REPORT 5
(1215/52/IM)

PROPOSED CHANGES TO THE BUILDING ACT 2004

1. Purpose of Report

The purpose of this report is to present a submission on the Department of Building and Housing's (DBH's) proposal to review the Building Act 2004.

2. Executive Summary

The Department of Building and Housing is reviewing the Building Act and is seeking feedback on the proposed changes, the closing date for submissions is 23 April 2010. The four areas for which feedback is sought are:

- Part 1: Clarifying the purpose and principles of the Building Act 2004 and the requirements of the Building Code.
- Part 2: Moving to a more balanced approach to building regulatory control.
- Part 3: Building consumer confidence.
- Part 4: The impacts of improving building control in New Zealand.

Officers support the development of cost-effective building controls and in principle support the direction of the proposed changes. It is, in our view, important to ensure the proposals are developed as a package. To borrow the analogy of the discussion document – the building control engine will fail if all the cogs are not aligned and working effectively. A weakness in any of the processes will impact on others and result in an inefficient regime that is unbalanced and ineffective.

The proposals will impact on the work, workload, income and the costs of consents of Building Consent Authorities to varying degrees, although because of Wellington's hilly terrain and high wind speeds, the overall impact is expected to be relatively low (less than 5% of consents). The impact on building professionals is even more significant but this is required to achieve the objective of a more balanced system.

Officers support the move to clarify the purposes and principles of the Building Act and believe the review should also consider clarification of the roles and

responsibilities for those involved in implementing, monitoring and participating in the building process.

Overall, we consider that the proposed reforms may lead to a reduction of the risks currently faced by councils, principally as a consequence of the shift of some functions currently performed by the Council to other private sector parties.

We suggest that implementation of finalised proposals should be managed cautiously, and before placing too much reliance on licensed building practitioners that a bedding in process is developed to allow for graduated increase in accountability over time.

The proposed enhancements to the protection offered to homeowners through statutory warranties, a surety system and new dispute resolution mechanisms will indirectly benefit the Council by reducing the prospect that construction disputes will result in litigation. However, surety providers may still pursue the other parties to a dispute, such as the Council, so liability risks will not be removed completely.

We are disappointed that the opportunity was not taken to consider the issue of old building consents (consented work where a Code Compliance Certificate has not been issued). This needs to be addressed on a national basis as property owners are facing or will face problems in the future because of the lack of a code compliance certificate.

3. Recommendations

Officers recommend that the Strategy and Policy Committee:

1. *Receives the information.*

2. *Agree to the attached submission to the Department of Building and Housing on the proposed changes to the Building Act 2004.*

3. *Note that the closing date for this submission is 23 April 2010.*

4. *Delegate to the Chief Executive the authority to approve minor editorial changes and to give effect to any changes agreed by the Committee, prior to the submission being sent to the Department of Building and Housing.*

5. *Note that Wellington City Council will be contributing to a Wellington Region Building Consent Authorities Group (consisting of the eight BCAs in the region) joint response to the Department of Building of Housing.*

6. *Delegate to officers the ability to sign off the regional BCA submission, on the condition that the regional submission does not materially depart from the Council's own submission.*

4. Background

4.1 Introduction

The Department of Building and Housing (DBH) has released a discussion document on the Building Act review – "Cost-effective quality: next generation building control in New Zealand".

The document proposes major reforms of the regulatory system for building which will have major implications for local authorities. This is not just a technical review; the proposals include significant streamlining for low-risk and more complex buildings, more reliance on qualified building professionals via the licensed building practitioner scheme, contracts and warranties; and improvements/efficiencies to building control administration.

DBH has requested feedback by **Friday 23 April 2010**. Officers have prepared a submission for consideration by the Committee, which is attached as Appendix One to this paper.

