classes make you more likely to apply to become an LBP, and why?
3.1.10	**For builders:** If you're already an LBP, would you be likely to apply to become licensed under a new supervision licence class, and why?
3.1.11	**For builders:** Do you still see potential value in having a site licence for residential and commercial building projects; and how can this licence contribute to the coordination of building work?
3.1.12	**For builders:** Who do you think should be responsible for coordinating building work on a site and what skills are required for this type of role?
3.1.13	Do you think that the introduction of a fit and proper person test and a code of ethics for LBPs will help to ensure that building professionals are held accountable and improve the public's confidence in the LBP scheme?

Changes required to introduce the proposals

Building Act	■ Amendments to references to "carry out and supervise" ■ Amendments to the BPB's role and function to support a broader LBP scheme scope ■ Specify that LBPs must follow the code of ethics and meet 'fit and proper person' requirements to be licensed.
Regulations	■ Restricted Building Work ■ Licence class redesign
Rules	■ Changes to the competence standards and licensing assessment processes for existing licence classes ■ Introduction of competence standards for new licences ■ Development of a code of ethics and fit and proper person requirements in the Rules.

How the proposed changes measure up to our five assessment criteria

Does the proposal meet the objectives for occupational regulation?

The proposed changes are intended to address regulatory gaps in the system of occupational regulation to reduce risk to public safety and provide assurance that buildings are safe and durable:

- The proposed changes would ensure that the regulation of building work is more proportionate to the level of risk.
- LBPs will have a higher level of competence, can competently supervise those who are not licensed, and are held accountable for substandard work.
- Building owners, BCAs and others will get a stronger signal about an LBP's skill level and what area they're competent to practice in. That skill level will differ depending on the nature and complexity of the work. The skill level may be entry, experienced, or proficient in a specific area of competence.
- The credibility of the LBP scheme will improve, as it's directly linked to competence standards. Competence standards will include a higher standard of current technical competence as well as new competence standards to demonstrate good judgement and ethical behaviour.
- The BPB will be better supported when handling complaints against LBPs for unethical conduct. In turn, this will reduce risk to consumers and improve the credibility of the scheme.

Does the proposal support the desired behavioural shifts in the building sector?

The proposals support the desired behavioural shifts in the building sector by raising the competency standards for RBW, which should reduce the risk associated with substandard practice across the building process. This supports proposed changes to achieve a fairer allocation of risk across the sector.

Builders will have stronger incentives to fulfil their obligations, be accountable for their work, and promptly remedy defects. In turn, BCAs will be more confident that technically competent builders have carried out or supervised RBW with reasonable care and skill. This will reduce reliance on BCAs to identify errors in building work.

Would the benefits of the proposal outweigh the risks and costs?

Further work is needed to quantify the costs and benefits of the proposals.

By widening the definition of RBW to include more complex non-residential work, the proposed changes would ensure that the regulation of building work is proportionate to the level of risk associated with the work. Raising the competency standards and introducing tiered licensing classes, including a supervision licence class, would provide building owners, the public and BCAs with greater assurance about the skills, knowledge and competence of people doing or supervising restricted building work.

There are also potential risks.

The forecast increase in building activity (mostly residential) over the next few years combined with a broader definition of RBW would increase demand on the existing pool of LBPs. Additional LBPs would be required to meet the increased demand for LBPs. While it is difficult to estimate with any accuracy how many more would be required, because projects will vary in length, duration and complexity, MBIE's estimate is in the range of 8,000 to 12,000.

The proposals could also have the effect of reducing the available pool of LBP supervisors, in the short term at least, as only those LBPs who are licensed under the supervision licence class could supervise RBW. This could potentially result in a slowdown in building activity.

A reasonable transition period would be required to minimise the risk of reducing building activity.

There is likely to be some increased cost to a small number of LBPs associated with upskilling as a result of the proposals to raise competency standards and introduce a licence class for supervision.

Is the proposal consistent with other elements of the building regulatory system?

The focus on providing clear roles and responsibilities for those undertaking restricted building work is consistent with other parts of the building legislative reform programme.

A review of competence standards will support risk being allocated more fairly. It will ensure people carrying out or supervising RBW have a higher technical competence. It will hold people to account if they work outside their area of competence or carry out substandard work. It will incentivise people to better manage risks in the building process so that work is carried out effectively and efficiently.

Is the proposal consistent with related government policy and regulations?

The proposals are consistent with other government policies, such as the Construction Skills Strategy, by providing assurance that building practitioners have the skills, knowledge and competence to construct safe and durable buildings.

Options we considered, but don't recommend

MBIE has considered licensing building companies but does not propose it in the reform programme.

Rather, we're prioritising the licensing of individual building practitioners to tackle the key problems with the definition of RBW. Building companies in the commercial sector cannot directly assess the competency of builders or building work because of the subcontracting structure and the different types of roles in commercial building projects. It's more reasonable to first regulate the people who can manage risks relating to building work.

We've considered introducing offences and penalties for building companies who engage non-LBPs to carry out or supervise RBW, and for directing LBPs to carry out RBW that is of poor quality or non-compliant. We're prioritising the competence standards, including introducing behavioural competence standards, for LBPs to tackle concerns with the quality of building work. We may consider introducing building company offences in future.

Potential impacts of the proposed changes

Building practitioners

The individual licensing model of the LBP scheme will stay in place.

Existing LBPs

Competence standards will be raised. LBPs will be required to demonstrate higher technical competency and knowledge of the LBP code of ethics before they can be licensed or relicensed. A small number of LBPs may face increased costs to upskill to meet the new competency standards.

New LBPs

The biggest expected impact of the new definition of RBW on builders will be on builders who work only on commercial and mixed-use building projects. Broadening the definition will mean that builders who carry out or supervise work defined as RBW in some of the commercial construction sector will need to be licensed, and meet new competence standards. Any new LBP will need to pay a licensing fee. MBIE wants to make the licensing renewal process less frequent than it is currently.

All LBPs

Competence standards will include supervision competencies for higher tiered LBPs. While the proposal to introduce a supervision licence with a higher level of competency may create some barriers to being supervisors, it would also ease pressure on new LBPs to provide supervision and may encourage more builders to join the LBP scheme. LBPs will undergo some reassessment of their competence to ensure they're on the right tier for their level of skill and competence. The proposal may also reduce the number of available LBP supervisors in the short term.

Competence standards will also include minimum standards of ethical conduct and requirements for fit and proper persons. Both will change the LBP scheme entry bar for a small number of LBPs, including the licensing renewal process. Discretion by the BPB with fit and proper person assessments will ensure the LBP scheme is applied reasonably and fairly.

Builders overall

Based on stakeholder feedback, we assess that commercial building projects may require two to three LBPs to carry out or supervise RBW. We estimate an additional 8,000 –12,000 LBPs will be required under the expanded definition of RBW. As the size and duration of building projects vary, we can't accurately estimate the number of LBPs required. Our estimate considers:

- the forecast increase in building activity over the next five years (see the National Construction Pipeline Report 2018)
- the current number and proportion of non-residential consent issued
- stakeholder feedback indicating more LBPs are required for commercial building projects
- stakeholder feedback indicating some LBPs work in both the residential and commercial sectors.

Allowing enough time to transition the changes will minimise potential risks.

BCAs

BCAs will have more confidence that RBW has been carried out or supervised by technically competent building practitioners with reasonable care and skill. The proposed changes are expected to reduce building inspection failures or instances where remediation of work is required. By lifting competency requirements, the proposed changes are expected to reduce inefficiencies in the consenting and inspecting processes.

Building owners/ developers

Building owners and developers will have more assurance that RBW has been carried out or supervised by technically competent building practitioners with reasonable care and skill, and the building practitioner will be held accountable for poor quality building work.

A potentially smaller pool of LBP supervisors to draw on in the short term could slow down the building process. This would happen because only those LBPs who meet the required competency standards for supervision could supervise the work. Currently, all LBPs are permitted to supervise the work.

MBIE/Building Practitioners Board

The proposed change will enable them to hold building practitioners accountable for their work where they act outside their competency.

Training organisations

Changes to competence standards and a broader definition of RBW will impact industry training organisations. Training programmes will need to include new competence requirements for LBP licences. The changes will involve MBIE, the BPB and training providers working together and ensuring significant lead-in time so that training providers are well prepared.

Public

The public will benefit from better quality building work and safer buildings. The public will have more confidence in the LBP scheme and the competence of LBPs.

MBIE proposes a transition over several years to implement the changes

The proposed changes to the LBP scheme need to be phased in over a reasonable timeframe to minimise the potential risks arising from the changes, in particular, such a timeframe will reduce the risk of slowing down building activity over the short term. A transition period is needed to allow the sector to adjust their practices and the workforce (including existing LBPs) to upskill and be reassessed when required.

We assess that the transition period for introducing the new definition of RBW will provide enough time for builders currently doing building work that will become restricted. This timeframe aims to minimise impacts on productivity and ensure enough LBPs are available to work on commercial and multi-use buildings.

TABLE 3.1.3

Proposed transition process for LBP scheme changes

Proposed action
Redefine RBW in the regulations
Confirm the role and functions of the BPB, and include any changes in legislative process
Redesign the licence classes
Set the competency standards
Implement changes to the BPB
Provide time for the BPB and Minister to make decisions about the competency standards
Plan for re-assessing existing LBPs, and assessing new LBP scheme applicants
Implement the transition period: ■ reassess every existing LBP under the new competency standards after two years (November 2022); reassessment will be done when each licence comes up for renewal. ■ assess new LBP applicants under the new competency standards; assessment will start in November 2022.

Questions for stakeholders

3.1.14	Do you agree the proposed timeframe for the changes to the LBP scheme is sufficient?
3.1.15	What should we consider in setting the transition timeframe?

Recap of questions

Part 3.1 – The LBP scheme	
3.1.1	How effective do you think expanding the scope of RBW will be in managing risks to public safety in the building sector?
3.1.2	Do you agree with the proposed threshold for the definition of RBW?
3.1.3	**For Builders:** What impacts do you think the proposals for RBW will have on you and your business (including type of work, recruitment, training and costs)?
3.1.4	What impacts do you think the proposals for RBW will have on homeowners, building owners and building occupants?
3.1.5	How do you think the proposed changes for the LBP scheme would affect the behaviour of the LBPs?
3.1.6	What impact do you think expanding the scope of RBW will have on the construction sector skill shortage?
3.1.7	How effective do you think raising the competence standards for the LBP Scheme would be in increasing confidence in the LBP scheme?
3.1.8	What impact would changing the competence standards for the LBP scheme have on builders, building companies, building sector associations and training organisations?
3.1.9	**For builders:** Would the introduction of tiered licence classes make you more likely to apply to become an LBP, and why?
3.1.10	**For builders:** If you're already an LBP, would you be likely to apply to become licensed under a new supervision licence class, and why?

3.1.11	**For builders:** Do you still see potential value in having a site licence for residential and commercial building projects; and how can this licence contribute to the coordination of building work?
3.1.12	**For builders:** Who do you think should be responsible for coordinating building work on a site and what skills are required for this type of role?
3.1.13	Do you think that the introduction of a fit and proper person test and a code of ethics for LBPs will help to ensure that building professionals are held accountable and improve the public's confidence in the LBP Scheme?
3.1.14	Do you agree the proposed timeframe for the changes to the LBP is sufficient?
3.1.15	What should we consider in setting the transition timeframe?

3.2: Engineers

The primary purpose of this proposal is to reduce the risks to public safety resulting from substandard engineering work

The proposed changes in this paper seek to better align the level of regulation with the risks to public safety resulting from substandard engineering work. This will be achieved by placing restrictions on who can do medium to high complexity engineering work that has implications for life safety, and establishing a licensing regime. The licensing regime will provide greater assurance that those carrying out safety-critical engineering work:

- have the right skills, knowledge and behaviour
- can be held to account if they carry out substandard work.

The proposals in this paper also respond to a finding of the Canterbury Earthquakes Royal Commission that there should be greater assurance that complex buildings are adequately designed to minimise the risk of building failure and consequent loss of life.

How the occupational regulation of engineers works today

Engineers can, and do, operate outside of the occupational regulatory system for engineers

The Chartered Professional Engineer (CPEng) credential was established as a voluntary occupational regulatory regime. CPEng is a statutory title that provides recognition of an engineer's general competence and professionalism. It is administered by Engineering New Zealand, with oversight from the Chartered Professional Engineers Council (CPEC). CPEng requires reassessment at least every six years and demonstration of New Zealand specific good practice. CPEng are automatically deemed to meet the design licensing requirements for restricted building work under the Licensed Building Practitioners (LBP) scheme without any further assessment.

Engineering New Zealand also administers a self-regulatory system. Chartered members must demonstrate competency and professionalism that is set to an international benchmark. Competency standards are similar to those for CPEng.

There are nearly twice as many members of Engineering New Zealand with chartered membership or higher than those with CPEng. Most individuals that have CPEng would also be chartered members or higher.

What we mean by 'engineering work'

For the purposes of this paper, 'engineering work' is defined as design work requiring professional judgement, informed by underlying scientific principles, with the intent to ensure building occupant safety (including maintenance of structural stability and that occupants are safe during and after a fire). Engineering work also includes monitoring that the construction has been carried out in accordance with the design.

Few restrictions are placed on who can carry out engineering work on buildings

Many engineers carry out building work that is critical to public safety. This includes structural, geotechnical and fire safety engineering work that ensures buildings are safe and durable, and that people have time to evacuate in the event of an emergency.

There are no restrictions on who can carry out or supervise engineering work on buildings, other than what is restricted under the LBP scheme. The LBP scheme was not intended to regulate complex engineering work and excludes work on non-residential buildings and apartments that are over 10 metres high.

There are different views about the purpose of CPEng

The purpose of CPEng is not clearly defined. The *Chartered Professional Engineers of New Zealand Act* states that the purpose is to "establish the title of chartered professional engineers as a mark of quality. . ."

The lack of clarity about the purpose of the scheme has contributed to it being both a mark of professionalism and general competence for all engineers, as well as a mark of technical competence to undertake very complex and specialised work.

The lack of clarity has led to uncertainty about whether the objective is to protect the reputation of engineers, resolve disputes, protect the public from harm, or some combination of these objectives. This makes it difficult to determine when a regulatory response is required and what the appropriate sanction should be.

CPEng in its current form is not fit for purpose as a mark of general or technical competency

Engineers and BCAs have raised concerns about CPEng's usefulness in providing assurance of an engineer's competence to carry out complex or specialised work. The assessment process is largely self-driven by the engineer applying for CPEng.

BCAs rely on third-party expertise to inform their decision making on whether to grant consent. Some BCAs have developed ad-hoc ways to determine if an engineer is capable of certain work and maintain their own lists of 'competent' engineers. This lacks transparency and consistency, especially for engineers that work across territorial authority boundaries.

Many engineers choose not to obtain CPEng as it is considered too onerous in terms of time and effort for a generic credential.

The current regime does not have the full range of tools it needs to hold engineers to account for acting outside their competence, or carrying out substandard work. A CPEng found to have performed engineering services in a negligent or incompetent manner, or breached the code of ethics or other rules, can only be censured, have their CPEng registration suspended or cancelled, and/or pay a maximum fine of $5,000.

There is nothing to prevent an engineer who has had their CPEng registration cancelled or suspended from continuing to design buildings, including complex buildings that require a higher level of technical competence and judgement. Instead, there is a reliance on people not engaging an engineer that has had their CPEng cancelled or suspended, or BCAs applying greater scrutiny of the engineer's work.

MBIE proposes three changes to the occupational regulation of engineers

1 Establish a new voluntary certification scheme that provides assurance of an engineer's professionalism and general competency and phase out CPEng.

2 Restrict who can carry out or supervise safety-critical structural, geotechnical and fire-safety engineering work within the building sector. This would cover all medium-to-high complexity work and be triggered by factors such as building size, use and location.

3 Establish a new licensing scheme to regulate who can carry out or supervise engineering work that has been restricted.

The objectives of these changes are to:

- ensure that restrictions on building work are proportionate to the risks to public safety
- ensure that those who are licensed to undertake restricted work have the right level of competence, and are held accountable for substandard work.

1. A new voluntary certification scheme for all engineers

Proposal

Establish a new voluntary certification scheme that provides assurance of an engineer's professionalism and general competence and phase out CPEng.

MBIE proposes to establish a new certification scheme that would replace CPEng.

Engineers applying for certification would be required to meet prescribed competency standards that demonstrate an ability to deal with complex engineering problems, and commit to continuing professional development.

The regulator would have the powers to determine the competency standards and assessment process. The regulator would be required to address the problems that have undermined confidence in CPEng as a mark of general competence and made it unattractive to many engineers.

We considered modifying CPEng, but concluded that it would be more effective to establish a new title that is fit for purpose as a standalone credential that can also be used as a step towards licensing.

The certification scheme would have more direct oversight by the Minister for Building and Construction.

Competency standards would be similar to those for chartered membership of Engineering New Zealand

MBIE expects the competency standards would be similar to those for chartered membership of Engineering New Zealand and that an Engineering New Zealand member with chartered membership or higher would meet most of the requirements for certification.

Certification provides statutory assurance of professionalism and general competency

Many types of engineering work in the building sector aren't safety critical and don't need to be carried out or supervised by a licensed engineer. There are also many engineers working outside of the building sector. In these situations, consumers need the option to engage an engineer that has their competence and professionalism assessed to a consistent standard and have assurance that the engineer will be held to account if something goes wrong.

Professional bodies, including Engineering New Zealand, often have strong incentives to self-regulate as they want to maintain the good standing of their profession. Industry self-regulation can be more efficient and more easily able to adjust in response to new circumstances or developments.

