

Departmental Disclosure Statement

Building Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

9 August 2018

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Part One: General Policy Statement

General policy statement

This Bill amends the Building Act 2004 (Building Act), and proposes two new sets of powers to improve the system for managing buildings after an emergency and to provide for investigating building failures.

Managing buildings after an emergency

This Bill proposes new powers that aim to address risks to people and property from buildings during and after an emergency. The proposed amendments seek to create a system that is clear, has proportionate impacts on personal and property rights, and ensures that heritage values are appropriately recognised.

A new scheme of powers under the Building Act is required to manage risks to people and property during and after an emergency. This is because existing business-as-usual powers under the Building Act to manage dangerous and insanitary buildings are inadequate for this purpose. The Canterbury and Kaikōura earthquakes highlighted gaps in current legislation for managing buildings after an emergency, including the need to better manage the transition from civil defence emergency management powers to business-as-usual powers under the Building Act.

The Bill introduces into the Building Act an end-to-end process for managing buildings from response to recovery following an emergency.

The amendments in the Bill—

- provide powers to territorial authorities (and where a state of emergency or transition period is in force, the relevant civil defence emergency management person) to manage buildings during and after an emergency event, including—
 - inspecting and placing notices on buildings:
 - evacuating and restricting entry to buildings:
 - closing roads and cordonning streets:
 - requiring further information from building owners, such as detailed engineering assessments:
 - demolishing or carrying out works to buildings that pose an urgent risk of injury or death (including through impacts to critical infrastructure) or risk of damage or disruption to neighbouring buildings, critical infrastructure, and public thoroughfares:
 - requiring building owners to reduce or remove risks posed by their building, on a case-by-case basis:
- provide that the Minister for Building and Construction can choose to take direct action and make decisions to manage buildings, when warranted by the scale and impacts of an emergency event:
- provide that the powers can be used when no state of emergency or transition period is in force:
- provide that the powers are available for up to 3 years and can be extended;
- provide a requirement that territorial authorities review whether powers are still necessary every 90 days:
- provide for powers of varying durations of 6 months or 3 years (depending on the power):
- make the carrying out of works on certain heritage buildings (Category 1 or wāhi tūpuna on the New Zealand Heritage List or buildings on the National Historic Landmarks List) that pose an urgent risk of injury or death a Ministerial decision,

and requiring consultation with Heritage New Zealand for other heritage buildings:

- introduce a framework for recognising personal and property rights including criteria governing the use of the powers, ensuring relevant parties are adequately consulted before decisions to undertake works are made, and an appeal process.

If a state of emergency or transition period is in force under the Civil Defence and Emergency Management Act 2002 (**CDEM Act**), buildings in a designated area that have been damaged in an emergency event will primarily be managed under the Building Act, with the broader powers under the CDEM Act in relation to buildings only available if necessary or desirable to remove or reduce risks. During a state of emergency or transition period the relevant CDEM officials will exercise the powers. The Bill sets out a process for deciding how and when to use the new building emergency management powers. The Bill also provides a mechanism to transfer directives made under the CDEM Act to the building emergency management powers in the Bill at the end of any state of emergency or transition period.

Investigating building failures

The Bill proposes amendments to the Building Act 2004 that provide the Ministry of Business, Innovation and Employment (**MBIE**) with a clear set of legislative powers to investigate significant building failures to determine the circumstances and causes of these failures. The key focus of the proposed powers is to learn lessons in order to improve building regulation to help avoid similar occurrences in the future. The Bill proposes that the powers of investigation can only be used when there has been a building failure that did, or could have resulted in serious injury or death.

Significant building failures can occur as a result of deficiencies in design and construction. These deficiencies can emerge when stress is placed on a building, for example during an earthquake. To date, in the absence of a clear set of legislative powers, investigations of significant building failure by the central building regulator (**MBIE**) has proceeded on an *ad-hoc* basis with the cooperation of building owners, and relied heavily on incomplete or partially destroyed information.