4.2 The current building control system

The current system was established in 1991 and was significantly amended in 2004 in response to systemic problems that failed to prevent the construction of a large number of leaky buildings. The key problems with the system were:

- lack of skills and capability;
- lack of responsibility and accountability for building quality;
- poorly articulated building standards;
- inadequate regulatory oversight by the Building Industry Authority (the central regulator at the time); and
- inadequate focus on consumers' interests.

The Building Act 2004 significantly tightened regulation to strengthen the existing performance-based regulatory approach. Since 2004, amendments to the system include:

- strengthening the role of the central regulator, now the Department of Building and Housing (DBH);
- reviewing the Building Code and producing more guidance in support of the Code;
- requiring building consent authorities to become accredited and to have periodic performance audits;
- introducing a voluntary Licensed Building Practitioner Scheme to recognise and improve capability; and
- introducing statutory warranties into every residential building contract.

In August 2009, the Government confirmed its support for the Licensed Building Practitioner Scheme, and defined the scope of restricted building work. From March 2012, restricted building work will have to be carried out or supervised by licensed building practitioners.

The building consent authority (BCA) accreditation programme is also well advanced, with most BCAs now having gone through the accreditation process twice.

In addition, a new national process for approving standard multiple-use building designs has been under way from February 2010.

Since 2004, it is accepted that there has been a general improvement in building quality, but the current system is out of balance, relying too heavily on building consent authorities. The system is overly cumbersome and there are concerns about costs, complexity and delays.

4.3 Why is the review happening?

As part of the Government's regulatory reform programme, the Building Act 2004 is being reviewed in response to concerns from the public and the building and construction sector about:

- implementation of the Building Act at council level;
- the costs and complexity of the building consent process;
- delays and costs caused by councils being too risk-averse in the building consent process;
- whether key processes of the building control system deliver value for money; and
- the allocation of risk and liability between the parties in the building consent process, which is leading to risk-averse behaviour by building consent authorities, resulting in delays and additional costs.

The aim of the review is to reduce the costs associated with the building control system in New Zealand, without compromising quality. The review seeks the following results:

- Quality homes and buildings produced through an efficient regulatory framework;
- Informed decisions by consumers and confidence in the building and housing market;
- A productive sector where homes and buildings are built using the right skills and knowledge;
- An efficient and cost-effective regulatory system.

The proposed changes to the Building Act 2004 as a result of the review, if implemented, will particularly affect councils, building officials, practitioners and homeowners.

4.4 Focus of the Review

The discussion document states that the review will identify reforms to the Act, its associated regulation and its administration, to reduce the costs but not the quality of the building control system. It will consider:

- removing building regulation that adds cost but is of little benefit;
- streamlining building consent requirements to reflect risk and complexity, including reducing the amount of work requiring a consent;
- improving the allocation of risk and liability across parties in the building and construction sector;
- providing consumers with more information about their rights and responsibilities as consumers, and improved dispute resolution mechanisms;
- greater incentives for professional performance, including self-certification of licensed building practitioners' work (ie fewer inspections);
- streamlining administration of building regulation, including options for consenting processes to be carried out by groupings of councils or at regional/national level; and
- how the use of smart technology could improve consenting processes.

5. Discussion

5.1 Why building controls are important

The DBH has set out its view of the operation of the ideal building sector as a series of five interlocking cogs, as follows:

- Authorities target their regulatory control to the level of risk
- Skilled, capable people who stand behind their work
- Minimum requirements that are clear and widely known
- Clear, upfront, contracted agreements between all parties
- Well informed owners maintain their buildings appropriately

Together, these cogs work to produce cost effective, quality buildings. If one of these cogs does not work the whole system will not work.

Officers support the aims of this review, however, have a number of concerns about relating to the effectiveness of some proposals and their impact on the overall system.

Most importantly, the proposals must be developed and implemented as a total package with a number of equally important and interdependent processes each relying on the other processes to deliver its part. To borrow the analogy of the discussion document – the building control engine will fail if all the cogs are not aligned and working effectively. A weakness in any of the cogs will result in the engine being ineffective and inefficient.