Government regulation is more appropriate where there is a risk of significant harm to the public or where intervention by government is likely to improve outcomes.

MBIE seeks feedback on the proposal to replace CPEng with a new statutory certification scheme. Statutory certification provides assurance that the regulator acts in the interests of the public, rather than the profession, provides for powers to enforce sanctions and protection of title, and ensures the regulator is accountable to the Minister for Building and Construction.

There are also several regulatory regimes outside of the building regulatory system that require CPEng. The new credential needs to fulfil the statutory requirements for competent and skilled engineers in these regimes. These regimes include:

- *Amusement Devices Regulations 1978*
- *Health and Safety in Employment Regulations 1995*
- *Health and Safety in Employment (Pressure Equipment, Cranes, Passenger Ropeways) Regulations 1999*
- *Fire and Emergency New Zealand Act 2017*
- *Heavy Motor Vehicle Regulations 1974*

A new title for engineers that have been certified

Engineers that have been certified would be given exclusive right to use a certain title. The title provides the public with assurance that the engineer has met the prescribed standards. It would be an offence for a person to use the title or abbreviation of the title, if they have not been certified.

MBIE proposes to create a new title for engineers that have been certified, that distinguishes the new regime from CPEng. We are seeking feedback on what the title should be. This could be, for example 'certified engineer', 'chartered engineer' or something else. The title will need to demonstrate professionalism and be meaningful to people using engineering services in New Zealand and overseas. It will also be important to ensure that the title, which will have protection, is not confused with other titles that do not have protection, such as Chartered Members of Engineering New Zealand.

Questions for stakeholders

3.2.1	Do you agree that there is a need for a statutory mark for engineers of professionalism and general competence to solve complex engineering problems?
3.2.2	How well do you think CPEng currently provides this assurance? What do you think needs to change?
3.2.3	Do you agree that a new title is needed for engineers that have been certified? If so, do you have a view on what that title should be?
3.2.4	For engineering work on buildings that does not require specialised skills, do you think certification would provide sufficient assurance of general competence and reduce the risks of substandard work?

2. Restrictions on medium-to-high complexity engineering work in the building sector will help reduce life safety risks

Proposal

Restrict who can carry out or supervise safety-critical structural, geotechnical and fire safety engineering work within the building sector. This would cover all medium-to-high complexity work and be triggered by factors such as building size, use and location.

MBIE proposes to introduce restrictions on fire, geotechnical, and structural engineering work that is medium-to-high complexity and that has implications for life safety. This is to ensure that suitably competent people are carrying out, or supervising, that work. This work presents the greatest risk to life safety and has little regulatory oversight.

The *Building Act* would be amended to allow 'restricted engineering work' to be defined by regulations

This would allow flexibility to adjust the definition as required over time. Once the enabling legislative amendments are passed by Parliament and come into effect, a regulatory process to finalise the threshold for restricted engineering would commence.

Regulations would establish a simple and clearly defined test for restrictions based on building complexity, size, occupancy, location and use

MBIE proposes to base restrictions on building size, use and ground conditions as these are the most significant factors determining the complexity of the engineering work and present greater risks to public safety in the event of building failure. Further detail on how these factors affect complexity and risk is provided in Figure 1.

The definition of restricted engineering work would be a simple, clearly defined and objective test that would not require interpretation. The aim would be to set the threshold at a level that includes building work that poses risks to public safety, while not imposing unnecessary costs on more straightforward building projects. It would set out the particular criteria that would be applied to determine if one or more licensed engineers were required.

FIGURE 1
Factors that would be included in setting the threshold for restricted engineering work.

Building size (height and area)

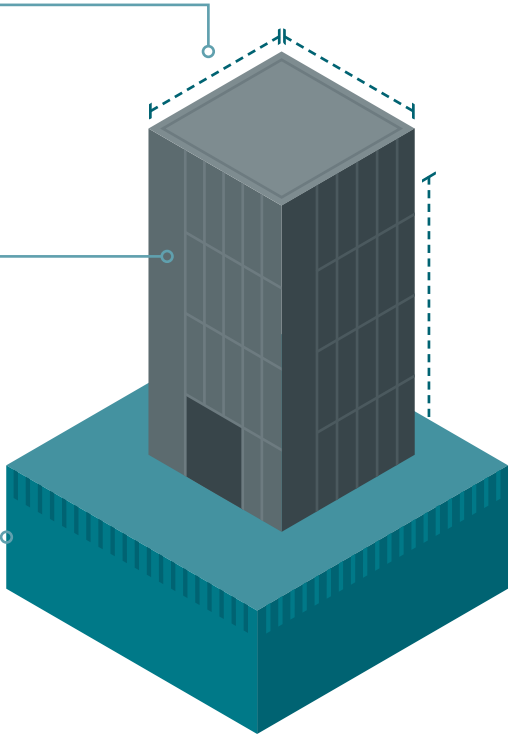
The larger the building, all else being equal, the greater the complexity involved in the engineering design, which represents risks to public safety (a particular concern for structural, geotechnical and fire safety design).

Building use

Buildings that have vulnerable occupants, contain hazardous materials or are occupied by large numbers of people pose greater risks to public safety in the event of building failure (a particular concern for structural and fire safety design).

Ground conditions

Complex ground conditions pose significant risks of building failure if not managed appropriately and have significant impacts on decisions for building foundations and the building structure (a particular concern for geotechnical and structural design).



A task-based test is likely to be more expensive and less certain

We considered a task-based approach to restrictions (where individual elements of the engineering process are licensed rather than the engineer), but decided against this option as it would likely create additional costs and/or uncertainty. Task-based restrictions are more likely to become complicated and highly prescriptive in order to clearly define restricted work, while a simple and high-level set of task-based restrictions would remain open to interpretation, creating uncertainty and potential disagreement between developers, engineers and regulators.

Questions for stakeholders

3.2.5	Do you agree that life safety should be the priority focus determining what engineering work is restricted?
3.2.6	What combination of the following factors should be used to determine what engineering work is restricted: building size; building use; ground conditions; other?

3. Licensing would regulate who can do restricted engineering work

Proposal

Establish a new licensing scheme to regulate who can carry out or supervise engineering work that has been restricted.

An independent regulator would administer the licensing and certification schemes. The regulator would be directly accountable to the Minister for Building and Construction. Engineering New Zealand staff would carry out some of the functions for the regulator initially. MBIE would provide oversight and monitor the performance of the regulator in carrying out its functions. An independent decision-maker would make decisions on whether there has been a disciplinary breach and impose sanctions.

MBIE proposes to establish a new licensing regime in legislation to regulate who can do restricted engineering work. A licensing regime provides a mechanism to prevent those without the necessary licence, and who therefore haven't been assessed to be competent, from carrying out restricted engineering work without supervision.

Engineers would be required to demonstrate their technical ability in a specialised field to obtain a licence to carry out restricted engineering work. Entry competency requirements would match the threshold for restricted engineering work. Engineers would need to satisfy the professionalism and general competency requirements for certification before they could be assessed for licensing, although it may be possible for an engineer to apply for certification and licensing at the same time.

Licensed engineers would still be responsible for determining which work they're competent to carry out within the scope of their licence. However, they would be subject to disciplinary action for doing work outside of their competency. For example, a structural engineer who specialises in single-storey steel warehouse structures may not be competent to design a 20-storey, high-rise building.

It would be an offence for a person to carry out or supervise restricted engineering work that they're not licensed to carry out. It would also be an offence for a person to engage another person to carry out or supervise restricted engineering work if they know that person isn't licensed to carry out that work.

A move from voluntary certification to licensing for safety-critical engineering work

'Certification' refers to situations in which a regulatory body sets a standard for practitioners to be placed on a public register and provides exclusive right to use a title. 'Licensing' refers to situations in which it's unlawful to carry out a specified range of work without first having obtained a licence, which confirms that the licence holder meets prescribed standards of competence.

This proposal would shift regulation of safety-critical engineering work on buildings – what will be known as 'restricted engineering work' – from a voluntary certification system to a licensing regime.

Regulations would define the licence classes

Initial licence classes would be geotechnical, structural and fire safety engineering. However, this framework would enable licence classes to be created for other engineering disciplines at a later date.

These three engineering disciplines have been identified as priorities as they present a significant life safety risk if work is carried out poorly or there is insufficient supervision.

Figure 2, on the next page, sets out an overview of the options and progression available under the proposed regime.

The new regulatory regime will have a clearer statement of purpose

MBIE proposes that the purpose of the new regime would be to:

- protect the public from harm by ensuring engineering services are performed with reasonable care and skill
- require engineers carrying out or supervising work that has been restricted to have the necessary technical competence to do that work.

The certification and licensing schemes will need an independent, capable regulator

The preferred form of the regulatory body and governance arrangements will depend on final decisions on the establishment of a new certification scheme and the scope of engineering work restricted to licensed engineers. This section sets out some of the proposed features of a new regulatory body.

A new regulatory regime for engineers needs to be rigorous, and independent from the engineers it regulates. MBIE proposes three measures that would give the regime the independence and powers it will need:

- An independent regulator. The certification and licensing schemes would be administered by an independent regulator.
- Accountability. The regulator would be accountable to the Minister for Building and Construction, and be required to report on performance against expectations set by the minister.
- Oversight. MBIE would have oversight of the regulator and monitor its performance.

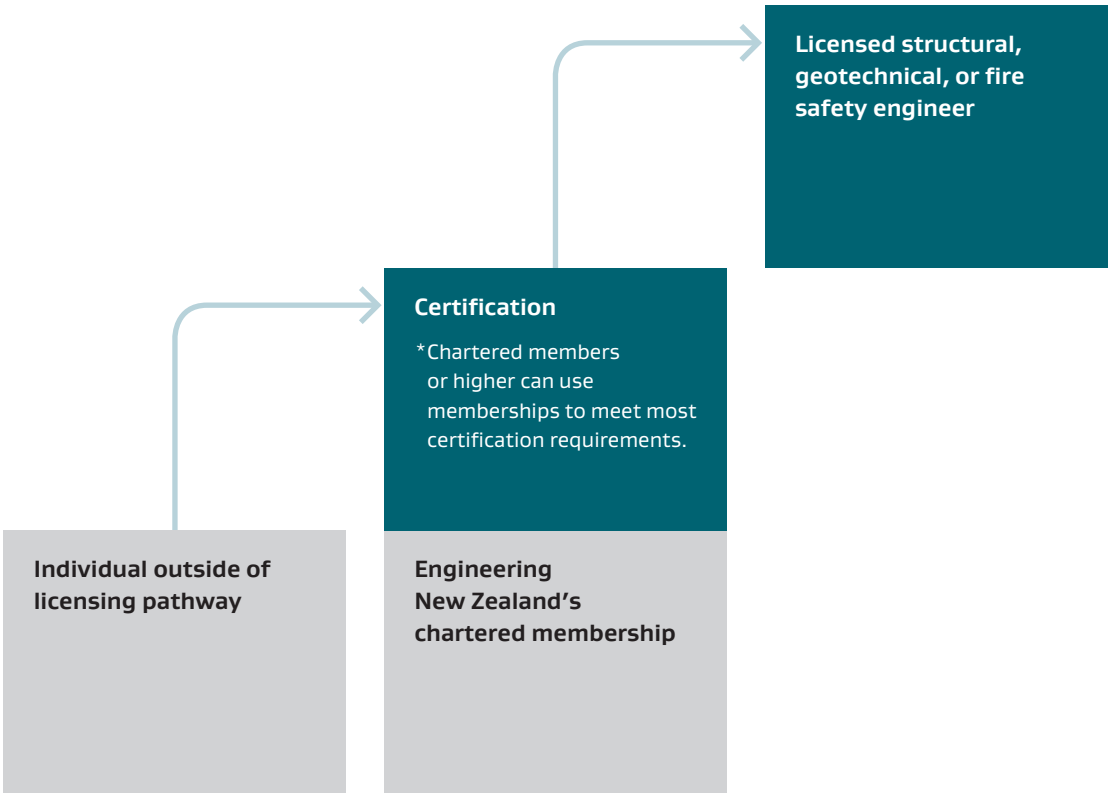
MBIE considers additional oversight by a third party, such as CPEC, would be unnecessary and potentially lead to a confusion of roles and responsibilities, as the regulator would be directly accountable to the Minister and MBIE would provide the monitoring functions.

The regulator would have powers to propose rules and make decisions

The regulator would have powers and functions to:

- propose rules for certification and licensing (including competency standards) for approval by the Minister for Building and Construction
- make decisions on applications for certification and licensing
- maintain public registers of certified engineers and licensed engineers
- set requirements for continuing professional development
- monitor compliance with the rules, standards and conditions of certification and licensing, and receive and triage complaints

FIGURE 2
Options and progression for qualified engineers under the proposed licensing and certification regime



Comparison of different stages of the proposed licensing pathway

	Licensed engineer	Engineer with certification	Chartered Member of Engineering New Zealand	Individual outside of licensing pathway
The title provides...	Demonstration of an engineer's technical competence in a specific area	A general mark of quality	A general mark of quality	No regulatory or industry body guarantee of competence or professionalism
Protected statutory title	✓	✓	− [20]	−
Can carry out restricted work without supervision?	✓ [21]	−	−	−
Engineer can demonstrate professionalism and general competence (can solve complex engineering problems)	✓	✓	✓ [22]	−
Assessed as being technically competent in a specific field	✓	−	−	−
Fulfils regulatory requirements for competent and skilled engineers in other regimes	✓	✓	−	−

20 Professional body provides and protects marks of quality
21 Can carry out and supervise restricted engineering work
22 Chartered members or higher can use membership to meet most certification requirements

Engineering New Zealand is uniquely suited to support the new regulator

Engineering New Zealand has developed considerable in-house expertise from administering the CPEng scheme.

MBIE proposes to enable the new regulator to utilise this expertise to establish and administer the certification and licensing schemes. This would be simpler and more efficient than requiring the regulator to recruit its own staff before it could begin to establish the schemes.

Independence would be managed by making the Engineering New Zealand staff performing tasks for or on behalf of the regulator directly accountable to the regulator, and the regulator accountable to the minister. Legislation would enable these tasks to be done by another body or person if required.

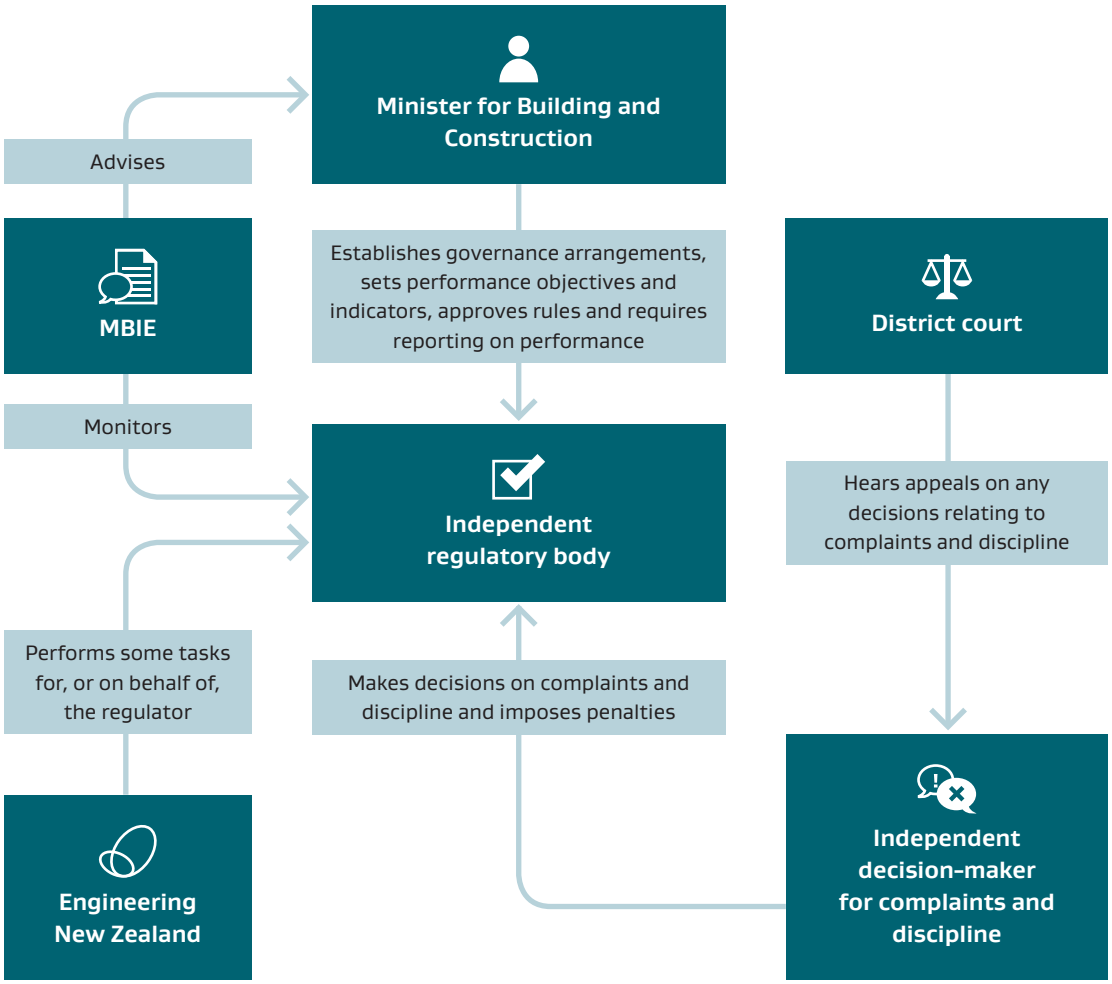
The regime would be funded by fees and levies

The costs of processing and assessing applications for certification and licensing (including renewals) would be recoverable through fees. A separate annual levy would cover costs not directly related to the processing and assessment of applications. These costs would include:

- developing rules and standards
- monitoring compliance
- investigating and making decisions on disciplinary matters
- servicing the licensing board.