The amendments in the Bill will enable MBIE, on its own initiative or at the request of the Minister responsible for the Building Act 2004, to investigate the circumstances and causes of building failures, including to—

- secure, or direct any person to secure, the site to be investigated for a reasonable period;
- enter a property and carry out inspections (which includes the taking of samples and evidence);
- require information relating to the building failure from any person who might hold information relevant to the building failure;
- share relevant information related to the building failure with the regulatory bodies responsible for handling complaints and discipline in the building and construction sector;
- publish reports and findings.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
Informing the proposals relating to building emergency management: <ul style="list-style-type: none">Final Report – Volume 7 – Canterbury Television Building (CTV), Canterbury Earthquakes Royal Commission, 10 December 2012 (accessible at http://canterbury.royalcommission.govt.nz/Final-Report-Volume-Seven-Contents)	
Informing the proposals relating to investigations into building failure: <ul style="list-style-type: none">Final Report – Volume 6 – Canterbury Television Building (CTV), Canterbury Earthquakes Royal Commission, 10 December 2012 (accessible at http://canterbury.royalcommission.govt.nz/Final-Report-Volume-Six-Contents).	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
A RIS has been prepared in relation to the proposals for managing a building after an emergency event: <i>Regulatory impact statement: Managing buildings after an emergency event</i> , Ministry of Business, Innovation and Employment, November 2016, http://www.mbie.govt.nz/publications-research/publications/building-and-construction/ris-managing-buildings-after-emergency-event.pdf	
A RIS has also been prepared in relation to the proposals for investigating building failures: <i>Regulatory impact statement: Building investigation powers for the building regulator</i> , Ministry of Business, Innovation and Employment, February 2017, http://www.mbie.govt.nz/publications-research/publications/building-and-construction/ris-building-investigation-powers-for-the-building-regulator.pdf	
2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
The RISs were not reviewed by the RIA Team in the Treasury as they did not meet the threshold for their assessment.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	YES

Managing buildings after an emergency

To assess the net benefit of the preferred proposals, a quantitative cost benefit analysis was carried out by Sapere (an economic consultancy), to consider the broad costs and benefits that can be quantified. An initial assessment is made of the anticipated effectiveness at protecting life safety. This does not include a quantitative assessment of the value of the number of lives saved, due to the high levels of uncertainty involved.

The analysis in the RIS includes consideration of the impacts on the property rights of owners whose buildings are subject to requirements to carry out works or where access to those buildings is restricted.

There are small economic benefits associated with the building emergency management proposals compared to the current system.

Investigating building failures

This information is discussed in the RIS for managing buildings after an emergency event.

A qualitative analysis of the impacts of the building failure investigation proposals was carried out. As building failure investigations are varied and rare, it is difficult to quantify the expected benefits and costs of regulation supporting them. Nonetheless, it is anticipated that the expected benefits in avoiding future failures will outweigh negative impacts.

This information is discussed in the RIS for investigating building failures.

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES

Managing buildings after an emergency

The benefits of the proposals relating to building emergency management have the potential to be impacted by compliance. It is expected that the majority of buildings owners and the public will comply with building emergency management directives. However, there is a risk that some people will intentionally interfere with directives or use a building without permission. The offences and penalties in the Bill are intended to mitigate this risk.

This information is discussed in the RIS for managing buildings after an emergency event.

Investigating building failures

The costs and benefits of investigations into building failure are also likely to be impacted by the levels of compliance and regulator effort in encouraging or securing compliance. It is expected that penalties for non-compliance are sufficient to ensure a high level of compliance.

This information is discussed in the RIS for managing buildings after an emergency event.