Our comments have been summarised using the headings contained within each of the cogs of the DBH model:

5.1.1 Authorities target their regulatory control to the level of risk

Overall, we consider that the proposed reforms may lead to a reduction of the risks currently faced by the Council. This is principally a consequence of the shift of some functions currently performed by the Council to other parties, especially where 'low-risk simple residential building work' is concerned.

While Wellington City Council is keen to see liability for building work sit with those who are best placed to manage the risk, we are not confident there are currently sufficient practitioners with the necessary skills and knowledge who are prepared to take on the responsibility of managing their own work without third party review.

The proposed changes do not eliminate the opportunity for DIY'ers to carry out work themselves; however, they would be subject to the existing non-streamlined consent process

While it is not proposed to move to proportionate liability in law, the proposals indirectly attempt to achieve a similar outcome through a refocus on contracts, warranties and associated law. The proposals will only achieve this shift if they are advanced in combination. In particular, the warranty system (and surety backstop) are critical to any other changes and must be mandatory for new homes and major alterations.

Council's duty of care

The Council is likely to owe a duty of care to current and future homeowners when performing new functions in relation to 'low-risk residential building work'. Whether or not this is an issue will depend on what decisions are made in regards to warranties and sureties.

The Council's established duty of care in relation to complex residential building work is likely to be unaffected by the proposed reforms. This class of building work will remain subject to existing consent, inspection, and certification processes.

The Council is unlikely to owe a duty of care when performing new functions in relation to commercial building work. The proposals outlined in the discussion document do not displace the fundamental presumption that commercial parties can take adequate steps to protect themselves from project-related losses.

Council's BCA role in streamlined process

The discussion document expresses an expectation that BCAs will be able to receive plans and specifications under the proposed 'streamlined' consenting processes for 'low-risk residential building work' and 'complex commercial building work' without checking those documents. We consider that this

expectation is unrealistic, as BCAs will necessarily be required to conduct a general review of those documents to ensure that the proposed work is within the scope of relevant LBP `licensing requirements and/or that effective quality assurance processes are in place.

Any legislation resulting from the proposals should confirm that BCAs will need to examine the plans and specifications, but only for the limited purposes of the streamlined consent process. A statutory immunity from civil proceedings should be provided where the plans and specifications reveal errors or omissions that are not relevant to the new BCA functions.

One of the Council's functions under the proposed 'streamlined' consenting process is to keep a public record of relevant documentation. This does not pose any significant legal risk beyond that currently faced by the Council as a result of sections 216 and 217 of the Act. Any additional risk would be dealt with by an immunity provision of the kind discussed above.

Relationship to other Council functions

The existing building consent process provides a vital trigger for checking compliance with the TAs District Plan and therefore the requirements of the Resource Management Act 1991. Without that trigger we anticipate higher levels of complaints and District Plan non-compliance and a resulting need for enforcement action against homeowners who may not have been made aware of their responsibilities. Similar issues arise with heritage buildings. We suggest a notification process that would enable Councils to advise owners that other approvals may be required.

The issue of old building consents

Proposals are silent on non new building work such as alterations and additions, change of use and old outstanding consents. This will lead to uncertainty and confusion of process and responsibilities if not addressed.

We are particularly disappointed that the opportunity was not taken to consider the issue of old building consents (consented work where a Code Compliance Certificate has not been issued). There are tens of thousands of building consents throughout the country which have never been issued a code compliance certificate. In many cases the work was done so long ago that Councils will no longer consider issuing a code compliance certificate for the work.

As a result the country has tens of thousands of property owners who are facing or will face problems in the future because of the lack of a code compliance certificate. The issue normally surfaces when an owner tries to sell. Buyers will use this to bargain down a sale price, mortgagors may refuse to lend on the properties, and insurers may refuse cover or reject claims in the event of damage. We would suggest that this be resolved by changes to the legislation that allow for old work to be signed off on the basis of what can be seen and that Councils have no liability for anything done in good faith.