The level of fees and levies would be set through a regulatory process, including consultation, and would be required to comply with Treasury guidelines for the setting of fees.

FIGURE 3
Proposed governance and oversight arrangements for the regulator



There will be a robust process to manage complaints and discipline

The management of complaints and discipline needs to be robust, fair, impartial and transparent to ensure that all parties – including engineers, building owners, developers, BCAs and the wider public – have confidence in the regime. This requires:

- clear separation of discipline functions from those providing services to members to mitigate the risks of any conflict of interest
- a person deciding if a standard has been breached should be different to the person that takes the complaint to the decision maker, so that one person or body is not both the prosecutor and judge.

MBIE proposes that the regulator would monitor compliance with the standards and rules and receive and assess complaints. Two features will help deliver a robust, fair, impartial and transparent process:

- An independent decision-maker. An independent decision-maker would make decisions on whether there has been a disciplinary breach and impose penalties.
- An appeals process. A person would be able to appeal to the district court against any decision by the disciplinary decision-maker.

Grounds for discipline would be similar to those of the current CPEng scheme

We have taken the current grounds for discipline of registered engineers under section 21 of the *Chartered Professional Engineers of New Zealand Act 2002* as our starting point and added some grounds for discipline from the LBP Scheme in relation to work that has been restricted.

The list below is not an exhaustive list. We are keen to hear your views if there are other grounds that should be added, or if there are any that should be modified or removed.

The proposed grounds for discipline of licensed or certified engineers are:

- carrying out restricted engineering work without appropriate supervision that they were not licensed to carry out
- supervising restricted engineering work that they were not licensed to carry out or supervise
- publicly stating that they can carry out or supervise restricted engineering work that they were not licensed to carry out or supervise
- being convicted of an offence before or after registration that was punishable by term of imprisonment of no less than six months, if the offence adversely impacts on a licensed or certified engineer's ability to practice
- breaching the standards of professional conduct
- carrying out engineering services in a negligent or incompetent way
- providing false or misleading information for an application for licensing or certification (for their own application or another person's)
- failing to comply with the terms or conditions of their licence
- misrepresenting their competence or carrying out or supervising work outside their competence.

Disciplinary penalties would be in proportion to the breach of discipline

Breaches of discipline would be subject to a range of penalties, including:

- cancelation of certification or licensing
- suspension of certification or licensing
- restrictions on the type of work the person may carry out or supervise (if licensed)
- censure
- publicly naming
- an order to undertake training
- an order to pay a fine.

The maximum fine would be set at a level that is consistent with the framework for penalties in Part 6 of the discussion paper.

Questions for stakeholders	
3.2.7	In your opinion, does geotechnical, structural and fire safety engineering work pose the greatest life safety risk in the building sector? Do you think there are any other engineering specialities that pose greater life-safety risks in the building sector that are not included here?
3.2.8	Do you agree that engineers should satisfy the requirements for certification before they could be assessed for licensing?
3.2.9	What impact do you think the restrictions and licensing would have on the number of engineers who can carry out or supervise engineering work on buildings that requires technical competence in a specialised field? Do you feel that there are enough engineers with the necessary technical competence to meet any new demand?
3.2.10	What impact do you think the restrictions and licensing would have on the cost of engaging an engineer?
3.2.11	How effective do you think the proposed restrictions and licensing would be in reducing the risks to public safety from substandard engineering work?
3.2.12	If you engage a licensed engineer, would you feel confident that the engineer has the necessary technical competence to do the work?
3.2.13	Do you agree with the proposed grounds for discipline of licensed and certified engineers?
3.2.14	Is there anything else that you think should be grounds for discipline? Are there any proposed grounds for discipline that you think should be modified or removed?

How the proposed changes measure up to our five assessment criteria

Does the proposal meet the objectives for occupational regulation?

The proposal meets the three objectives for occupational regulation:

Regulation is proportionate to the risks to public safety

This proposal restricts work that if carried out poorly could have a significant impact on life safety and economic wellbeing – but the threshold will be designed to strike a balance with work that is more straightforward or has less associated risk. This kind of lower-risk building work will be regulated through other parts of the building regulatory system.

Practitioners who are registered or licenced are appropriately skilled and productive

The licensing requirements demonstrate rigorous assessment of technical competence in a particular field and remedy a gap in the current system.

Certification will demonstrate professional capability and general engineering competence of engineers carrying out less risky work, engineers in the earlier stages of their career who do not yet meet the requirements for licensing, or engineers who work outside of the building regulatory system.

The new licensing regime will make it clear to the sector – and the public – which engineers are competent to carry out particular work.

Practitioners are held to account for carrying out substandard work

The current voluntary regime has low associated penalties. A move to licensing will set clear competency-based restrictions and clear offences and penalties for not complying.

Engineers would be subject to sanctions if they:

- act outside their competence without appropriate supervision
- carry out or supervise work without a licence
- carry out substandard work.

Does the proposal support the desired behavioural shifts in the building sector?

The proposal supports the desired behavioural shifts in the building sector:

- **Engineers.** Engineers are required to demonstrate their competence to carry out or supervise restricted engineering work. There are then strong incentives for licensed engineers to carry out work in a satisfactory way to avoid losing their licence/ability to supervise or carry out restricted engineering work. Risks of substandard work will be reduced through assurance that engineers working outside their competence and/or carrying out or supervising substandard work will be held to account.
- **BCAs.** Having authenticated, competent engineers carry out or supervise work should provide confidence to BCAs that work with a higher level of risk was carried out with the appropriate level of skill and care. This should support a more efficient consenting process. This would also remove the need for individual BCAs to keep lists of competent engineers, and minimise the use of producer statements[23] that councils rely on to minimise their risk.
- **Consumers and developers.** It will be clear what work is restricted, and when a licensed engineer is needed. Consumers and developers will be able engage appropriately competent engineers and rely on them. This should reduce risks to life safety, reduce costs of remedying problems and lead to better design work.

Would the benefits of the proposal outweigh the risks and costs?

Reducing the risk to public safety from building failure, together with efficiencies in the building process, should outweigh the costs of this proposal.

Ensuring that restricted engineering work has been carried out or supervised by competent engineers with reasonable care and skill will reduce the risk and cost of building defects requiring rectification. BCAs will have greater confidence in the quality of the work, enabling a more efficient consenting process.

There is a risk that the restrictions may limit the supply of engineers who can carry out or supervise safety-critical geotechnical, structural and/or fire safety engineering work. This could particularly affect some regional areas where some engineers may be currently doing work outside of their competence under remote guidance from a more specialised engineer.

The risk of a shortage of licensed engineers needs to be weighed against the risks to public safety of restricted engineering work being carried out by engineers who don't have the necessary technical competence. The proposed transition period provides time for engineers currently doing work proposed to be restricted to become licensed before the restrictions come into effect. We are seeking feedback on whether the proposed timeframe to obtain a licence is sufficient.

23 A producer statement is a professional opinion based on sounds judegement and specialist expertise. They are used as one source of information which a BCA may rely on to determine whether there are reasonable grounds to conclude that work complies with the building code.

Some engineers who could meet the standards to become licensed may not see sufficient value in going through the application and assessment process. This may particularly apply to engineers near the end of their careers. However, we've heard that engineers want to be able to demonstrate their technical competence – something that CPEng does not let them do now – and that the restrictions on engineering work would create market demand for licensed engineers.

The costs of the regime will be funded through a mix of fees and levies. Actual costs will depend on final decisions on the design and administration and will need to go through a regulatory process, including consultation, and will comply with the Treasury's guidelines.

Is the proposal consistent with other elements of the building regulatory system?

Proposed changes to rebalance risk and liability (see Part 4 of the discussion paper) depend on practitioners being competent, taking responsibility for their role in the building process and being held accountable for substandard work.

Restricting who can do safety critical engineering work and establishing a licensing regime will ensure the regulation of engineers is consistent with proposals to widen the scope of restricted building work under the LBP scheme and lift the competence standards of LBPs.

Is the proposal consistent with related government policy and regulations?

The proposal is consistent with other government policies intended to improve public safety, including the safety of building users. This includes obligations on designers in the *Health and Safety at Work Act 2015* and work underway to remove section 162 of the *Crimes Act 2002* (which states that no-one can be held criminally responsible for a death that occurs more than a year and a day after an act that contributed to the person dying) and to create an offence of corporate manslaughter.

Potential impacts of the proposed changes

Engineers

There will be a nationally consistent approach for engineers to demonstrate their technical competency in a specialised field.

Engineers seeking certification or licensing will be required to pay a fee for application and assessment. An annual levy would cover costs not directly related to the processing and assessment of applications. Actual costs will depend on final decisions on the design and administration and will need to go through a regulatory process, including consultation, and comply with the Treasury's guidelines.

Consumers and developers

Able to access the public register of licensed engineers. That register would make it clear if an engineer is licensed and what kind of engineering work they can practice, and show any conditions on their licence.

Those in regional areas may need to bring in a licensed engineer from one of the main centres, where this work may have been previously done by a less experienced or competent engineer under remote guidance from a more experienced engineer. However, the changes will provide greater assurance that buildings are safe and durable, and that people will have time to get out of buildings in the event of an emergency.

BCAs

More confident that restricted engineering work has been carried out or supervised by technically competent engineers with reasonable care and skill. This confidence would enable a more efficient consenting process. It should also reduce BCAs relying on their own lists of capable engineers, lists that are not consistent across the country.

Banks / insurance providers

Less likely to face risk associated with sub-standard engineering work. These proposals should increase confidence as they make it clear who is competent to carry out particular kinds of engineering work.

Wider public

Benefit from better quality engineering work and safer buildings and assurance that individuals can be held to account for any poor practice.

It will take time to establish a new regime and transition to it

MBIE estimates that a transition period to establish the regime in full could take up to six years from when enabling legislation is passed and comes into effect. The regime would need to be in effect before restrictions on who can do restricted engineering work could be enforced.

We propose that Engineering New Zealand should continue to administer the CPEng regime during this transition period, with oversight by CPEC, to allow the new regulator to focus on establishing the licensing regime.

Once the licensing regime is fully established and rules are in place for certifying engineers, provisions for the regulator to issue certificates would come into force. Engineers with a current CPEng at that date would transition to the new regime and the *Chartered Professional Engineers New Zealand Act* would be repealed.

Some of the actions to be completed during this transition period include:

- establish governance arrangements
- developing regulations to set the threshold for restricted engineering work, and the fees and levies for licensing
- recruiting any additional staff needed to administer the regime, and develop and implement processes and systems
- developing and approving the competency standards and rules for licensing, and ensure compliance with existing mutual recognition arrangements
- developing assessment processes and systems, and recruiting assessors
- receiving and assessing applications for licensing.

Questions for stakeholders	
3.2.15	What things should we consider when we develop transitional arrangements? What supports would you need to help you during this transiton?
3.2.16	**For engineers who currently do not have CPEng or higher:** Would you be likely to apply for a licence (fire safety, geotechnical, structural)?

Recap of questions

Part 3.2 – Engineers	
3.2.1	Do you agree that there is a need for a statutory mark for engineers of professionalism and general competence to solve complex engineering problems?
3.2.2	How well do you think CPEng currently provides this assurance? What do you think needs to change?
3.2.3	Do you agree that a new title is needed for engineers that have been certified? If so, do you have a view on what that title should be?
3.2.4	For engineering work on buildings that does not require specialised skills, do you think certification would provide sufficient assurance of general competence and reduce the risks of substandard work?
3.2.5	Do you agree that life safety should be the priority focus determining what engineering work is restricted?
3.2.6	What combination of the following factors should be used to determine what engineering work is restricted: building size; building use; ground conditions; other?
3.2.7	In your opinion, does geotechnical, structural and fire safety engineering work pose the greatest life safety risk in the building sector? Do you think there are any other engineering specialities that pose greater life-safety risks in the building sector that are not included here?
3.2.8	Do you agree that engineers should satisfy the requirements for certification before they could be assessed for licensing?
3.2.9	What impact do you think the restrictions and licensing would have on the number of engineers who can carry out or supervise engineering work on buildings that require technical competence in a specialised field? Do you feel that there are enough engineers with the necessary technical competence to meet any new demand?
3.2.10	What impact do you think the restrictions and licensing would have on the cost of engaging an engineer?
3.2.11	How effective do you think the proposed restrictions and licensing would be in reducing the risks to public safety from substandard engineering work?

3.2.12	If you engage a licensed engineer, would you feel confident that the engineer has the necessary technical competence to do the work?
3.2.13	Do you agree with the proposed grounds for discipline of licensed and certified engineers?
3.2.14	Is there anything else that you think should be grounds for discipline? Are there any proposed grounds for discipline that you think should be modified or removed?
3.2.15	What things should we consider when we develop transitional arrangements? What supports would you need to help you during this transiton?
3.2.16	**For engineers who currently do not have CPEng or higher:** Would you be likely to apply for a licence (fire safety, geotechnical, structural)?

3.3: Plumbers, Gasfitters and Drainlayers (PGD)

The PGD Act aims to protect the public's health and safety

The purpose of the *Plumbers, Gasfitters, and Drainlayers Act 2006* (PGD Act) is to protect the health and safety of the public by ensuring the competency of persons engaged in providing the regulated services. The Plumbers, Gasfitters and Drainlayers Board (the PGD Board) does this by establishing and administering a registration and licensing system for plumbers, gasfitters and drainlayers that includes competency development, discipline and prosecution.

Some restricted sanitary plumbing work may be undertaken without relevant qualifications under an exemption for householders and some rural areas. Some tradespeople may also undertake restricted sanitary plumbing, drainlaying or gasfitting work without any relevant qualification provided that they work under supervision.

How the legislation works today

MBIE is reviewing the operation of the PGD Act; as required by the Act.

This review has identified a range of issues with the overall functioning of the PGD Act. The exemptions allowing work to be undertaken without relevant qualifications are the most important changes to be progressed now and are relevant to fulfilling objectives in the building system legislative reform programme. Other identified issues will be addressed through future work.

Eleven exemptions allow unqualified people to carry out restricted work

The PGD Act provides 11 exemptions that allow people to perform specific work without meeting the PGD Board's registration and licensing requirements. Exemption holders are still required to meet the requirements of the building code and meet any building consent requirements.

The exemptions fall into three broad categories:

- Exemptions for specified areas. Sanitary plumbing exemptions may apply for some householders in specified areas, and in specified rural districts. They apply in places approved by the Minister for Building and Construction after consulting a local authority.
- Exemptions for work done under supervision. These exemptions cover sanitary plumbing, drainlaying and gasfitting.
- General exemptions. These generally relate to certain gas installations or the conveying of gas and may require the approval of the PGD Board or any gas operator.

Exemptions for specified areas are a carry-over from 1970s legislation

Sanitary plumbing exemptions for specified areas are a legacy of the previous *Plumbers, Gasfitters, and Drainlayers Act 1976*.

The householder exemption lets homeowners in areas as diverse as the Hurunui district, the Hauraki Gulf Islands Ward of Auckland City, Porirua, Wellington and Kiwitea County, Oroua County, and Pohangina County do their own sanitary plumbing. The rural areas exemption allows anyone to complete restricted work in specified rural areas. No new exemptions have been approved since 1994.

People without relevant qualifications can carry out restricted work if they're supervised by a certified tradesperson

Currently, 2,100 people hold around 2,700 exemptions for sanitary plumbing, gasfitting and drainlaying. This represents nearly one third of the total plumbing, gasfitting and drainlaying sector. These exemptions let tradespeople do restricted work if supervised by a certified plumber, gasfitter or drainlayer. Most of these people are not registered in a trade. Certified tradespeople, as supervisors, are solely responsible for completed work.

These exemptions are no longer appropriate

The current exemptions create arbitrary gaps in regulation. They make it hard to hold some people to account when they complete work that would otherwise be restricted.

Some specified areas no longer exist as recognised territorial areas. This is because local government boundaries have changed. For other areas, such as Wellington and Porirua, the rationale to let homeowners do their own sanitary plumbing is unclear or out of date.

The exemptions for doing restricted sanitary plumbing, gasfitting and drainlaying work under supervision create unfair situations where some tradespeople can gain an exemption from regulatory requirements while others are bound by them. Tradespeople working under the supervision exemptions face little or no regulatory accountability for substandard work or poor conduct. The scale of substandard work completed by people working under supervision is hard to assess because supervisees are not documented in inspection failures.

MBIE proposes to repeal exemptions for specified areas, and work done under supervision

1 Repeal specific sanitary plumbing exemptions for householders in specified areas and for rural districts.

2 Repeal exemptions for restricted sanitary plumbing, gasfitting and drainlaying work under supervision.

The objectives of these changes are to:

- ensure that restrictions on building work are proportionate to the risks to public safety
- ensure that those who are licensed to undertake restricted work have the right level of competence, and are held accountable for substandard work or poor conduct.

1. Repeal specific sanitary plumbing exemptions for householders in specified areas and for rural districts

Proposal

Repeal the current sanitary plumbing exemptions for householders in specified areas and for rural districts, including the current Gazette notices for districts made under the *Plumbers, Gasfitters and Drainlayers Act 1976*.

MBIE proposes to repeal the householder and rural districts sanitary plumbing exemptions. These exemptions create public health and safety risks to current and future householders where unqualified people attempt to do sanitary plumbing work that would otherwise be restricted. Using a qualified plumber would address the risk that work does not meet building code requirements and ensure that people are not exposed to hazards from substandard work. Such hazards include the loss of hot water, the leakage of foul water, moisture problems and contaminated water.