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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MBIE has consulted the Ministry of Foreign Affairs and Trade (MFAT) to identify any potential issues with New Zealand's international obligations. Overall, MFAT advise it is broadly comfortable with the proposals. MFAT has advised that the use of the powers under the Bill, particularly those that have an impact on property rights, may have implications for New Zealand's international investment obligations. All building owners will be treated the same, regardless of whether or not they are foreign investors. MFAT will continue to be involved in the implementation of the powers.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The provisions in the Bill on managing buildings after an emergency have potential impacts on heritage. In developing this Bill, MBIE consulted with the Office of Treaty Settlements regarding potential impacts on iwi heritage in regard to proposals on managing buildings after an emergency. The Office of Treaty Settlements had no concerns about impacts on iwi heritage that are not already identified during the Treaty settlement process.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights	

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES

Managing buildings after an emergency

The Bill creates offences:

- with a maximum fine of \$200,000 for an individual and a body corporate for:
 - intentional non-compliance with a notice to reduce or remove the risk posed by a damaged building: section 133BV(10) and 133BW(9)
 - use of a building in breach of a placard without permission or without reasonable excuse: section 133BS(5)
- with a maximum fine of \$5,000 for an individual and \$50,000 for a body corporate for:
 - intentionally failing to comply with a direction to evacuate a building: section 133BQ(3)
 - intentionally entering a building after bypassing access restrictions: section 133BR(4)
 - deliberately interfering with access restrictions and protective measures: section 133BR(5)
 - intentionally interfering with a sign or notice: section 133BS(6)
 - using of notices that imitate signs or notices: section 133BS(7)
 - failing to provide requested information: section 133BT(8).

The Bill also amends the current determinations process in the Building Act 2004, under which the Chief Executive of MBIE can review the decisions of building consent authorities and territorial authorities, and applies it to certain decisions made under the powers in subpart 6B. Where subpart 6B powers are the subject of the determination, and the application for the determination is made within the 6 months following the designation, the Bill provides for an expedited determinations process of up to three weeks. This is to provide a more accessible appeals process when quick decisions about buildings will need to be made. Decisions of the Chief Executive will be appealable to the District Court.

Where an owner wishes to dispute a direction to provide information, they may apply to the District Court on the grounds that the requirement is unreasonable, however the appeal does not act as a stay on the requirement to provide the information, and the only remedy the Court may grant is in relation to the costs of obtaining the information.

Where, under section 133BU, a Responsible Person carries out works that are required without delay to avoid injury or death, the existing provision of s130 of the Building Act applies in a modified form to disputes following the carrying out of the works. Section 130 will require a Responsible Person to apply to a District Court for confirmation of their decision to carry out works.

Investigating building failures

The Bill also creates offences:

- with a fine not exceeding \$10,000 for an individual and \$50,000 in any other case, for any person who intentionally interferes in any way with the scene of any building investigation without the permission of MBIE or without reasonable excuse: section 207Q
- with a fine not exceeding \$10,000 for an individual and \$50,000 in any other case, for any person who intentionally accesses an investigation site in breach of a restriction or prohibition without the permission of MBIE or without reasonable excuse: section 207R
- to wilfully obstruct an investigation or wilfully fail to comply with requests for information, with a fine not exceeding \$10,000 for an individual and \$50,000 in any other case: section 207S.