This is a countrywide issue that has yet to reach its peak. While most of these consents relate to work carried out under the 1991 Building Act, the problem continues under 2004 Act as there is no mechanism to ensure that owners complete their projects in a reasonable timeframe. There needs to be consideration of this problem at a national level.

Other issues

The proposals favour more regional co-operation of councils in the area of building control. The government may be able to provide support and incentives to encourage this. For example, technology solutions may assist.

Any changes to administration arrangements or consent process will need to carefully consider critical links to councils' property based information source, records systems, and local development controls particularly under RMA.

5.1.2 Skilled, capable people who stand behind their work

Heavy reliance on licensed building practitioners

The submission document places heavy reliance on licensed building practitioners being ready and willing to take accountability and accept liability for their work. We consider that this willingness is not yet proven and as such is a potential weakness in the proposals. We also note from our experience, that many of these potential licensed building practitioners currently do not understand building code requirements and as such rely heavily on the building consent authorities (BCAs) to ensure code compliance.

We suggest that implementation of finalised proposals should be managed cautiously, and before placing too much reliance on licensed building practitioners that there is an appropriate bedding in process developed to allow for graduated increase in accountability and upskilling over time rather than all at once. We suggest a period of at least five years would be required.

While Wellington City Council is keen to see liability for building work sit with those who are best placed to manage the risk, we do not believe there are currently sufficient practitioners with the skills and knowledge prepared to take on the responsibility of managing their own work without third party review.

It is worth noting that the Hunn report and resulting changes in legislation identified that getting the design right is key to a quality end product. It also pointed out the problems with on-site changes (eg changes to products, systems and construction details) which were a contributing factor to building failure.

This proposal appears to be advocating a return to a similar process based on a Design LBP sign off backed up by a Site LBP sign off with minimal third party checking, processes that were identified as contributing to significant failure in the 1990's. We are also concerned that this proposal will undermine changes made in the Building Act 2004 to ensure that compliance with code is assessed at the design/consent stage. Under the proposal compliance will be assessed at construction stage.

5.1.3 Minimum requirements that are clear and widely known

Wellington City Council supports the move to clarify the purposes and principles of the Building Act. We also believe the review should consider clarification of the roles and responsibilities for those involved in implementing, monitoring and participating in the building process. Unless the Act clarifies liability and responsibility for all roles (designers, constructors, BCAs, TAs, manufacturers, suppliers, DBH) then it does not matter what the intention of the streamlined process is in terms of assigning responsibility – the courts will likely still hold Councils liable.

That said, we acknowledge that careful attention will need to be paid to the language of draft legislation that arises from the proposals. Conceptually, the purpose and principles provisions exist to provide context and guidance for the interpretation of other provisions within the Act. They are also frequently referred to where confusion arises as to the performance requirements described in the building code or compliance documents.

There is a danger that amendments to the purpose and principles provisions may convert them into a more directive (as opposed to explanatory) suite of provisions. It will be critical to ensure that 'important' purposes and principles are not too prescriptive, becoming akin to the determinative purposes and principles set out in Part 2 of the Resource Management Act 1991.

5.1.4 Clear, upfront, contracted agreements between all parties

The apparent intent of the proposals set out in the discussion document is to enhance the prospect that effective warranties will be available to homeowners. We are conscious that the adequacy or otherwise of the existing statutory warranties is a relative unknown, however, we have suggested some improvements in the discussion document.

The existence of a warranty, or any other form of contractual remedy for faulty building work, does not prevent an owner from simultaneously pursuing a claim based in tort (i.e. without the need for a contractual relationship). This is often seen in leaky building litigation, where owners pursue the builder or other tradesmen on the basis of a contractual relationship, while also claiming against other persons with whom there is no contractual relationship (such as territorial authorities) via the tort of negligence.

The proposed enhancements to the protection offered to homeowners through statutory warranties, a surety system and new dispute resolution mechanisms will indirectly benefit the Council by reducing the prospect that construction disputes will result in litigation. However, surety providers may still pursue the other parties to a dispute, such as the Council, so liability risks will not be removed completely.