Questions for stakeholders

3.3.1	Have you encountered instances of hazards or health issues from sanitary plumbing work completed by unlicensed people?
3.3.2	How often do you find work undertaken under a householders or a rural areas exemption that does not comply with the requirements of relevant codes and standards?
3.3.3	Do you think that a person should be qualified to do sanitary plumbing work on your property?

2. Repeal the exemptions for restricted sanitary plumbing, gasfitting and drainlaying work under supervision.

Proposal

Repeal the exemptions for restricted sanitary plumbing, gasfitting and drainlaying work under supervision.

MBIE proposes to repeal the exemptions for restricted sanitary plumbing, gasfitting and drainlaying work under supervision. These exemptions create risks to public health and safety and unfair situations where some tradespeople are exempted from regulatory requirements while others are bound by them. This creates gray areas in regulation and makes it difficult to train and grow competency through continuing professional development and to hold some tradespeople to account for substandard work or poor conduct. Tradespeople working under a supervision exemption would be deemed to be registered. They would be able to apply for a new class of licence before the exemptions are repealed to allow a smooth transition for people in work.

Questions for stakeholders

3.3.4	How often do you find substandard work carried out under a supervision exemption?
3.3.5	What benefits (if any) do you see from regulating people who are currently exempted if they work under supervision?
3.3.6	What potential issues (if any) do you see from removing the exemptions for doing restricted work under supervision?
3.3.7	What impacts (such as business impacts) would removing the supervision exemptions have on how your business is managed?
3.3.8	Do you support allowing people currently working under supervision exemptions to continue working as a regulated person under a new registration and licence?
3.3.9	Is anything else required to support the transition of exempted tradespeople to a new registration and licence?

How the proposed changes measure up to our five assessment criteria

Does the proposal meet the objectives for occupational regulation?

These proposals would ensure clear roles, responsibilities and accountability for completing restricted work.

The overall impact would be more consistent levels of accountability and competency for restricted work. More tradespeople completing restricted work under the PGD Act would be subject to the regulatory powers and competency requirements of the PGD Board.

Does the proposal support the desired behavioural shifts in the building sector?

The proposal would have the desired behavioural shift by protecting public health and safety and by lifting competency and improving levels of accountability.

Tradespeople would be more consistently held to account for the quality of their work.

Tradespeople previously working under exemptions would have to meet the PGD Board's requirements for continuing professional development. This would help support high standards competency and skill in the sector.

Would the benefits of the proposal outweigh the risks and costs?

Further work is needed to quantify the costs and benefits of these proposals. Our initial assessment is that they strike the best balance between costs and benefits.

The cost of being licensed to be able to complete restricted work would be balanced by a reduced need for remedial work to address non-compliant work done by unskilled people.

Is the proposal consistent with other elements of the building regulatory system?

These proposals are broadly consistent with other elements of the building regulatory system that seek to lift competency and accountability and close gaps in building sector regulation.

Is the proposal consistent with related government policy and regulations?

These proposals are consistent with the approach to other regulated occupations where high-risk, complex work must be done by people licensed to do the work and be held accountable for the quality of their work. They also supports a fairer allocation of risk and responsibility across the building sector.

Potential impacts of the proposed changes

Householders in designated areas

No longer able to do work that is normally restricted. This work would be consistently completed by a tradesperson who is registered and accountable for their work. Householders would be expected to pay for these services

This would address the risk that work does not meet building code requirements and ensure that householders are not exposed to hazards from substandard work. Such hazards include loss of hot water, leakage of foul water, moisture problems, and contaminated water.

Tradespeople currently working under supervision

Accountable for their work and conduct. They would not be made worse off because they would be deemed to be registered and would be able to apply for a new licence. They would have access to opportunities for training and professional development.

All tradespeople

Fair and more consistent levels of regulatory oversight. Examples of oversight include suspending or cancelling a registration or licence, disqualifying a tradesperson from doing certain types of work, and requiring a tradesperson to complete a competency related programme.

The proposed transition includes time to develop and put in place a new class of licence

Once new legislation is in place, the PGD Board would have time to develop, consult and gazette a new class of licence before the supervision exemptions for plumbers, gasfitters and drainlayers are repealed.

Anyone previously working under a supervision exemption would be deemed to be registered. They could apply for a licence before the exemptions are repealed to allow a smooth transition for tradespeople. This would ensure that anyone who intends to continue working can do so.

All those who transition to the new licence would need to undertake ongoing training and develop their competencies. They will also face the accountability requirements for doing substandard work or poor conduct. Fees to renew licences would continue, as would disciplinary levies.

The time needed to transition would depend on how long it would take the PGD Board to design and implement a new class of licence for tradespeople who currently work under supervision.

Recap of questions

Part 3.3 – Plumbers, Gasfitters and Drainlayers (PGD)	
3.3.1	Have you encountered instances of hazards or health issues from sanitary plumbing work completed by unlicensed people?
3.3.2	How often do you find work undertaken under a householders or a rural areas exemption that does not comply with the requirements of relevant codes and standards?
3.3.3	Do you think that a person should be qualified to do sanitary plumbing work on your property?
3.3.4	How often do you find substandard work carried out under a supervision exemption?
3.3.5	What benefits (if any) do you see from regulating people who are currently exempted if they work under supervision?
3.3.6	What potential issues (if any) do you see from removing the exemptions for doing restricted work under supervision?
3.3.7	What impacts (such as business impacts) would removing the supervision exemptions have on how your business is managed?
3.3.8	Do you support allowing people currently working under supervision exemptions to continue working as a regulated person under a new registration and licence?
3.3.9	Is anything else required to support the transition of exempted tradespeople to a new registration and licence?

List of acronyms

BCA	Building consent authority
BCO	Building consent official
CE	Chief executive
CPEC	Chartered Professional Engineers Council
CPEng	Chartered Professional Engineer
LBP	Licensed Building Practitioner
MBIE	Ministry of Business, Innovation and Employment
PGD	Plumbers, gasfitters and drainlayers
PGD Act	*Plumbers, Gasfitters, and Drainlayers Act 2006*
RBW	Restricted building work

Submissions close on 16 June 2019

Have your say

See **page 4** of the introduction (Part 1) for details on how to submit your feedback.

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

4

Discussion paper –
Building system legislative reform

Risk and liability

APRIL 2019

New Zealand Government

Contents

Summary of Part 4: Risk and liability

Risk and liability affects people's behaviour in the building process

The way risks are identified and managed affects the way people behave during the building process. Risks are allocated by statutory and common law responsibilities and contractual arrangements – and when things go wrong, someone has to pay to put them right.

The proposals set out in this section aim to address several problems.

- Homeowners often aren't aware of the risks of the building process, or the need to have something in place to manage them.
- When something goes wrong, homeowners may face a long, expensive and stressful process to get compensation.

MBIE is also seeking feedback on whether changes are needed to address concerns that building consent authorities (BCAs) may face a disproportionate share of damages when other parties are absent.

MBIE wants stakeholders' feedback on two proposals

1	Require that a guarantee and insurance product is put in place for all residential new builds and significant alterations. Homeowners would be able to actively opt out of having a guarantee and insurance product.
2	Leave the liability settings for building consent authorities unchanged.

These changes will help deliver the programme's outcomes

The programme's three outcomes are safe and durable buildings, an efficient regulatory system and a high-performing building sector.

The proposals set out in this section would help deliver these outcomes by:

- providing protections for homeowners
- providing incentives for builders and designers to produce high-quality building work.

Guarantee and insurance products

Guarantee and insurance products offer protections to homeowners who are building or renovating their home. These can be a 'guarantee' or an 'insurance product'.

- A guarantee (or warranty) means that, should a problem arise, the responsible party will correct the problem.
- An insurance product is a policy that will pay out to compensate the policy holder for a loss, and often pays for the problem to be corrected.

Risk and liability

Changes to produce fairer outcomes when things go wrong and parties are absent

There are many different types of risks in the building process. This part of the discussion paper considers the risks that arise when there are defects in a building and some parties in the building process are absent. Changes to address these risks would require legislative change.
Measures to address other types of risks (such as commercial contracting risks) can be addressed through mechanisms outside of the *Building Act 2004*.

Part 1 of the discussion paper sets out what all of the proposed changes in the legislative reform programme aim to do – that is to lift quality throughout the building sector by:

- making sure things go right in the building process
- delivering fairer outcomes when things do go wrong.

Part 2 (building products and methods) and Part 3 (occupational regulation) are focused on changes that would increase the quality of building work and make sure things go right. This part is focused on changes that would deliver fairer outcomes when things do go wrong and increase incentives to get things right.

Risk and liability is governed by statute and common law

Risks are allocated by statutory and common law responsibilities and contractual arrangements. Parties often shift risk to other parties using contracts, insurance and other arrangements.

Liability may arise when things go wrong. In New Zealand, like in many other common law jurisdictions, the principal liability rule is that of 'joint and several liability'. This means that where two or more people have caused a particular loss, each party can be held liable for the full extent of that loss. The overriding concern is to correct harm and compensate injured parties, rather than determine the relative level of wrongdoing by each defendant.[1]

MBIE's objectives include fairer outcomes and changes in behaviour

MBIE has identified four objectives for risk and liability

The objectives for the risk and liability settings are that:

- each party understands their roles and responsibilities in the building process, the risks they face and their options for managing those risks
- each party faces risks that are in line with their role
- each party has access to cost-effective options for managing their risks
- homeowners have access to cost-effective ways to quickly resolve disputes about building work.

The changes aim to influence how people behave when they undertake building work

Any proposed changes should support the programme's wider objectives to drive behavioural changes throughout the building sector.

The table below sets out the behaviours the proposed changes aim to reinforce.

Homeowners

Have access to information and advice about the risks they face, and have a better understanding of these risks.

Make informed decisions when hiring someone to do their building work.

Are more likely to take up guarantee and insurance products.

Can get building defects fixed – without having to resort to costly litigation.

Builders and designers

Understand their responsibilities and have stronger incentives to fulfil their obligations.

Don't rely on BCAs alone to identify errors in building work.

Stand behind their work.

Improve the quality of building work, resulting in fewer defects.

BCAs

Take a proportionate, risk-based approach to building consents and inspections. This could contribute to more efficient consenting processes and lower costs for homeowners, builders and designers.

Providers of guarantee and insurance products

Provide products that meet or exceed the minimum standards placed on guarantee and insurance products.

How risk and liability in the building process works today

Risk and liability should reflect the responsibilities of participants in the building process

The table below sets out participants' current responsibilities in the building process.

Homeowner[2]

Obtains any necessary building consents and code compliance certificates.

Designer [3]

Makes sure that plans and specifications are sufficient to result in building work that complies with the building code, if the building work is completed as set out in those plans and specifications.

Builder [4]

Makes sure that building work complies with the building consent, the plans and the building code.

Makes sure they meet their obligations under the implied warranties and other consumer protection measures (eg written contracts, disclosure statements, repair of defects).

Product manufacturer and supplier

Makes sure that any information they provide about their building products is accurate.

Makes sure their products are fit for purpose (under consumer protection or commercial law).

BCA

Checks that an application for a building consent complies with the building code and that building work has been carried out in line with the building consent.

Issues building consents and code compliance certificates.

Makes sure they make these decisions on reasonable grounds.

2 Includes body corporates and developers

3 A 'designer' is defined in section 14D of the *Building Act* as someone who prepares plans and specifications for building work or who gives advice on the compliance of the building work with the building code.

4 A 'builder' is defined in section 14E of the *Building Act* as someone who carries out building work, whether in trade or not.

The *Building Act* gives homeowners some protections

Under the *Building Act*, protections are available for homeowners before building work starts (pre-contract and contract protections) and after the building work is completed. These measures include a set of implied warranties for building work. These warranties apply for 10 years to all residential building work, and include that building work will:

- comply with the building code
- be carried out with reasonable care and skill
- be completed in a timely manner.

In 2015, the consumer protection measures for homeowners were extended to require that building contractors:

- provide pre-contract disclosure statements, and written contracts for work worth $30,000 or more
- repair defects that are identified within 12 months of the work being completed.

The *Construction Contracts Act* helps resolve disputes

The *Construction Contracts Act 2002* aims to facilitate payments and provide efficient methods of dispute resolution for parties to construction contracts. It covers all construction contracts, including residential and commercial. This Act provides an adjudication process for construction contract disputes, including disputes about payments and rights and obligations.

In March 2017, changes to the *Construction Contracts Act* were brought in that aimed to strengthen the protections for subcontractors. MBIE is evaluating these changes in 2019.

Joint and several liability is used to allocate liability when there are multiple parties

The operation of the common law also plays an important role in how parties can seek a remedy. BCAs, designers and builders owe a duty of care to the owners of buildings, including to people who later purchase that building.

In New Zealand, claims for building defects are limited to 10 years from the date of the action that caused the defect.

More than one party may cause a building defect. For example, the BCA, the builder and the designer may all have contributed to the defect. The courts usually determine how much each party contributed to the defect. For example, the BCA may be found responsible for 20 per cent of the damages, and the builder responsible for the remaining 80 per cent.

New Zealand uses joint and several liability to allocate liability when multiple parties are found responsible for the same loss. Under joint and several liability, a claimant can recover damages from any or all of the parties that caused the loss. In a case where some of the parties are no longer in business (an absent party), the remaining parties would have to cover their share of the losses.

It's not uncommon for one or more party to be absent for claims relating to defects in buildings. The nature of building defects means that it can be a long time before defects are discovered. The parties responsible for that defect may no longer be in business. The churn rates of businesses in the construction sector are consistent with those of other New Zealand industries. But the expected lifespans of the sector's outputs is far longer than most other goods and services.[5]

If no parties are left, homeowners would be unable to recover their losses.

In 2014, the Law Commission recommended that BCA liability be capped to limit the exposure of BCAs in liability cases. The Law Commission also recommended developing a comprehensive guarantee or warranty scheme to cover building work for single and multi-unit residential dwellings.[6]

Guarantee and insurance products are available to protect homeowners

Guarantee and insurance products offer protections to homeowners who are building or renovating their home. These can be a 'guarantee' or an 'insurance policy'.

- A guarantee (or warranty) means that, should a problem arise, the responsible party will correct the problem.
- An insurance product is a policy that will pay out to compensate the policy holder for a loss, and often pays for the problem to be corrected.

Homeowners normally purchase a guarantee and insurance product through their builder. They might pay the premium for the guarantee and insurance product separately, or the premium might be incorporated into the total cost of the building work.

Three main guarantee and insurance products are available in New Zealand:

- Halo Residential Guarantee, provided for work done by members of the New Zealand Certified Builders Association.
- Master Build Guarantee, for work done by a member of the Registered Master Builders Association.
- Stamford Building Warranty Insurance, available from any builder approved by Stamford Insurance, or through BuiltIn Insurance.

Professional indemnity insurance is available to protect builders and designers

Professional indemnity insurance helps protect builders and designers who face a negligence claim. The insurance may contribute towards their legal fees and any damages awarded for economic losses or negligence. Some professionals, such as architects, are required to have professional indemnity insurance as part of their occupational regulation requirements.

5 Statistics New Zealand report 61,860 construction firms were in business as at February 2018. Between February 2017 and February 2018, 7,038 construction firms went out of business and 8,277 were established. In 2017/18, construction firm owners faced a 12% chance that within one year, their firm would have ceased trading. Of construction firms established in 2008, 22 per cent remained in trade 10 years later. (Source: Statistics New Zealand, *New Zealand Business Demography Statistics for February 2018.)*

6 Law Commission (2014) *Liability of Multiple Defendants: Report 132.*

Homeowners and BCAs may face a disproportionate share of the costs when things go wrong

Homeowners have a limited understanding of their risks and how to manage them

In 2018, MBIE commissioned Colmar Brunton to carry out qualitative research into how homeowners and builders perceive and manage risk in the building process. They carried out in-depth interviews with 18 homeowners who had been involved in the building process and with 16 builders.

The research found that homeowners have limited understanding of the risks they face when commissioning building work and low awareness of the tools they can use to manage their risk.[7] While some homeowners may be aware that there are risks, they struggled to identify specific risks or the potential consequences – they didn't know what they should be protecting against.

Low understanding of the risks they face may mean that homeowners fail to take adequate steps to manage their risks. Homeowners can help to manage their risks by using the implied warranties in the *Building Act*, and guarantee and insurance products.

Enforcing the implied warranties in the *Building Act* can be difficult

Stakeholders have told MBIE that homeowners can find it difficult to enforce the implied warranties under the *Building Act*. Enforcing implied warranties relies on homeowners being aware of their rights and the builder still being in business when building defects come to light.

After the first year, the homeowner becomes responsible for showing that the defect was a result of the original building work. If a builder is unwilling to fix a defect, the homeowner may need to seek remedies through the court. This can be a long, expensive and stressful process.

Homeowners don't know about guarantee and insurance products

The research found that there is low awareness of guarantee and insurance products. Homeowners who took part in the research struggled to differentiate between general house insurance and insurance to cover building work. None of the interviewees had actively sought out a guarantee and insurance product of their own accord.[8]

7 Colmar Brunton (2018) *Risk, Responsibility and Liability in the Building Process: An exploration of the behaviours of homeowners and builders.* Report prepared for the Ministry of Business, Innovation and Employment.

8 Colmar Brunton (2018) *Risk, Responsibility and Liability in the Building Process: An exploration of the behaviours of homeowners and builders.* Report prepared for the Ministry of Business, Innovation and Employment.

Only 40 per cent of new homes and renovations are protected by guarantee and insurance products

Research estimates that only about 40 per cent of new homes and significant renovations have a guarantee and insurance product.[9]

In comparable jurisdictions like Canada and Australia, many provinces and states have made it compulsory to have some form of guarantee and insurance product.[10] In the United Kingdom, mortgage lenders only approve mortgages on newly built homes covered by a guarantee and insurance product.

