

8 August 2023

Consultation: Review of the Building Consent System
Building System Performance Building,
Resources and Markets
Ministry of Business, Innovation and Employment
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Kapiti Coast District Council: Submission to the Options Paper: Review of the Building Consent System

Thank you for the opportunity to submit on the Options Paper: Review of the Building Consent System. The following are some general comments on the reform package and options. Attached is a Schedule that provides specific comment on the options put forward.

Previous issues raised.

In Council's submission to the Issues paper in September 2022, we raised a number of points that remain valid. Our view remains that the current approach to tackle reform of the building regulatory system is being undertaken in a piecemeal manner. Of note:

- Undertaking a review of the Building System, of which this review forms part, independently to the wider strategic focus of the Future of Local Government review and other reviews currently underway in the resource management, climate change and infrastructure. This disjointed approach risks missing an opportunity to consolidate and integrate legislation, or at the very least introduce a workable hierarchy/relationship between different Acts and regulation.
- We note that the review is an end-to-end review of the system, from building design to the issue of a Code Compliance Certificate. We also note that this review sits within a wider consideration of the Building Control System, supporting other changes being progressed via a programme of Building System Reform, including review of occupational regulation and consumer protection settings.

Given this, our concern is that this siloed approach to looking at the various elements of the Building Control System, when one part of the system relies heavily on all other parts of the system performing well, risks delivery of the efficient and effective delivery of healthy, safe and durable buildings being sought. Council is 100% supportive of this overarching system focus but is unconvinced the siloed approach being taken can achieve the synergy required for systemic improvement.

That said, our detailed comments on the proposed option and solutions are attached as we don't want to miss the opportunity to inform this work; however, we would like the point raised around the risks of taking a siloed approach to system related change.

Risk and liability

The changes to the Building Consent System being promoted are situated within a risk-based framework. However, without for instance, these reforms referencing the reforms to strengthen occupational regulation, the ability of the system to successfully manage risk is an unknown.

Council also has significant concern and disappointment that the Government's position on risk, liability and insurance in the building sector remains tied to joint and several liability. Council has previously submitted in agreement with the findings of the Law Commission, suggesting a capping of territorial authority exposure when building work goes wrong. Council believes that until this change is made, and real incentives of financial accountability to get building work right first time are in place, many of the options in the Options Paper will have minimal affect in consistently achieving on the public expectations of having healthy, safe, and durable buildings.

The Ministry should further explore insurance and liability regimes from other jurisdictions, such as Queensland's <https://www.qbcc.qld.gov.au/your-property/queensland-home-warranty-scheme/who-pays-premium>. This type of approach would incentivise all of the system's participants to build right first time.

System capacity and capability

Our experience of the building control system and the building consent system in particular, is that there is a disconnect between the role of central government and local government. In recent years the Ministry of Business, Innovation and Employment (the Ministry) has introduced changes within the system through the Building Code without quality guidance to support consistent interpretation. This is a fundamental issue that will impact on a majority of the reform options suggested, and although improving capacity and capability within local government features predominantly in the options suggested, increasing MBIE's own capacity and capability is not raised (other than it potentially being a risk/disadvantage).

The technical ability and agility of MBIE to provide innovative stewardship of the system must be a cornerstone of any system improvement. This must be more than the issuing of guidance, although that is vital, but must include proactive engagement with local government, architects, designers and engineers and other building and construction practitioners, to ensure a cohesive community of practice within the building and construction sector focused on getting it right first time.

Roles, responsibilities, and expectation

There is currently a fundamental disconnect in the Building Consent System that the Options package does not adequately address. A number of parties, from homeowners, insurance companies, real estate agents through to building practitioners place undue reliance and trust on Building Consent Authorities (BCA), their role in the system and the consents and certificates they issue. Indeed, building practitioners often use the BCA as a default quality assurance agent.

The assigned responsibility of the BCA under the Building Act does not align with this accorded level of trust. A building consent is granted on reasonable grounds, if the design of a building/structure is deemed to comply with the NZ Building Code – which is only a minimum standard. If quality buildings that are durable are sought, then the Ministry should incentivise building designers to design, and building practitioners to build, to a standard higher than the Code minimums. Homeowner choice of ‘quality’ should not be restricted to the choosing of fittings and finishes because their awareness of quality at a more fundamental build level is insufficient for them to ask for designs that exceed Code and could better meet their needs.

Council considers that the current system has appropriate assurance safeguards built into existing roles and responsibilities, but that these are not applied and enforced robustly enough. A case in point, is the Licensed Building Practitioner’s Board doing more to hold Licensed Building Practitioners to account.