5.1.5 Well informed owners maintain their buildings appropriately

Our experience in this area is that consumers are difficult to reach. Typically consumers only "hear" a message when it has special meaning for them or relevance. For the majority of building consent applicants, relevance is only when they need a building consent, which is generally not often. For this reason information about consumers rights and responsibilities in relation to building work needs to be available through lawyers, mortgage lenders and real estate agents to help ensure consumers make informed decisions.

Consumers need more consistent messages and the DBH can help in this area. Messages from the DBH can be seen to have independence rather than sounding like TAs pushing their messages or being risk averse.

We recommend that there be some targeted generalised advertising campaigns (accepting that this will only reach a small percentage of consumers). There also needs to be a programme of "just in time" information that consumers can access when they need it. For this reason information should be available through hardware stores, building product suppliers, LBPs, trades, industry organisations, lenders, and online from the DBH and other major industry players.

We also suggest that making it a requirement that consumers confirm they have seen the information as part of the standard contract process would be helpful.

5.1.6 Impacts

While the aim of the proposals is to achieve a more balanced system overall, it is unlikely that the changes will have a significant impact for Wellington City Council.

In Wellington, officers estimate less than 3% of all consents issued between July 2009 and January 2010 would have fitted the "simple" criteria.

In terms of the streamlined process for complex commercial buildings, the proposal relates only to complex new commercial buildings. New buildings of this scope represented less than 1% of building consents issued in Wellington in 2009. The proposal does not consider other complex commercial work that makes up the bulk of commercial building consents in Wellington or the decisions TAs must make when approving consents such as:

- alterations or change of use to existing commercial buildings and triggers for upgrade of accessibility, fire, means of escape, structure
- natural hazards (s71 – 74 Building Act 2004)
- building work over two or more allotments (s75 – 78 Building Act 2004)
- occupation of buildings intended for public use.

In addition, while the additions to schedule 1 of the Building Act for work exempt from consent and inspection requirements (the apricot segment) will impact we do not expect the impact to be significant for Wellington City Council.

5.2 Consultation and Engagement

We have also discussed this review with our regional TA partners from the Wellington Region Building Cluster. Over the past year the regional partners have been working with the DBH on the feasibility of a shared service approach to building control for the Wellington region. This work has been referenced in the proposal document and the TA partners believe a submission from that group would also be appropriate.

Wellington City Council's Chief Building Officer has been invited to a workshop hosted by the DBH with the Metro Sector Strategic Building Group (consisting of Auckland, North Shore, Tauranga, Wellington, Christchurch, Dunedin and Porirua City Councils).

DLA Phillips Fox has provided advice on the submission and comment has also been received from the Planning and Infrastructure business units.

5.3 Financial Considerations

As this relates to a submission on the Building Act review there are no immediate financial implications.

Changes as a result of the review (e.g. additional work exempt from the need to obtain building consent) will impact on the number of building consent applications.

5.4 Climate Change Impacts and Considerations

There are no direct climate change impacts or considerations related to this decision.

5.5 Long-Term Council Community Plan Considerations

There are no LTCCP implications of the decision to send a submission to the Department of Building and Housing on the "Cost-effective quality next generation building controls in New Zealand" consultation document.

6. Conclusion

Officers recommend that the Strategy and Policy Committee agree to the submission being sent to the Department of Building and Housing.

Contact Officers: *John Scott Group Manager, Building Consents and Licensing*
Richard Toner, Chief Building Officer

Supporting Information

1) Strategic Fit/Strategic Outcome

This report relates to 6.2.1 Building Control and Facilitation, which is part of the Urban Development Strategy

2) LTCCP/Annual Plan reference and long term financial impact

There is no LTCCP impact as this report relates to a submission on a proposal.

3) Treaty of Waitangi considerations

No specific Treaty of Waitangi considerations have been identified.

4) Decision-Making

This is not a significant decision as defined by the Wellington City Council's Significance Policy.