BCAs may face a disproportionate share of damages

Concern is often raised about BCAs being the only party left to compensate homeowners when building defects arise. This can mean that the total amount paid by BCAs is disproportionate to the role they played in contributing to that defect. Generally, BCAs are seen as having a relatively passive and supervisory role in the building process. To be liable to pay some of the costs, BCAs must have contributed in some way to the defect.

MBIE has heard mixed views about whether the financial risks that BCAs face in performing their role are significant. We commissioned an analysis of court cases involving building defect disputes between 2008 and 2018 to get an up-to-date picture of the financial risks faced by BCAs.[11]

BCAs paid out $1 billion to settle building disputes in the last ten years

The research found that BCAs paid out an estimated $1 billion for the period 2008-2018. This includes court-ordered and out of court settlements.[12] About $332 million of the total amount paid covered the costs of defects incurred by other parties who were unavailable to pay their share of the claims (eg insolvent). Rate payers ultimately carry these costs.

While these are substantial amounts, they need to be considered within the broader context. Over the same ten year period, BCAs issued consents for new residential and non-residential buildings valued at approximately $75 billion.

The research estimated that around 2.5 per cent of residential building consents resulted in disputes settled by court cases or dispute resolution processes. Court cases relating to building disputes have been steadily decreasing since 2012 as cases related to leaky homes have worked their way through the courts.[13]

9 Covec (2018) *Guarantee and Insurance Products: Market and policy analysis.* Report prepared for the Ministry of Business, Innovation and Employment.

10 Five of 10 Canadian provinces and all Australian states, apart from Tasmania, require guarantee and insurance products.

11 Sapere (2018) *Liability outcomes in the building sector – glimpses from available data.* Report prepared for the Ministry of Business, Innovation and Employment.

12 Sapere (2018) *Liability outcomes in the building sector – glimpses from available data.* Report prepared for the Ministry of Business, Innovation and Employment

13 Sapere (2018) *Liability outcomes in the building sector – glimpses from available data.* Report prepared for the Ministry of Business, Innovation and Employment

BCAs have limited ways to manage their risks

Unlike other participants in the building process, BCAs can't decline to do certain work, enter risk-sharing arrangements in contracts, or be absent or insolvent at the time of a defect liability case.

Previously, some BCAs attempted to manage their risks by setting up 'risk pools' for territorial authorities that could be used to cover their liabilities. But this system didn't survive the leaky homes crisis.

Currently BCAs manage their risks by requiring detailed plans and specifications for building consent applications and carrying out multiple and detailed inspections.

MBIE proposes one change to the risk and liability settings

1	Require guarantee and insurance products for residential new builds and significant alterations, and allow homeowners to actively opt out.
2	Leave the risk and liability settings for BCAs unchanged.

The objectives of this change are to:

- provide protections for homeowners
- provide incentives for builders and designers to produce high-quality building work.

1. Require guarantee and insurance products

Proposal

Require a guarantee and insurance product to be in place for all residential new builds and significant alterations. Homeowners would have the choice to actively opt out of having a guarantee and insurance product.

Guarantee and insurance products can be an effective way for homeowners to manage their risks during and after the building process. They can provide a remedy for some of the most significant risks that a homeowner may face during the building process:

- the risk that their building work isn't completed due to the builder going out of business, being insolvent, or disappearing
- the risk that the finished house or renovations will have defects.

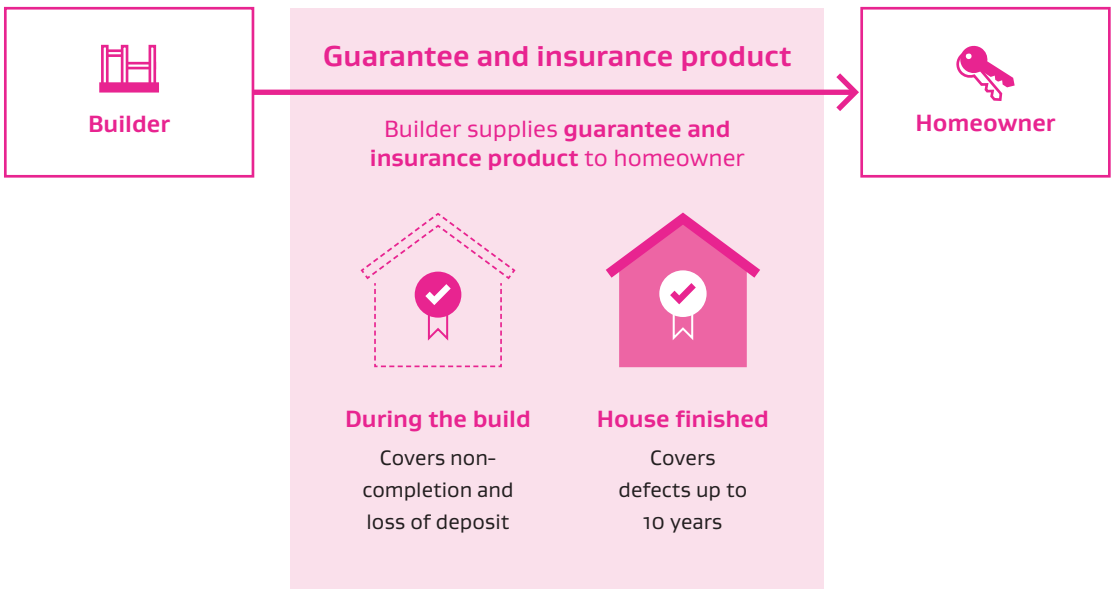
MBIE is seeking your feedback on a proposal to require all residential new builds and significant alterations to be covered by a guarantee and insurance product when the building work starts. Homeowners would be able to actively opt out of having a guarantee and insurance product.

How this proposal would work

Residential builders would need to be able to offer a guarantee and insurance product to homeowners. The builder could either join one of the two builders' associations or be approved by an insurer or broker to offer their product.

Homeowners would either pay the premium directly through their builder or the builder would incorporate the premium into the overall cost of the build.

The homeowner would be the 'policy holder' of the guarantee and insurance product allowing them to make a claim directly with the guarantee and insurance provider. Homeowners would still be able to take a claim for negligence through the courts whether or not they have a guarantee and insurance product.



If the house was sold, the guarantee and insurance product would transfer to the new owners.

MBIE proposes that the guarantee and insurance product would be in place for 10 years once the building work is completed, to align with the implied warranties in the Building Act.

Builders who don't offer a guarantee and insurance product would face financial penalties. Related obligations would be included in the licensed building practitioner scheme requirements.

Homeowners would be able to opt out of a guarantee and insurance product

MBIE proposes that homeowners should be allowed to actively opt out of having a guarantee and insurance product. This would provide choice to homeowners who are in a position to manage their own risks.

Information about the guarantee and insurance product would be included on the building's land information memorandum (LIM). This information could include whether the building had a guarantee and insurance product, the term and extent of cover and who the provider is.

Protections would need to be in place to ensure that homeowners make an informed decision to opt out. These protections could include several measures:

- A 'cooling off period'. The homeowner would be automatically offered a guarantee and insurance product, but be able to apply to opt out once they received confirmation that they're covered.
- A declaration that confirms the homeowner understands the risks of proceeding without a guarantee and insurance product.
- Owner builders could be exempted from having to have a guarantee and insurance product.

MBIE doesn't recommend making guarantee and insurance products compulsory

Some comparable overseas jurisdictions don't allow homeowners to opt out of a guarantee and insurance product.

MBIE considered making a guarantee and insurance product compulsory, with no way to opt out. But we have taken the view that:

- this would be a significant intervention that isn't in proportion with the size of the problem
- this would place greater pressure on the market to be able to meet demand
- this would be unusual for New Zealand as there are no other comparable compulsory private insurance schemes.

MBIE considers it is preferable that homeowners are the policy holder because:

- If the builder was the policy holder, it could be difficult for the homeowner to make a claim as they would have to go through their builder. Their builder may dispute that there is a problem or refuse to submit a claim to the provider.
- There would not be any difference in the costs to homeowners, as builders are likely to pass on the costs of the guarantee and insurance product on to homeowners as part of the cost of the building work. Guarantee and insurance products cost an estimated 1 per cent of the value of the building work.
- It would be challenging to establish and enforce clear rules about what happened to a guarantee and insurance product if the builder holding the product went out of business. Of the building firms established in 2008, only 22 per cent remained in trade 10 years later.
- Having the homeowner as the policy holder is consistent with the existing practice in the market.

MBIE wants stakeholder feedback on how best to make this proposal work

The proposal should apply to all residential buildings – including high-rise apartment buildings

MBIE considers that guarantee and insurance products should be required for all types of residential buildings. This includes simple detached houses, medium density housing (eg townhouses) and high density housing (eg apartments). This recognises the potential risks faced by all homeowners, irrespective of the type of building they live in.

MBIE has to test whether the existing market would be able to provide guarantee and insurance products for high-rise apartment buildings if they were all required to have a guarantee and insurance product. We will also undertake further work on how this option would apply to mixed-use buildings (eg where a residential building also has office or retail space). MBIE considers that this proposal should cover the residential parts of mixed-use buildings, but more work is needed on how to draw the boundary between residential and non-residential use.

Further work will be undertaken on the types of residential buildings covered by this proposal before MBIE finalises our advice to Ministers. We're interested in your views on what types of residential buildings should be covered.

There are three options for a threshold for guarantee and insurance products for 'significant alterations'

We consider that all new residential buildings should be required to have a guarantee and insurance product. However, not all alterations to existing residential buildings need to have a guarantee and insurance product.

Minor alterations are unlikely to create significant enough risks for homeowners to justify a requirement to have a guarantee and insurance product (eg they're more likely to choose to self-insure). Therefore, MBIE considers that this proposal should apply to 'significant alterations'.

Significant alterations could be defined using a threshold. We've identified three potential thresholds:

- alterations valued at $30,000 or more
- alterations valued at $100,000 or more
- alterations that would affect the structure or weathertightness of the building.

Setting the threshold at $30,000 would be simpler to implement as it would align with the requirement to have a written building contract. However, it would capture lower-risk work. Homeowners may prefer to self-insure as the potential costs of getting defects fixed should be lower. A low threshold may limit the number of builders available to undertake alterations, if they were unable to meet the requirements to offer a guarantee and insurance product.

Setting the threshold at $100,000 is more likely to capture high-risk work, and it is a level of risk that most homeowners would be less willing to self-insure. A higher threshold would have a smaller impact on builders who were unable to offer a guarantee and insurance product, as they would still be able to do work under the threshold. This threshold may make it harder to remember the different requirements, as it's a different threshold to the requirement for written building contracts.

Another option is to base the threshold on the type of work done. This would capture work that is more at risk of defects that could result in high repair costs (eg work that affects the structure or weathertightness of the building). This threshold may be harder to clearly define or implement

Options for a threshold for the requirement to have a guarantee and insurance product

	OPTION 1 **At $30,000**	OPTION 2 **At $100,000**	OPTION 3 **Type of work done**
	✓ Simple to implement ✓ Mirrors threshold requirement for a written building contract	✗ Doesn't mirror threshold for written building contracts	✗ Harder to clearly define or implement
	✗ Captures lower-risk work that homeowners may prefer to self-insure	✓ Captures a level of risk that most homeowners are less willing to self-insure	✓ Captures riskier work
	✗ Fewer builders may be available to undertake alterations	✓ Lower impact on builders who can't offer a guarantee and insurance product	✓ Lower impact on builders who can't offer a guarantee and insurance product

Minimum standards should apply to guarantee and insurance products

MBIE proposes setting minimum standards or requirements for guarantee and insurance products. The minimum standards would be set in regulations. Public consultation on these standards would be undertaken before the regulations are put in place.

MBIE has identified the following areas that the minimum standards need to cover (at the least):

- the type of product (eg insurance, guarantee)
- the types of events that are covered (eg loss of deposit, non-completion of building work, defects etc)
- the minimum level of cover to be provided
- the period of cover for different types of events
- the nature of redress (eg if the provider will provide monetary compensation or arrange someone to fix a defect, and whether the homeowner has to try to get the builder to repair any defects in the first instance)
- the maximum claim value
- dispute resolution processes
- the ability to transfer the guarantee and insurance product to subsequent owners of the building.

Providers would have to certify that their product meets the minimum standards. It would be an offence to hold out that a product meets these requirements when it did not.

Financial and prudential requirements would need to be placed on providers of guarantee and insurance products

This proposal depends on enough guarantee and insurance products being available in the market. Currently, only three products are available. Based on current evidence, the existing providers have the capacity between them to cover the entire residential building market.[14]

Current evidence suggests that additional providers are unlikely to enter the New Zealand market. These providers may be, for example, insurers operating in New Zealand who don't currently offer guarantee and insurance products, or guarantee and insurance providers based overseas.

Providers have been reluctant to enter the New Zealand guarantee and insurance product market for a number of reasons. Guarantee and insurance products have not always performed well internationally. It is a unique form of 'long-tail' liability insurance. Homeowners pay a one-off premium in return for being covered for up to 10 years. This can be a significant liability for providers and they can find it hard to take steps to manage those risks (such as raising premiums or declining cover). Additionally, the total premium pool for guarantee and insurance products is relatively small. The average total cost of building a new residential building in 2017 was estimated to be $642,296. Guarantee and insurance products are estimated to cost around 1 per cent of the cost of the build, giving a potential premium pool of around $200 million.[15] Residential consents are estimated to reach a peak of 43,000 a year in 2023.[16]

14 Covec (2018) *Guarantee and Insurance Products: Market and policy analysis.* Report prepared for the Ministry of Business, Innovation and Employment.

15 Covec (2018) *Guarantee and Insurance Products: Market and policy analysis*. Report prepared for the Ministry of Business, Innovation and Employment.

16 Ministry of Business, Innovation and Employment (2018) *National Construction Pipeline Report 2018: A Forecast of Building and Construction Activity* (6th ed.)

In Australia, most states have mandated the purchase of guarantee and insurance products. Many states have experienced a collapse of their private insurance market, leading to state government intervention in the market. The risk of similar events occurring in New Zealand must be considered.

Regulation of providers can help to ensure their financial stability and continuing viability. Insurers in New Zealand are currently regulated by the Reserve Bank under the *Insurance (Prudential Supervision) Act 2010*. This Act requires insurers to meet various standards, including solvency, auditing requirements, security and prudential requirements.

MBIE needs to consider whether:

- the existing requirements under the *Insurance (Prudential Supervision) Act* should apply to guarantee and insurance providers
- a different standard to the *Insurance (Prudential Supervision) Act* is more appropriate so as to ensure an adequate supply of guarantee and insurance products
- guarantee and insurance providers should be subject to further regulation, including what should happen if a provider is no longer in business.

Questions for stakeholders

4.1	Do you support the proposal to require guarantee and insurance products for residential new builds and significant alterations?
4.2	Do you think homeowners should be able to actively opt out of having a guarantee and insurance product?
4.3	Should there be conditions on when homeowners are able to opt out? What should these conditions be?
4.4	What types of buildings do you think should be required to have a guarantee and insurance product?
4.5	What threshold do you think the requirement for a guarantee and insurance product should be set at?
4.6	Do you have any views on the minimum standards that should be set for a guarantee and insurance product? For example: the type of product, the types of events that are covered, the minimum level of cover, the period of cover, the nature of redress, the maximum claim value, dispute resolution processes, the ability to transfer to new owners.
4.7	What financial and prudential requirements do you think should be placed on providers to ensure there is a continuing supply of guarantee and insurance products? For example: reinsurance or other insurance backing, solvency, auditing requirements, security and prudential requirements.

How the proposed change measures up to our five assessment criteria

Does the proposal meet the objectives for risk and liability?

The impact of this proposal depends on a well-functioning market for guarantee and insurance products.

The current number of providers in the market is small. Further work is needed to test whether the market can meet potential increased demand and the regulatory requirements on providers.

If a well-functioning market is operating, then this proposal should meet three of the four objectives for risk and liability.

Each party understands their roles and responsibilities in the building process, the risks they face and their options for managing those risks.

Homeowners would have to make an informed decision about their risks and options for managing these as part of the process of opting out of a guarantee and insurance product.

The proposal would introduce more system checks on the quality of builders, as providers would want assurance of the builder's competency and financial viability before they would allow the builder to offer guarantee and insurance products.

Each party has access to cost-effective options for managing their risks.

Homeowners would have effective options to manage their risks. With an active 'opt out' in place, people are more likely to remain with the default option so they would be more likely be covered by a guarantee and insurance product.

Homeowners have access to cost-effective ways to quickly resolve disputes about building work.

It should be easier for homeowners to get their build completed or defects fixed if their builder is no longer in business.

Each party faces risks that are in line with their role.

It is unclear if the proposal would ensure that each party faces risks that are in line with their role. This depends on whether guarantee and insurance providers try to recover the costs of a claim from other parties who had contributed to the defect.

Does the proposal support the desired behavioural shifts in the building sector?

The proposal should support the desired behavioural shifts for homeowners and builders.

In making an informed decision on whether to opt out, homeowners would become more aware of their risks and take steps to manage them.

Builders would be further incentivised to undertake quality building work so they continue to meet providers' requirements for offering a guarantee and insurance product and they can continue to operate in the residential construction market.

Would the benefits of the proposal outweigh the risks and costs?

Further work is needed to quantify the costs and benefits of this proposal.

The use of guarantee and insurance products would increase upfront costs for some homeowners. Homeowners could opt out if a guarantee and insurance product did not suit their particular circumstances.