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
MBIE consulted the Ministry of Justice on these provisions, particularly regarding the proposed offences and the level of the penalties. Advice from the Ministry of Justice was incorporated into the development of the Bill.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>The Bill creates provisions relating to the collection, use and disclosure of information relating to the effects of an emergency on a building (section 133BT and 133BY), and amendments to section 83 of the CDEM Act (clause 28). Any personal information obtained would be incidental to the collection of this information.</p> <p><i>Investigating building failures</i></p> <p>The Bill gives MBIE powers to collect, use and disclose information to determine the causes and circumstances of significant building failures (section 207C to 207P). These investigations will not be criminal or disciplinary investigations. However, it is proposed that the Chief Executive of MBIE may share relevant information related to the building failure with the regulatory bodies responsible for handling complaints and discipline in the building and construction sector (section 207O).</p>	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Office of the Privacy Commissioner was consulted on the policy proposals for investigations into building failure and managing buildings after an emergency. Feedback from the Office of the Privacy Commissioner around addressing privacy impacts of the powers to enter and inspect premises and share information with occupational regulation bodies informed the development of the bill.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p><i>Managing buildings after an emergency</i></p> <p>MBIE conducted public consultation on proposals to manage buildings after an emergency event in May 2015. MBIE received 35 submissions, mainly from territorial authorities, engineers and participants in the building and construction sector. Submitters generally supported the proposals, but raised concerns about impacts on property rights and the protection of heritage.</p> <p>In addition to the submissions on the consultation document, the policy decisions were informed by evidence submitters provided to the Canterbury Earthquakes Royal Commission, and Volumes 6 and 7 of the Royal Commission's Final Report.</p> <p><i>Investigating building failures</i></p> <p>In February 2017, MBIE consulted Local Government New Zealand and the Property Council on the building failure investigation proposals. Initial feedback from these discussions was generally supportive.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p><i>Managing buildings after an emergency</i></p> <p>During policy development, MBIE consulted selected territorial authority representatives to test the workability and appropriateness of the powers and settings to manage buildings after an emergency event. The policy details for the new system given effect by this Bill were also informed by:</p> <ul style="list-style-type: none">• analysis of approaches adopted in other jurisdictions, including parts of the United States of America, Japan, Taiwan, Italy, Canada, the United Kingdom and Australia;• a sector reference group and officials reference group. <p><i>Investigating building failures</i></p> <p>Initial feedback on policy proposals was sought from Local Government New Zealand and the Property Council New Zealand in February 2017. Both groups were generally supportive of the building failure investigation proposals, noting some practical suggestions that will be included in the operationalisation of the Bill.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
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The Bill provides civil immunities in relation to both managing buildings after an emergency event, and investigations into building failure (clause 25). The immunity for good faith actions in 390 of the Building Act will continue to apply. However the Bill ensures that people engaged by the Chief Executive or the Territorial Authority for the purpose of exercising or assisting in the exercise of powers in this Bill will receive the same immunity.

Ensuring these people have a civil immunity is justified by:

- the interest in effectively managing risk to people and property posed by buildings after an emergency event
- the interest in MBIE conducting effective investigations, in order to determine the circumstances and causes of significant building failures with the aim of avoiding similar occurrences in the future.

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p><i>Managing buildings after an emergency</i></p> <p>The Bill provides powers to make decisions that have the potential to affect a person's rights:</p> <ul style="list-style-type: none">• powers that impact use of and access to private property: sections 133BP to 133BS• powers to carry out works on, or demolish private property: sections 133BU to 133BW. <p>Safeguards include:</p> <ul style="list-style-type: none">• these powers are only triggered by an emergency event or the Minister for Building and Construction approving that the powers can be made available: section 133BD• where appropriate, consultation is required with Heritage New Zealand, owners, building occupiers and other stakeholders: sections 133BU to 133BV• the responsible person must review whether the powers are still necessary every 90 days: section 133BG• there is an appeals process available. <p><i>Building failure investigations</i></p> <p>The Bill involves decisions to exercise powers that can potentially affect private property and impose obligations on various persons.</p> <p>Safeguards include but are not limited to the following:</p> <ul style="list-style-type: none">• the proposed powers can only be used in the case of a building failure that did, or could have, resulted in serious injury or death: section 207C• the powers of investigation may be used for no longer than is reasonable, and only in a way that is reasonable in the circumstances: section 207E• the Chief Executive of MBIE must ensure that the investigation of a building failure does not interfere with any activity to preserve the life of, or prevent injury to, an individual: section 207E(4)• a household unit may not be entered without consent of the occupier or in accordance with a search warrant issued for the purpose of investigating the building failure: section 207I• the Chief Executive of MBIE must, as soon as practicable, give written notice to the owners and occupiers of the investigation site of the power of entry: section 207H(2).	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Bill provides that the Chief Executive of MBIE may approve the following forms and notices (if any):</p> <ul style="list-style-type: none"> • the methodology and written form of the post-event assessment: section 133BP(2) • the notice informing that a property has been entered in the absence of the owner or the building manager: section 133BP(6) • the notice restricting entry to the building: section 133BS • the notice directing the building owner to provide information, for example an engineering assessment: section 133BT • notice requiring building work to reduce or remove the risk of the building: section 133BV and 133BW. <p>The powers associated with these forms and notices are provided for in primary legislation. These forms and notices are delegated to allow for their quick revision to incorporate lessons learnt following major events.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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