The Ministry could incentivise attainment of LBP status, and work to ensure increase capability in the sector.

Climate change and a low-carbon future

As previously noted in our submission on the Issues paper, Council believes consideration of the impacts of climate change and the need to reduce carbon emissions should be central to any review of the building consent system, and indeed, the wider review of the Building Control System. Council believes that climate change challenges should be a central consideration in all decision-making when considering whether a building is indeed healthy, safe, and durable.

Such consideration could perhaps be captured in the Purpose with amendment to s.3(a)(iii) to the effect that buildings should be situated in locations and in ways that minimise exposure to flood and inundation, and to other natural hazard. Section 3(a)(iv) could also be amended by adding the minimisation of greenhouse gases in addition to broader concept of ‘sustainable development’.

This theme could also be carried through to the Principles of the Act. An amendment to s.4(2)(m) could see inclusion of greenhouse gas emissions over the life of the building, both through material selection (and their eventual disposal), and in consideration of the buildings likely use.

Competition

In reviewing the Building Consent System, options have been put forward to respond to two recommendations from the Commerce Commission’s market study on residential building

supplies, which found that competition for the supply and acquisition of key building supplies is not working as well as it could.

Five options are put forward to make competition a more central consideration:

- include in either the Purpose or Principles of the Act, as a decision-making consideration throughout the administration of the Act,
- through requirements around acceptable solutions and verification methods etc., as a procedural consideration, and
- through two non-regulatory options, to provide guidance, and raise awareness.

The Options paper notes that other jurisdictions (Victoria) have included competition as an objective of the system. However, there is a difference in providing for competition as an objective, where its consideration is focused on system efficiency allowing for a competitive industry, and an expectation that a BCA (or TLA) somehow apply principles of competition to their regulatory decision-making.

A preferred option for this element is to amend the Act's Principles to include competition. This would amend what the Minister and Chief Executive of the Ministry, and in limited instances, a territorial or regional authority, must take into account in performing their functions or duties, or exercising powers. It is unclear what affect this could have on the building control system (as it would not apply to a BCA's or TLA's consenting functions) other than through the Ministry's stewardship of the system as a whole, and the production of guidance (Options 4 and 5). Examples of how regulatory consideration of competition have been facilitated in the regulatory functions of consent authorities in Victoria would have been usefully illustrative to see how this could potentially play out in the system.

An alternative response to the Commerce Commission's concern regarding supply and acquisition of key building supplies, arises from the demand side, through allowing variation and substitution of product. This may yield some opportunity to strengthen building supply markets through allowing designers and homeowners wider product choice. However, as noted in our comments in the attached schedule, this would bring further processing costs into the system that BCA's would need the facility to on-charge to applicants that may be paying for something they in the end do not need (if the substitution is not required).

Research and investment

Product assessment pathways need to be expanded and costs reduced. Research and development incentives or research subsidy for bringing new products to market should be explored. Greater recognition should be given to quality standards of equivalent jurisdictions (e.g. Australian), particular for high volume products. Lessons from approaches taken during Covid should be applied more widely to the building supply market to help reduce monopoly and stimulate competition.

Funding

It is imperative that any further responsibilities arising from any of the options also come with a funding stream. It is not appropriate for any further cost of system assurance fall on the ratepayer.

Responding better to the needs of Māori

A better problem definition of the issues being faced by Māori would help tailor a better response. In principle, Council is supportive of any approach that allows recognition of traditional building systems that still provide for healthy, safe and durable buildings. However, where liability still sits with Council, a level of rigor must be assured.

With respect to the private BCA options, any private BCA would need to meet the 'adequate means' test of s.192(1)(c) which could be a significant obstacle for anything less than a large and well-funded iwi organisation, unless the Crown underwrote the endeavour.

Interface between building consents and resource consents

This was looked at in depth during the Phase 1 resource management reforms in 2010. A straightforward solution was not found as the consents are fundamentally disparate. Further encouraging the use of PIMs while helpful will not solve the issue, which is essentially one of user behaviour.

However, we could usefully look at other jurisdictions such as New South Wales's *Environmental Planning and Assessment Act 1979 (EP&A Act)*.

Referring back to our early comments, undertaking this review in isolation to the wider reforms happening in local government and environmental legislation (i.e. the review of resource management) is perhaps a lost opportunity.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Darren Edwards', with a stylized flourish at the end.

Darren Edwards
Chief Executive
Te Tumuaki Rangatira