When something does go wrong, the overall costs for homeowners with a guarantee and insurance product should be lower. The cost and effort associated with making a claim should be lower than having to seek redress from other parties involved in the building work, particularly if those parties are unwilling to resolve the problem or are no longer in business.

Some builders who don't currently offer guarantee and insurance products may face increased compliance costs. They would incur costs to meet the requirements on them to be able to offer a guarantee and insurance product, and administrative costs (such as filing applications with providers).

Increased regulation and oversight of this market would likely add costs to the government and to guarantee and insurance providers.

The long-term benefits of reduced defects and improved quality in the system should outweigh the short-term compliance and regulatory transition costs.

One risk is that an external shock, such as in financial markets, may adversely affect the ability of providers to stay in the market. In some Australian states, the state government was forced to intervene after insurers withdrew from the market due to the poor performance of the home warranty sector. The government may face political pressure to intervene if an external shock was to occur.

MBIE is aware that some builders don't comply with the requirement to provide a written contract. This suggests some builders may not offer homeowners a guarantee and insurance product. MBIE considers that increased enforcement and advising homeowners on what to ask their builder would help to mitigate this risk.

Recording the guarantee and insurance product on the LIM would provide a way to check if a guarantee and insurance product was in place. This record may help to identify potential non-compliance for regulators to follow up.

Is the proposal consistent with other elements of the building regulatory system?

This proposal is consistent with other elements of the building regulatory system as it complements the existing consumer protection measures.

It is possible that this proposal could have a limiting effect on innovation. To manage their risk, guarantee and insurance providers might choose to limit their cover to tried and tested building methods and products, and could be more reluctant to cover new and innovative builds.

Is the proposal consistent with related government policy and regulations?

This proposal is consistent with other government policies, providing it doesn't significantly reduce the supply of builders to build new homes. MBIE doesn't know yet how many builders would meet the requirements to be able to offer a guarantee and insurance product.

A long transition period would help to mitigate the risk from a drop in the number of available builders as it would give them time to adjust. Alternatively, the risk could be mitigated by setting a high threshold for when guarantee and insurance products are required.

The price of housing might increase slightly if building owners or developers pass on the cost of a guarantee and insurance product to subsequent owners.

Potential impacts of the proposed change

Homeowners

Improved awareness and take up of guarantee and insurance products. This would offer them protection in the event of lost deposit, non-completion and post-completion defects.

May increase immediate costs of building. Premiums for a guarantee and insurance product are estimated to be about 1 per cent of the value of the building work. We consider that these costs are offset by greater protection if something goes wrong. Homeowners could opt out if they believe a guarantee and insurance product isn't right for them.

Given the current size of the market, homeowners would have limited choices of guarantee and insurance product providers. The provider is likely to be determined by their builder. However, the guarantee and insurance product is likely to be one of many factors that help inform their decision on which builder to use. Regulating minimum standards for guarantee and insurance products would help mitigate the limited choices for homeowners.

Builders

May have increased costs (eg membership/application fees, administration costs) if not already able to offer a guarantee and insurance product.

Stronger incentives to ensure work complies with the building code and run a sound business in order to be able to continue to offer guarantee and insurance product.

If not eligible to offer a guarantee and insurance product, would have to choose to only do residential work under the threshold or subcontract to another builder.

Designers

No direct impact.

BCAs

New role to register and monitor the presence of a guarantee and insurance product. May require changes to their systems.

Guarantee and insurance providers

Increased demand for their products.

Would need to review their products and processes to ensure that they comply with new requirements.

Would need to approve builders who apply to them to be able to offer their products.

Guarantee and insurance market

May incentivise new providers to enter the market or a greater range of products on the markets, but this seems unlikely based on current evidence.

Government

Increased role in monitoring and enforcing guarantee and insurance products as well as existing consumer protection measures.

Questions for stakeholders

4.8	If residential new builds and significant alterations are required to have a guarantee and insurance product, what do you think the impacts will be?
4.9	**For builders:** How difficult will it be for you to gain eligibility to offer a guarantee and insurance product?

A two-year transition period

The proposed change would require a change to the *Building Act*. Once the legislation has been changed, the following things need to happen:

- Regulations would need to be put in place that set out the minimum requirements for guarantee and insurance products.
- Guarantee and insurance providers would need enough time to prepare for the increased demand and to ensure their products meet the minimum standards.
- Builders would need time to meet the requirements set by providers to allow them to offer guarantee and insurance products.
- Builders and BCAs would also need to change some of their processes and systems.

MBIE considers that a two-year transition period is needed after the regulations are made for these things to happen. We're interested in your feedback on how long the transition period should be.

Implementing a guarantee and insurance product would take time. A possible interim measure is to introduce a requirement to record on the LIM whether a guarantee and insurance product is in place. This would help to signal the importance of a guarantee and insurance product to home buyers.

An information and education campaign would support any changes, to ensure people are aware of, and understand, them.

Questions for stakeholders	
4.10	How long do you think the transition period for guarantee and insurance products needs to be to ensure providers, builders and BCAs are prepared for the changes?
4.11	Is anything else needed to support the implementation of guarantee and insurance products?

Two options MBIE considered but doesn't recommend

Below are two alternative options for guarantee and insurance products, but MBIE doesn't recommend either of them.

- Rely only on increased educational campaigns to try and increase the use of guarantee and insurance products: This option by itself is unlikely to be effective at increasing the uptake of guarantee and insurance products. As a result, many homeowners may still have no protection. Further, this option wouldn't be durable as many homeowners only build a new home once in their lifetime. They may not receive the information when they need it and have a significant ongoing cost to the Government of a continued awareness campaign.
- Have the government provide guarantee and insurance products: This option would incur significant costs to implement. While homeowners would be covered, it would crowd out the private market for guarantee and insurance products. The costs of introducing a government scheme wouldn't equate with the size of the risk being managed.

MBIE wants stakeholders' feedback on the liability of BCAs

There are concerns that BCA liability may be disproportionate – or create a risk-averse consenting process

A BCA can be liable for a building defect where the BCA's actions or inactions have contributed in some way to that defect.

Suggestions to limit the liability of BCAs have been driven by concerns that:

- BCAs' financial contributions towards fixing defective buildings are disproportionate to their largely supervisory role in the building process
- BCAs' potential liability exposure results in risk-averse consenting processes.

MBIE proposes to leave BCAs' liability as it is – but have considered how a cap might work

Based on the evidence currently available to us, MBIE proposes not to make any changes to the liability settings for BCAs. However, this position is based on assumptions that need to be tested further. For that reason, we are seeking your feedback on two options:

- leave the liability settings for BCAs unchanged (preferred)
- place a cap on BCA liability.

This section describes how a cap would work and sets out our initial assessment of both options.

2. Leave the liability settings for BCAs unchanged

Proposal

Leave the liability settings for BCAs unchanged.

How a percentage cap on BCA liability could work

MBIE has examined different ways to limit the liability of BCAs. Of the options looked at, we consider that placing a cap on the amount BCAs would have to pay is the option that best meets the objectives. But all of the options could have significant risks for the performance of the building sector.

BCA liability could be capped at 20 per cent

Under this option, BCAs that are found to have contributed to a defective building would pay no more than 20 per cent of the total losses.

Any cap would apply to all types of buildings

This option would apply to all types of buildings, including residential and commercial. The joint and several liability settings for other parties in the building process (such as product manufacturers and suppliers, designers, builders and developers) wouldn't change.

Setting a cap of 20 per cent would be broadly consistent with previous court decisions

MBIE proposes setting any cap on the liability of BCAs at 20 per cent. This figure would be more closely aligned with their supervisory role in the building process.

A cap of 20 per cent is broadly consistent with decisions made by New Zealand's courts. The courts make an assessment for liability based on the specific facts and circumstances of each case. Precedent suggests that a BCA's liability in each case is assessed by reference to the nature (and value) of its role and responsibility in that building's process. This has been determined to be in the region of 20 per cent.[17]

A percentage-based cap has advantages over a dollar-based cap

In 2014, the Law Commission recommended capping liability at $300,000 for a single dwelling; $150,000 per unit in a multi-unit development with a total cap of $3 million per multi-unit development. MBIE considers that a dollar-based cap would be difficult to apply (as the thresholds would need to be regularly adjusted) and may result in unfair outcomes for owners of higher-value buildings. The thresholds are likely to be arbitrary amounts as data on where to set the thresholds is limited. The main advantage of a dollar-based cap is that it would provide greater certainty on the maximum amount that a BCA would have to pay.

17 Court decisions have broadly supported this approach since the late 1970s (see *Anns v Merton London Borough Council [1978] AC 728, 755 (UK) and Mount Albert Borough Council v Johnson [1979] 2 NZLR 234*). The approach taken is that a building consent authority's liability is limited by the nature of its more passive, regulatory role (compared with the more active role carried out by builders/architects). For example, in *Morton v Douglas Homes Ltd [1984] 2 NZLR 548* the High Court fixed the council's liability at 15%, and referred to the council's inspector's role as ''only supervisory'. In *Body Corporate 188529 v North Shore City Council [2008] 3 NZLR 479* Justice Heath's general conclusion was that the council ought not to be required to meet absolute standards when performing its regulatory functions and that its duty is to respond proportionately to the obligations cast on it. Based on the circumstances before him, he set the council's contribution at 15% as against the developer's 85% share.

MBIE considers that a percentage-based cap would be a better approach. It doesn't have to be adjusted to reflect inflation and wouldn't disadvantage owners of higher-value buildings.

Another option is to have a higher cap where the BCA's contribution to the losses is over 20 per cent

The liability of BCAs could be capped in all situations, irrespective of how much the BCA's actions (or inactions) contributed to the defect – that is, a blanket cap set at 20 per cent.

Alternatively, in situations where the BCA's contribution is found to be greater than 20 per cent, then its contribution to the losses could be the maximum it would have to pay.

For example, if a BCA was determined to have contributed to 15 per cent of the losses, the most it would have to pay is 20 per cent of the total (its contribution of 15 per cent plus 5 per cent towards any missing parties' contribution). Alternatively, if the BCA was found to have contributed to 30 per cent of the losses, the most it would have to pay is 30 per cent.

The table below illustrates how the two different options would work.

BCA level of contribution to losses	Blanket cap of 20 per cent	Higher cap when the BCA's contribution is over 20 per cent
15 per cent	pays up to 20 per cent of the total: 15 per cent (its share) + 5 per cent (towards losses incurred by any absent parties)	pays up to 20 per cent of the total: 15 per cent (its share) + 5 per cent (towards losses incurred by any absent parties)
30 per cent	pays 20 per cent	pays 30 per cent

A blanket cap is straightforward but could be unfair in some situations

A blanket cap of 20 per cent would be easier to understand. It may make it easier to resolve claims out of court, as the courts wouldn't be required to determine the extent of the BCA's contribution.

Allowing for BCAs to pay a higher share in some situations would send a stronger signal about the importance of BCAs undertaking appropriate levels of scrutiny in carrying out their role. It would reduce some unfairness to other parties who have to pick up some of the BCA's share. However, this potential variation would reduce certainty and may require more involvement from the court in settling any dispute.

MBIE are interested in your thoughts on whether BCAs should pay more than 20 per cent if their contribution to the losses is higher.

The liability settings should not be changed without a requirement to have a guarantee and insurance product

Any limitation to the liability of BCAs would have to be implemented at the same time as the proposal to require a guarantee and insurance product. If the only change was to limit the liability of BCAs, then homeowners would risk greater financial losses if the building turns out to have a defect.

How the two options measure up to the five assessment criteria

The assessment below considers two options:

- Leave the liability settings for BCAs unchanged. When assessing this option, MBIE has assumed that all the other changes in this discussion paper have been made. We've described this option as the 'enhanced status quo'.
- Place a 20 per cent cap on BCA liability.

Does the proposal meet the objectives for risk and liability?

Enhanced status quo

There would be no direct impact on the objectives for risk and liability.

The impact on BCAs' liability would depend on whether guarantee and insurance providers try to recover the costs of claims from BCAs. If they did not, guarantee and insurance products would help to reduce BCAs' contributions when some parties are absent.

Incentives for parties to change how they manage risks would not change directly. Homeowners are assumed to be more likely to have a guarantee and insurance product.

Changes to building products and methods and occupational regulation would increase awareness of parties' roles and responsibilities.

20 per cent cap

While it would meet the objective that the liability of BCAs is better aligned to their role, this wouldn't be the case for others in the building process.

It would increase the amount that other parties have to contribute. In some cases, the amount they have to contribute may be greater than their role.

Limiting BCAs' contribution would provide a strong signal to some participants that they cannot rely on BCAs alone to identify defects or to contribute towards any losses to a significant extent. This may encourage these participants to put in place other mechanisms to manage their risks.

It may strengthen incentives for builders and designers to take out professional indemnity insurance. However, this option may increase costs for insurance providers and, in turn, affect the cost or availability of professional indemnity insurance. This could potentially reduce the availability of cost-effective options to manage people's risks.

This option wouldn't affect the other objectives for risk and liability.

Does the proposal support the desired behavioural shifts in the building sector?

Enhanced status quo

The incentives for parties to change their behaviours would not directly change.

Proposed changes to building products, methods and occupational regulation (and offences and penalties) would incentivise behavioural changes that lead to higher-quality
building work.

BCAs have identified a range of factors that influence how they approach consenting. The proposed changes to building products and methods and occupational regulation should give BCAs greater confidence in the overall quality of the building sector. This, in turn, should support them to introduce more efficient consenting processes.

20 per cent cap

Limiting BCA contributions may strengthen the incentive for homeowners to take out a guarantee and insurance product. However, it is unlikely that BCA liability is a significant factor in their decision making.

This option may incentivise builders and designers to improve their quality assurance processes, resulting in better building work. On the other hand, it may lead to more risk-averse behaviour that would lead to increased costs or delays in the building process. Examples are when technical experts don't want to be involved in more complex building work or need more assurance before they provide a producer statement.

Risk aversion may lead some participants to rely more on contracts so they can shift some of their risks on to others. Where these risks are outside the other parties' control, this may increase the risk of insolvency when something does go wrong.

The responses from builders and designers would depend to some extent on whether the other proposed changes reduce the number of building defect claims.

This option may provide BCAs with greater confidence to be less risk-averse about how they fulfil their roles and responsibilities. However, a number of factors drive the consenting approach of BCAs. The proposed changes to building products and methods and occupational regulation are likely to play a greater part in changing their behaviour.

Would the benefits of the proposal outweigh the risks and costs?

Enhanced status quo

Further work is needed to quantify the costs and benefits of this option.

BCAs should face no direct change to their costs. Indications are that the BCAs' liability risk may be decreasing. Research indicates that the number of defective building cases involving BCAs has decreased since 2012. It is assumed that the other proposed changes would increase the quality of building work, further decreasing the number of building defect cases.

20 per cent cap

Further work is needed to quantify the costs and benefits of this option.

This option would likely increase the share of costs that other participants in the building system, such as designers and builders, would have to contribute in liability cases. Homeowners would find it difficult to recover costs from builders and designers who don't have sufficient assets or insurance to cover the losses.

This option may not change the total costs that fall on homeowners and rate payers. It may only change the way costs are spread among them. The total costs may decrease if the quality of building work increases.

We intend to undertake further work to test how this option would affect the provision of guarantee and insurance products. One risk is that capping liability reduces the attractiveness of the market to providers, as it would limit their ability to recover costs. Alternatively, it may significantly increase the cost of guarantee and insurance products for homeowners. Both scenarios would reduce the uptake of guarantee and insurance products and potentially leave homeowners financially exposed.

Is the proposal consistent with other elements of the building system?

Enhanced status quo

If the liability settings are creating ineffective consenting processes, then the settings may be working against what the regulatory system is trying to achieve.

20 per cent cap

This option would be consistent with other elements of the building regulatory system if it incentivises more efficient consenting processes and quality building work. If it leads to more risk-averse behaviour by other parties, then it would work against what the regulatory system is trying to achieve. It may limit innovation and the use of new products or building methods. It may shift to other parties more risk than they're able to manage. This may reduce firm viability or increase insolvency.

Is the proposal consistent with related government policy and regulations?

Enhanced status quo

If the liability settings are creating ineffective consenting processes, then the impact on the building of new houses may be limited.

20 per cent cap

More work is needed to identify what impact this option might have on the building of new houses. It may reduce the viability of a development if a suitable guarantee and insurance product (or another type of risk management mechanism) isn't available or the costs of building increase.

Potential impacts of the option to cap BCA liability

The assessment below only considers the potential impacts of a cap on BCA liability.

Making no changes to the liability settings should have no direct impacts – the indirect impacts are identified in all other parts of the discussion paper.

Homeowners

Should be no direct impact if the homeowner has a guarantee and insurance product and they can make a claim.

Increased risk of financial losses if they don't have a guarantee and insurance product.

May create a barrier to taking claims related to BCA negligence (as the costs may outweigh the potential amount that could be paid).

Size of impact depends on what impact there is on the availability of guarantee and insurance products and the cover provided.

Owners of non-residential buildings

Greater risk of financial losses.

May increase use of mechanisms to control risks, such as insurance, contracts, performance bonds and retentions. Could have negative outcomes (eg increased risk of insolvency) if shift risks to other parties who are unable to control those risks.

Builders and designers

Potential to face greater share of losses, especially if other parties absent. The losses may be greater than their role.

May incentivise use of professional indemnity insurance. But may have negative impacts on availability of this type of insurance.

May be reluctant to take on riskier or more complex building work.

May lead to increase in insolvencies.

BCAs

Likely to face lower liabilities from defective buildings.

May make it easier to get insurance cover.

Unlikely to directly impact on consenting process.

Guarantee and insurance providers

May find it harder to recover costs of claims from other parties.

May reduce viability of providing guarantee and insurance products.

Questions for stakeholders	
4.12	If the government decides to make all the other changes in this discussion paper, do you agree that that the liability settings for BCAs will not need to be changed?
	What area of work do you think will have the biggest impact on BCA consenting behaviour?
4.13	If the government decides to limit BCA liability, do you support the proposal to place a cap on BCA liability?
4.14	If there is a cap on BCA liability, do you agree that the cap should be set at 20 per cent?
4.15	If there is a cap on BCA liability, do you think BCAs should have to pay more than 20 per cent if they have contributed to more than 20 per cent of the losses?
4.16	What do you think would be the impacts of placing a cap on BCA liability?
4.17	Do you have any other comments on these proposals?

Three options MBIE considered but doesn't recommend

Below are three further options for the liability of BCAs, but MBIE doesn't recommend them as they fail to meet the objectives for risk and liability.

- **Restrict liability to dangerous defects.** The liability of BCAs would be restricted to where they have been found to contribute to a defect that risks causing death or serious injury or illness. This option was based on the approach taken in British Columbia, Canada. However, it's hard to define 'dangerous defect'. The term may be interpreted broadly, which could result in little or no change. It would result in some uncertainty and increased costs from court cases (to test the definition of 'dangerous defect').
- **Restrict the liability to residential buildings.** BCAs currently have a common duty of care for all types of buildings. A differentiated duty of care would introduce more complexity because of the lack of a clear boundary between residential and non-residential buildings, especially in mixed-use buildings. Costs would increase as people tested the boundaries. This option wouldn't align well with the roles and responsibilities of BCAs.
- **Introduce proportionate liability.** Under proportionate liability, each defendant is only liable for the proportion of damage that they caused. Proportionate liability wouldn't protect homeowners from financial loss, and may deter guarantee and insurance providers from entering the market due to the lower likely recovery of damages from others in the system. Homeowners would find it hard to show how much each defendant contributed to their loss. Court costs are likely to increase as the parties dispute their proportion of contribution. The Law Commission has recommended against moving to proportionate liability for building-related claims.

Recap of questions

Part 4 –Risk and liability	
4.1	Do you support the proposal to require guarantee and insurance products for residential new builds and significant alterations?
4.2	Do you think homeowners should be able to actively opt out of having a guarantee and insurance product?
4.3	Should there be conditions on when homeowners are able to opt out? What should these conditions be?
4.4	What types of buildings do you think should be required to have a guarantee and insurance product?
4.5	What threshold do you think the requirement for a guarantee and insurance product should be set at?
4.6	Do you have any views on the minimum standards that should be set for a guarantee and insurance product? For example: the type of product, the types of events that are covered, the minimum level of cover, the period of cover, the nature of redress, the maximum claim value, dispute resolution processes, the ability to transfer to new owners.
4.7	What financial and prudential requirements do you think should be placed on providers to ensure there is a continuing supply of guarantee and insurance products? For example: reinsurance or other insurance backing, solvency, auditing requirements, security and prudential requirements.
4.8	If residential new builds and significant alterations are required to have a guarantee and insurance product, what do you think the impacts will be?
4.9	**For builders:** How difficult will it be for you to gain eligibility to offer a guarantee and insurance product?
4.10	How long do you think the transition period for guarantee and insurance products needs to be to ensure providers, builders and BCAs are prepared for the changes?
4.11	Is anything else needed to support the implementation of guarantee and insurance products?

4.12	If the government decides to make all the other changes in this discussion paper, do you agree that that the liability settings for BCAs will not need to be changed?
	What area of work do you think will have the biggest impact on BCA consenting behaviour?
4.13	If the government decides to limit BCA liability, do you support the proposal to place a cap on BCA liability?
4.14	If there is a cap on BCA liability, do you agree that the cap should be set at 20 per cent?
4.15	If there is a cap on BCA liability, do you think BCAs should have to pay more than 20 per cent if they have contributed to more than 20 per cent of the losses?
4.16	What do you think would be the impacts of placing a cap on BCA liability?
4.17	Do you have any other comments on these proposals?

Have your say

See **page 4** of the introduction (Part 1) for details on how to submit your feedback.

Submissions close on 16 June 2019

List of acronyms

BCA	Building consent authority
LIM	Land information memorandum
MBIE	Ministry of Business, Innovation and Employment

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

5

Discussion paper –
Building system legislative reform

Building levy

APRIL 2019

New Zealand Government

Contents

Summary of Part 5: Building levy

The building levy should be set at an appropriate level; MBIE should be able to spend the money raised by the levy on stewardship of the building sector

Applicants for building consents which are granted, and which are above a threshold, pay a levy. The levy funds MBIE's work to regulate the building sector in connection with the functions of MBIE's chief executive under the *Building Act*.

The changes set out in this section address three problems:

- The current levy rate is higher than it needs to be. The rate was set in 2005 when there was significantly less building activity. The levy has generated a surplus that stood at $43 million in July 2018.
- Different building consent authorities (BCAs) use different thresholds for the building levy. This is because the GST rate increased in 2010, which had the effect of increasing the threshold. Not all BCAs adopted this change.
- The *Building Act* sets out what the chief executive can spend building levy funds on in a way that could be expanded. The Act doesn't specifically allow money raised by the building levy to be spent on activities related to broader stewardship of the building regulatory system unless they're already functions of the chief executive under the Act.

We want stakeholders' feedback on three proposals

1	Reduce the levy rate from $2.01 including GST to $1.50 including GST (per $1,000).
2	Standardise the levy threshold at $20,444 including GST.
3	Amend the *Building Act* to enable MBIE's chief executive to spend the levy for purposes related to broader stewardship responsibilities in the building sector.

These changes will help deliver the programme's outcomes

The programme's three key goals are safe and durable buildings, an efficient building regulatory system, and a high-performing building sector.

The proposals set out in this section will help meet these goals by:

- reducing the costs of residential and commercial building consents that are subject to the levy
- supporting MBIE's role as the regulator, and help MBIE's wider stewardship of the building regulatory system
- supporting a high-performing building regulatory system.

The building levy

Proposed changes will reduce cost, standardise the levy threshold, and support stewardship of the building sector

The building levy funds the core regulatory functions of the chief executive under section 53 of the *Building Act*. The levy is paid by applicants who are granted a building consent for work valued above the specified threshold.

The levy and the threshold must be set at the right levels. MBIE relies on the levy for some funding, but applicants for building consents shouldn't pay more than is reasonable.

Changes to the levy rate and threshold will lower the cost of building consents for applicants and apply a consistent threshold across all BCAs.

MBIE proposes that the chief executive should be able to spend the levy on activities related to stewardship of the building sector. Stewardship requires MBIE to analyse the building environment, understand where the future might take us and assess whether the building regulatory system is equipped to cope with the future. 'Stewardship' in this instance means actively planning for and managing the medium to long-term development and improvement of the building regulatory system as a whole. The goal is cost effective, efficient, fair and easy to use regulation.

Providing MBIE's chief executive some flexibility to spend the levy on stewardship responsibilities will help MBIE to:

- be a more effective regulator by promoting a consistent all-of-system view on building sector regulation
- ensure that the building regulatory system is fit for purpose over the medium to long-term
- meet its broader stewardship responsibilities as specified by the Treasury and Cabinet.

Note: All figures related to levy rate and threshold in this section include GST.

The proposed changes to the Building Levy Order 2005 will lower the rate of the levy payable and adjust the levy threshold

MBIE proposes two changes to the Building Levy Order 2005 to:

- lower the rate of the levy payable on successful building consents, to $1.50 from $2.01[1]
- standardise the levy threshold at $20,444 including GST.

A change to the *Building Act* will enable MBIE's chief executive to spend the levy on broader building sector stewardship responsibilities

MBIE proposes a change to the *Building Act* to enable the chief executive to spend the levy on building sector stewardship.

1 Note that the current Order refers to $1.97 including GST of 12.5%. See regulation 4 of the Building Levy Order 2005 and section 78(3) of the Goods and Services Tax Act 1985.

Our regulatory assessment shows that a range of statutes contribute to the building regulatory system[2]. The building regulatory system includes a broad range of participants, legislative tools and standards for regulating buildings, building work and occupational groups in the building industry.

All building sector participants contribute to the effective functioning of the building system. But system complexity means that opportunities are likely to emerge to make the system easier to use for the benefit of regulated groups, building consent applicants, BCAs and the wider public.

How the building levy works today

Building consent applicants pay the levy if a consent is granted

The levy is set in the Building Levy Order. BCAs calculate the levy using the estimated value of the building work set out in a building consent. If the value is over a threshold, and if the consent is granted, owners or developers of residential or commercial buildings pay the levy. The levy must be paid when the consent is granted.

The building levy funds the chief executive's functions under the *Building Act*

The revenue from the levy is used to fund MBIE's functions under the *Building Act*. For the most part, these functions are specific and operationally focused. The Building Act does not specifically allow MBIE to use levy finds on overall stewardship of the building sector which is central to the development of integrated high quality regulation.

Currently, the levy is used to fund a range of functions and activities performed by MBIE. These include operational policy advice and service design, service delivery, information and education, compliance and enforcement and monitoring and education.

2 These are the *Building Act*, the *Registered Architects Act*, the *Plumbers, Gasfitters, and Drainlayers Act*, the *Chartered Professional Engineers of New Zealand Act,* the *Weathertight Homes Resolution Act,* the *Electricity Act,* the *Construction Contracts Act* and the *Engineering Associates Act.*

The current levy rate is no longer appropriate and not all BCAs use the same levy threshold

The current levy rate is $2.01 for every $1,000 of the estimated value of the building work for which a building consent is issued.

Apart from a 2010 GST adjustment, the levy rate hasn't changed since the Building Levy Order 2005 came into effect in April 2005.

The current levy rate is no longer appropriate because it was set based on a lower level of activity in the sector and activity in the construction sector has increased.

The current levy rate has generated a surplus

The levy has generated a surplus of $43 million as at July 2018 and this surplus is projected to rise further. The levy rate should be set at a level where it funds the costs of MBIEs functions under the *Building Act*. The current levy rate has been over-recovering for several years because of unprecedented levels of activity in the construction sector.

Not all BCAs use the same levy threshold

The levy applies to all projects above a specified value. The current threshold in the Building Levy Order is $20,000 including GST. This threshold is used to decide which consents are subject to the levy.

In 2010 the GST rate increased from 12.5% to 15%. This had the effect of changing the threshold to $20,444. We've found that BCAs are using different thresholds for the levy due to this change in the rate of GST.

The purposes for which we can spend the levy

The *Building Act* allows the levy to be spent to perform the chief executive's functions under the Act. These functions don't specifically include MBIE's broader stewardship of the building sector. The chief executive cannot generally spend levy funds in ways that might lift the full breadth of building sector skills, streamline common processes or hold different types of regulated practitioners to account fairly and consistently – unless the expenditure is for or connected with the chief executive's functions under the *Building Act*.

More generally, although reviewing the *Building Act* is one of the roles described for MBIE in the Act, the Act is silent on MBIE's role of reviewing how the building regulatory system as a whole is functioning. In short, the Act describes our expenditure of the levy in a way that is narrower than the broader role we play as an effective building sector regulator.

MBIE proposes three changes to the building levy

1. Reduce the rate of the levy from $2.01 to $1.50.
2. Standardise the threshold at $20,444.
3. Amend the *Building Act* to enable MBIE's chief executive to spend the levy for purposes related to broader stewardship responsibilities in the building sector.

The objectives of these changes are to:

- reduce the surplus generated by the levy to Treasury best practice levels
- provide BCAs with certainty about thresholds, and make those thresholds consistent
- enable the chief executive to spend the levy on broader building sector responsibilities, and a system-wide view on building regulation.

1. Reduce the rate of the building levy

Proposal

Reduce the rate of the building levy from $2.01 to $1.50.

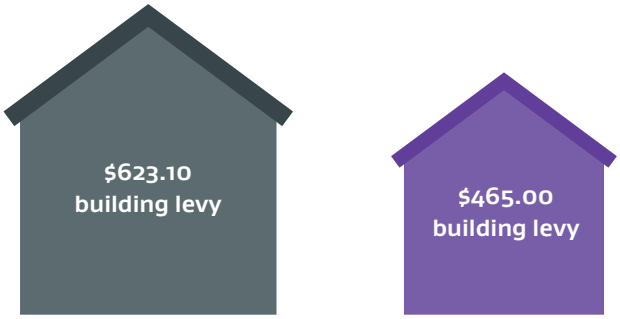
Reducing the levy rate is consistent with the objective of reducing a large and growing balance in the building levy memorandum account. A lower levy rate would result in revenue being more aligned to costs of the services that MBIE provides to levy payers.

On a $310,000[3] private house development (the current average cost of a new-build in Auckland) the levy bill would reduce from around $623 to $465.

Questions for stakeholders

5.1	Do you agree that the levy rate should be reduced from $2.01 to $1.50?
5.2	**For building consent authorities:** What impact, if any, would a reduced levy rate have on building consent authorities?
5.3	Other than reduced building consent costs, what are the other impacts from reducing the current levy rate?
5.4	**For building consent authorities:** How long would you need to implement the proposed change to the building levy and threshold?

Impact of building levy rate on a $310,000 private home build



Current levy rate
$2.01 per $1,000

Proposed levy rate
$1.50 per $1,000

3 This is the average cost of building work for a 150m², three or four bed, one or two bath home, in Auckland, at June 2018.

2. Standardise the threshold for the building levy

Proposal

Standardise the threshold for the building levy at $20,444.

Standardising the threshold at $20,444 means that building consents worth up to $20,443 would not trigger the levy. Clarifying the threshold at the higher of the two amounts used by BCAs is also consistent with the objective of reducing a large and growing balance in the building levy memorandum account.

MBIE will monitor the impact of this change to inform a more substantive threshold review after a new levy rate comes into force.

Questions for stakeholders

5.5	Do you have any comments on standardising the threshold at $20,444?

3. Amend the *Building Act* to enable MBIE's chief executive to spend the levy on for purposes related to broader stewardship responsibilities in the building sector

Proposal

Amend the *Building Act*'s provisions to enable the chief executive to spend the levy on activities related to stewardship responsibilities in the building sector.

'Stewardship' is a term that sums up the Government's expectation that MBIE will actively plan for and manage the Crown's and the sector's medium and long-term interests.

In 2017, the Government updated its expectations for regulatory stewardship. These expectations include responsibilities for:

- monitoring, review and reporting on regulatory systems
- robust analysis and implementation support for changes to regulatory systems, and
- good regulator practice.

At a practical level, these stewardship expectations require MBIE to analyse the building environment, understand where the future might take us, and assess whether the building regulatory system is equipped to cope with the future.

In the context of the building regulatory system, 'stewardship' means actively planning for and managing the medium to long-term development of the whole building regulatory system, and related activities. The stewardship goal is that the system is easy to use, flexible, responsive for industry and BCAs, and fair across the range of different sector occupations.

As previously discussed, the building regulatory system is broad and complex. It involves a number of different laws and regulations, institutions and practices that can make the system challenging to navigate and use.

MBIE considers that amending the *Building Act* so the chief executive can spend the levy on activities related to stewardship responsibilities in the building sector will help MBIE to:

- take an all-of-system view
- plan and manage the medium to long-term development and improvement of the building regulatory system, and related activities
- monitor and oversee of the building regulatory system as a whole.

A framework will help guide decisions about how to spend the levy

MBIE has a range of checks and balances to help guide decisions about spending the levy. The Treasury has also released guidance on the use of levies.

Each stewardship initiative would need to be considered on a case-by-case basis to demonstrate links to the chief executive's functions under the *Building Act*. If this link cannot be made, then other funding sources, such as Crown funding or fees and charges, would need to be considered.

Questions for stakeholders

5.6	Do you agree that the *Building Act* should be amended so MBIE's chief executive may spend the levy for purposes relating to building sector stewardship?

How the proposed changes measure up to the five assessment criteria

Does the proposal meet the objectives for managing the building levy memorandum account?

The proposed changes are consistent with the overall objective of reducing a large and growing surplus in the building levy memorandum account.

Does the proposal support the desired behavioural shifts in the building sector?

The proposed changes support the desired behavioural shifts in the building sector by reducing the costs of residential and commercial building consents that are subject to the levy.

Would the benefits of the proposal outweigh the risks and costs?

MBIE considers that the changes to the levy rate and threshold will confer only benefits to building consent applicants such as homeowners and developers.

BCAs will incur some administrative costs to recalibrate their existing business systems and to update websites and printed material. MBIE expect that these costs will be absorbed by retaining 3% of levy revenues for administrative purposes, although the BCAs will also be operating off of a smaller funding base. We welcome feedback on this.

Expenditure under the levy has fallen significantly short of the amount of levy collected. Increasing the scope of levy expenditure will enable MBIE to increase the amount of levy funding used and apply the funding more effectively and across a wider range of complex building system issues. This will have benefits for those who are regulated and for those who need to use the building system.

In the medium to long-term, enabling MBIE's chief executive to consider broader stewardship responsibilities in the building sector, when considering the use of the levy, will help MBIE be a more effective regulator for the benefit of all New Zealanders.

Is the proposal consistent with other elements of the building system?

Enabling the chief executive to support building sector stewardship responsibilities is consistent with the all-of-system approach taken in other parts of the building legislative reforms.

Is the proposal consistent with related government policy and regulations?

The proposals are consistent with both Treasury best practice guidance to manage levies to within 10% of yearly levy revenue and the government's expectations for regulatory stewardship.

Potential impacts of the proposed changes

Building consent authorities

As BCAs collect the levy, they may face up-front administrative costs to update their systems and processes to reflect the new levy rate and the appropriate threshold, if they haven't already adopted it. BCAs currently retain 3 per cent of the levy to cover administrative costs. MBIE expects that portion will cover these new costs.

The impact of standardising the levy threshold to $20,444 means that the BCAs not currently using this threshold would adopt it. This change would lead to clarity and consistency for all BCAs and applicants on what is the correct threshold.

Most large BCAs already use the higher threshold of $20,444. These BCAs would not need to make any operational changes.

Building owners and developers

The impact of reducing the levy would be lower building consent fees, but the level of service that levy payers receive would remain the same.

On a $310,000 private house development (the current average cost of a new-build house in Auckland) the levy bill would reduce from around $623 to $465.

On a $20 million commercial build, the levy bill would reduce from $40,200 to $30,000.

The impact of increasing the threshold means that building consents valued between $20,000 and $20,443 would no longer be subject to the levy. Those affected would benefit from a minor reduction in the costs of construction.

MBIE

Reducing the building levy revenue is in line with our objective of reducing a large and growing surplus in the building levy memorandum account.

The impact of enabling MBIE's chief executive to spend the levy on building sector stewardship activities, will mean MBIE can see the building regulatory system as an asset and:

- ensure the building regulatory system is well designed and remains fit for purpose over the medium to long term
- fulfil the government's broader stewardship expectations for the building regulatory system.

We propose that the levy changes take effect on 1 July 2020

If progressed, the proposed changes to the levy rate and threshold will come into effect on 1 July 2020. This date was chosen as the start of the first full financial year after final decisions on the levy rate and threshold are made.

We welcome your feedback on any administrative impacts on BCAs to recalibrate their systems by this date.

Changes in the *Building Act* to support building sector stewardship will be included in the broader legislative reform programme. Timeframes for implementing this change are on a longer timescale.

Questions for stakeholders

5.7	Do you agree with the proposed start date of 1 July 2020 for the changes to the building levy rate and threshold?

Recap of questions

Part 5 – Building levy

5.1	Do you agree that the levy rate should be reduced from $2.01 to $1.50?
5.2	**For building consent authorities:** What impact, if any, would a reduced levy rate have on building consent authorities?
5.3	Other than reduced building consent costs, what are the other impacts from reducing the current levy rate?
5.4	**For building consent authorities:** How long would you need to implement the proposed change to the building levy and threshold?
5.5	Do you have any comments on standardising the threshold at $20,444?
5.6	Do you agree that the *Building Act* should be amended so MBIE's chief executive may spend the levy for purposes relating to building sector stewardship?
5.7	Do you agree with the proposed start date of 1 July 2020 for the changes to the building levy rate and threshold?

List of acronyms

BCA	Building consent authority
GST	Goods and services tax
MBIE	Ministry of Business, Innovation and Employment

Have your say

See **page 4** of the introduction (Part 1) for details on how to submit your feedback.

Submissions close on 16 June 2019

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

6

Discussion paper –
Building system legislative reform

Offences, penalties and public notification

APRIL 2019

New Zealand Government

Contents

Summary of Part 6: Offences, penalties and public notification

Financial penalties should deter poor or illegal behaviour; MBIE needs enough time to investigate possible offences; and public notifications need to be fit for future use.

One of the building regulatory system's main goals is to make sure that New Zealand's building sector builds safe and durable buildings. Participants in the building process have to comply with the laws and regulations that make up the building regulatory system. Participants who don't comply face penalties – the goal of these penalties is to deter poor or illegal behaviour.

The proposed changes set out in this section focus on four main problems:

- Financial penalties may not be fit for purpose.
- Maximum financial penalties for organisations are the same as those for individuals. A fine that is likely to deter an individual may be seen as a minor cost by an organisation. Other New Zealand legislation, like the *Health and Safety at Work Act 2015,* sets higher penalties for organisations.
- The *Building Act 2004* only allows six months to lay a charge for an offence under the Act. This is not enough time as offences and investigations are often complex.
- Due to changes of preference in how people access information, requiring public notifications in daily newspapers may not be fit for purpose in the future.

MBIE wants stakeholders' feedback on four proposals

1	Increase the maximum financial penalties.
2	Set the maximum penalty levels differently for individuals and organisations.
3	Extend the time relevant enforcement agencies have to lay a charge under the *Building Act*, from six months to 12 months (section 378 of the *Building Act*).
4	Modify the definition of 'publicly notify' in section 7 of the Act.

These changes will help deliver the programme's outcomes

The programme's three outcomes are safe and durable buildings, an efficient regulatory system and a high-performing building sector.

The proposals set out in this section would help deliver these outcomes by:

- ensuring the penalty regime for offences in the *Building Act* provides sufficient incentive to comply with legislative requirements
- ensuring that public notification provisions are fit for purpose.

Offences, penalties and public notification

Penalties should deter poor or illegal behaviour by individuals and organisations; public notifications also need to be fit for purpose

A key purpose of the building regulatory system is ensuring that people can use buildings safely and without endangering their lives. Appropriate checks and balances are needed to ensure that buildings meet this objective. Penalties for non-compliance are one of these checks and balances. If regulations are not followed, building failure can have serious consequences, possibly putting people's lives at risk.

Financial penalties – and other aspects of the penalties regime may not be fit for purpose

Offences and penalties are intended to achieve compliance with legislation and deter individuals or groups from behaving poorly or illegally.

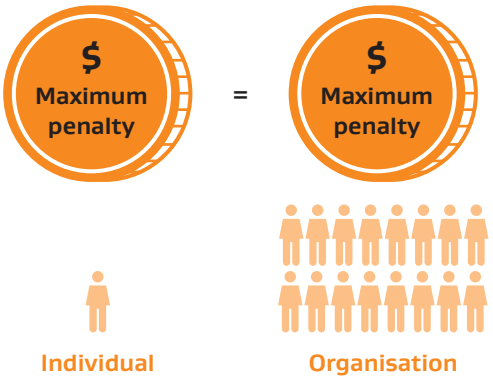
Current maximum penalties may no longer be fit for purpose

Many of the current maximum financial penalties set out in the *Building Act* have not been adjusted since 2004. This means that many penalties may not be fit for purpose in the future. They are also out of line with other legislation that affects the building industry and is aimed at protecting people's lives and wellbeing (such as the *Health and Safety at Work Act 2015*).

Maximum penalties don't distinguish between individuals and organisations

The maximum penalty amounts in the *Building Act* don't distinguish between an individual and an organisation. Other Acts that govern building practitioners do set different maximum penalties for individuals and organisations – the *Plumbers, Gasfitters and Drainlayers Act 2006* and the *Health and Safety at Work Act* both use this approach. The financial consequence for some organisations may be an insufficient deterrent compared to the effects on an individual. An increase in organisational penalties would send a stronger signal of the consequences of non-compliance, and provide a greater deterrent.

The financial consequence for some organisations may be an insufficient deterrent compared to the effects on an individual



Time to lay charges is not sufficient

The chief executive of MBIE, territorial authorities, regional authorities and other authorised people can file a charging document for an offence against the *Building Act*. They currently have six months to lay a charge from the date that an offence becomes known, or from when an authority could not justify having missed an offence. Due to the possibly complex factors of an offence under the *Building Act* and the number of people involved, six months is not a sufficient period to gather information and progress an investigation

Rules on public notification need to be updated

A number of sections of the *Building Act* require public notification of various matters that relate to the exercise of certain powers by the chief executive of MBIE or the Building Practitioners Board (BPB). For example, the chief executive is required to publicly notify a proposal to issue, amend or revoke an acceptable solution or verification method. Where the BPB disciplines a person, in addition to notification in the BPB Register, the BPB may also publicly notify the action in any other way it thinks fit.

'Publicly notify' is defined in section 7 of the *Building Act* and includes a requirement to publish a notice in one or more daily newspapers in Auckland, Hamilton, Wellington, Christchurch and Dunedin, in addition to publishing in the *New Zealand Gazette* and on the internet.

Changes in technology and how the public accesses information means that requiring public notification in daily newspapers may not be fit for purpose in the future.

MBIE proposes three changes to offences and penalties in the *Building Act*

1	Increase the maximum financial penalties for all persons.
2	Set the maximum penalty levels differently for individuals and organisations.
3	Extend the time relevant enforcement agencies have to lay a charge under the *Building Act*, from six months to 12 months (section 378 of the *Building Act*).

MBIE proposes one change to the notification requirements in the *Building Act*

4	Modify the definition of 'publicly notify' in section 7 of the *Building Act*.

The objectives of these changes are to:

- ensure that the financial penalties in the *Building Act* provide sufficient incentives to comply with legislative requirements and
- public notification requirements are fit for purpose.

1. Increase the maximum financial penalties

Proposal

Increase the maximum financial penalties for all persons under the *Building Act*.

MBIE proposes to set higher penalties so that the consequences of offences align with other legislation and are adequate for the future.

The proposed framework sets maximum penalties for both individuals and organisations in proportion to the consequence of that offence (see table 6.1). There are four levels of offence:

- Very high: Offences that cause serious risk to people or death.
- High: Offences relating to dishonesty or fraud in relation to risk and performance assessment. For example, permitting a person to use a building when you know it is unsafe or unsanitary.
- Medium: Offences relating to notification and information issues.
- Low: Offences relating to record keeping.

Questions for stakeholders

6.1	Are the current maximum penalty amounts in the *Building Act* appropriate?
6.2	Do you agree with the proposed increases to maximum penalties?

2. Set the maximums differently for individuals and organisations

Proposal

Set the maximum penalties differently for individuals and organisations.

MBIE also proposes a maximum penalty for individuals and a different maximum penalty for any other person (including all legal persons other than individuals such as the Crown, corporations sole, and bodies of persons whether incorporated or unincorporated). This proposal is aimed at differentiating between penalties to ensure that sufficient incentives are available to ensure compliance.

Table 6.1 outlines the proposed framework of offences alongside a comparison of current penalty maximums for both individuals and organisations in the *Building Act* and the *Health and Safety at Work Act*. It also outlines the new proposed penalty maximums for both individuals and organisations.

A number of reform proposals outlined in this document propose new offences and penalties. These are presented in their respective sections.

Questions for stakeholders

6.3	Do you agree with introducing higher penalties for organisations?
6.4	What impacts on the building industry could arise from this proposal if it is implemented?

TABLE 6.1

Comparison of penalty maximums in current legislation and proposed penalty maximums

LEVEL OF SERIOUSNESS
Very high

Types of offences:

- Offences that cause serious risk/death to people
- Other offences that may have serious consequences.

Building Act 2004		*Health & Safety at Work Act 2015*
s128A: Failure to comply with a notice when issued where a territorial authority is satisfied that a building is dangerous, affected or insanitary.		**s48:** Failure to comply with a duty that exposes an individual to a risk of serious injury, serious illness or death.
Current penalty $200,000	**Proposed individual penalty** $300,000	**Current individual penalty** $150,000 (not a PCBU or an officer of a PCBU) $300,000 (Officer of a PCBU or a PCBU)
	Proposed organisational penalty $1.5 million	**Current organisational penalty** $1.5 million

TABLE 6.1 – CONTINUED

LEVEL OF SERIOUSNESS
High

Types of offences:

- Offences relating to dishonesty/fraud.
- Offences relating to risk/performance assessment and hazard identification.
- Offences relating to (failure to put in place) risk controls.

Building Act 2004		*Health & Safety at Work Act 2015*
s116B(1)(b): A person uses a building, or knowingly permits another person to use a building, that has inadequate means of escape from fire.		**s49:** Offence of failing to comply with duty.
Current penalty $100,000	**Proposed individual penalty** $150,000	**Current individual penalty** $50,000 (not a PCBU or an officer of a PCBU) $100,000 (Officer of a PCBU or a PCBU)
	Proposed organisational penalty $500,000	**Current organisational penalty** $500,000

LEVEL OF SERIOUSNESS
Medium

Types of offences:

- Offences relating to administration and provision of information.
- Offences relating to notification.

Building Act 2004		*Health & Safety at Work Act 2015*
s108(5)(a): A building owner fails to display a building warrant of fitness that is required to be displayed.		**s204:** Conducting business at a workplace required to be authorised, which is not authorised.
Current penalty $20,000	**Proposed individual penalty** $50,000	**Current individual penalty** $50,000
	Proposed organisational penalty $150,000	**Current organisational penalty** $250,000

TABLE 6.1 – CONTINUED

LEVEL OF SERIOUSNESS
Low

Types of offences:

- Offences relating to record-keeping.

Building Act 2004		*Health & Safety at Work Act 2015*
s114(3): A person fails to give written notice to the territorial authority that the owner proposes to change the use of a building.		**s57:** Not keeping required records of notifiable events.
Current penalty $5,000	**Proposed individual penalty** $5,000	**Current individual penalty** $5,000
	Proposed organisational penalty $25,000	**Current organisational penalty** $25,000

3. Extend the time period for charges to be laid

Proposal

Extend the time relevant enforcement agencies have to lay a charge under the *Building Act*, from six months to 12 months (section 378 of the *Building Act*).

MBIE proposes to extend the time period to lay a charge for an offence. At present, six months is not always enough time. Due to the complexity of building and the number of parties involved, investigations can be lengthy. This proposal aims to better balance the time needed to enforce compliance with ensuring timely prosecution. MBIE proposes that 12 months is an appropriate time to lay a charge and aligns with other regulatory systems that have longer timeframes (12 months or more) in which to file a charge, such as the *Electricity Act* 1992 or the *Crown Minerals Act* 1991.

Questions for stakeholders

6.5 Do you think 12 months is an appropriate time period for relevant enforcement agencies to lay a charge?

4. Modify the definition of 'publicly notify' in the *Building Act*

Proposal

Modify the definition of 'publicly notify' in section 7 of the *Building Act* to remove the requirement to publish in daily newspapers circulating in each of the cities of Auckland, Hamilton, Wellington, Christchurch, and Dunedin. Public notification will still be required in a more modern form that is future proofed and publicly accessible.

The definition of 'publicly notify' applies to the exercise of certain powers of MBIE's chief executive and the LBP Board. Removing the requirement to publish in daily newspapers in the main cities is expected to better respond to changes in technology and how the public accesses information. The proposed change is consistent with proposals currently before Parliament to amend the *Building Act* to manage buildings following an emergency.

Questions for stakeholders

6.6	Do you agree that public notification under the *Building Act* should no longer be required in newspapers?
6.7	Do you agree that publication on the internet and in the New Zealand Gazette is sufficient?

How the proposed changes measure up to our five assessment criteria

Does the proposal meet the objectives for penalties and other matters?

The overall objective is to ensure that the penalty regime for offences in the *Building Act 2004* provides sufficient incentive to comply with legislative requirements, and that public notification requirements are fit for purpose. Compared to the status quo, the proposals are expected to better meet this objective:

- Increasing maximum financial penalties for offences and differentiating fines between individuals and organisations is expected to better support compliance with the *Building Act* and deter individuals or organisations from behaving poorly or illegally.
- Extending the time relevant enforcement agencies have to place a charge under the *Building Act* from six months to 12 months is expected to better balance the time needed to gather evidence in more complex cases, and the time for action to enforce compliance.
- The proposed changes to the public notification provisions will better respond to changes in technology and how the public accesses information.

Does the proposal support the desired behavioural shifts in the building sector?

Penalties for non-compliance with the *Building Act* are one of the checks and balances on the building regulatory system. The proposals should support desired behaviours in the building sector by helping to ensure that penalties are fit for purpose and effective.

Would the benefits of the proposal outweigh the risks and costs?

The penalty proposals will expose building owners, practitioners, developers and others in the sector to greater maximum fines for both individuals and organisations. However, many of the maximum penalties levels have not been adjusted since 2004 and may be not be fit for purpose in the future.

The benefits of the proposals are expected to outweigh the costs and risks.

Is the proposal consistent with other elements of the building regulatory system?

The proposals are consistent with other elements of the building regulatory system as they help to support the legislative requirements in the *Building Act*.

Is the proposal consistent with related government policy and regulations?

The penalty proposals will more closely align the *Building Act* with other legislation that affects the building industry and is aimed at protecting people's lives and wellbeing (for example, as set out in the *Health and Safety at Work Act 2015*).

Potential impacts of the proposed changes

Building consent authorities, territorial authorities and relevant persons

- Will have more time to investigate and lay a charge under the *Building Act*.
- Potentially a greater number of charges will be investigated in a 12-month period.

Building owners and developers

- Individuals and organisations would face higher fines for non-compliance.
- Higher fines will have a greater financial impact on individuals and organisations.
- Poor behaviour is deterred and conviction rates are lower.

MBIE

- Will have further time to investigate offences of the *Building Act*. This would potentially result in more successful prosecutions.
- Cost efficiencies associated with updated public notification processes.

Occupational regulation boards

- Potentially fewer investigations carried out due to the deterrent effect of higher penalties changing practitioner behaviour.
- The range of offences investigated by occupational regulation boards may potentially be wider.

Recap of questions

Part 6 – Penalties

6.1	Are the current maximum penalty amounts in the *Building Act* appropriate?
6.2	Do you agree with the proposed increases to maximum penalties?
6.3	Do you agree with introducing higher penalties for organisations?
6.4	What impacts on the building industry could arise from this proposal if it is implemented?
6.5	Do you think 12 months is an appropriate time period for relevant enforcement agencies to lay a charge?
6.6	Do you agree that public notification under the *Building Act* should no longer be required in newspapers?
6.7	Do you agree that publication on the internet and in the New Zealand Gazette is sufficient?

List of acronyms

LBP	Licensed building practitioner
MBIE	Ministry of Business, Innovation and Employment
PCBU	Person Conducting a Business or Undertaking

Have your say

See **page 4** of the introduction (Part 1) for details on how to submit your feedback.

Submissions close on 16 June 2019