5) Consultation

a)General Consultation

No specific interested parties have been identified for consultation.

b) Consultation with Maori

No issues of specific interest to Maori have been identified

6) Legal Implications

Legal advice was received in the development of the proposed submission.

7) Consistency with existing policy

This submission is consistent with Council policy

APPENDIX ONE

Submission to the Department of Building and Housing

23 April 2010

Building Act Review Team
Department of Building and Housing
Level 6, 86 Customhouse Quay
PO Box 10-729
Wellington 6143

Wellington City Council submission on the 'Cost-effective quality next generation building controls in New Zealand' consultation document.

Please find attached the Wellington City Council submission in response to the Department of Building and Housing's request for submissions on the 'Cost-effective quality next generation building controls in New Zealand' consultation document.

Wellington City Council supports the development of cost effective building controls for New Zealand and in principle we support the direction of the proposed changes.

It is important to ensure the proposals are developed as an integrated package with a number of equally important and interdependent processes each relying on the other processes to deliver its part. To borrow the analogy of the discussion document – the building control engine will fail if all the cogs are not aligned and working effectively. A weakness in any of the processes will impact on others and result in an inefficient regime that is unbalanced and ineffective.

In particular Wellington City Council **supports** the following proposals:

- The aim of shifting responsibility, accountability and liability more to those who are carrying out the work.
- Streamlining the process for straightforward building work.
- Increasing consumer protection and education.
- Shared services amalgamation of BCAs.
- Clarification of the purposes and principles of the Building Act.

The following are areas where Wellington City Council **has concerns or would like to see more detail**:

- The need to implement as a total package, but also whether as a package the proposals will collectively achieve what is desired.

- Whether LBPs are ready and willing to take on additional accountability, liability and responsibility.
- Whether the warranty/surety scheme will work in reality and if not, will Councils still ultimately carry liability.
- The risk that councils will end up facing the same liability.
- How the transition will be managed.
- Proposals are silent on non new building work such as alterations and additions, change of use and old outstanding consents.

Wellington City Council **does not support** the following:

- Leaving the third party checking of compliance with Code until the inspection stage. By that point rectifying errors will be confrontational and expensive.
- Placing an over reliance on consumers being suitably informed to the level where they can operate at an equal level to other parties in the process.
- LBPs will still have the ability to open and shut companies to limit their liability.

The proposals will impact on BCAs work, workload, income and the costs of consents. The impact on building professionals is even more significant but this must be taken on to achieve the objective of a more balanced system. There must not be too much focus on short term costs or behaviours, rather we must take a long term view to develop a system that is efficient and will achieve quality buildings.

Our submission is comprised of both general and specific comments which align with the format of the feedback form.

Thank you for the opportunity to provide feedback on the proposals. Should you require any further information, please contact Richard Toner, Chief Building Officer, on (04) 803 8087 or at Richard.toner@wcc.govt.nz.

Yours faithfully

Kerry Prendergast
Mayor
Wellington City Council

Part 1.1: Clarifying the purpose and principles of the Building Act

General comments

Wellington City Council supports the move to clarify the purposes and principles of the Building Act. We also believe the review should consider clarification of the roles and responsibilities for those involved in implementing, monitoring and participating in the building process.

We consider that a move to clarify the content and scope of these fundamental provisions is desirable. In general terms, increased certainty as to the operation of the Act is likely to reduce, rather than enhance, risks to local authorities.

That said, we acknowledge that careful attention will need to be paid to the language of draft legislation that arises from the proposals. Conceptually, the purpose and principles provisions exist to provide context and guidance for the interpretation of other provisions within the Act. They are also frequently referred to where confusion arises as to the performance requirements described in the building code or compliance documents.

There is a danger that amendments to the purpose and principles provisions may convert them into a more directive (as opposed to explanatory) suite of provisions. For example, Question 4 within the discussion documents asks whether some of the listed principles are 'fundamental'. This links to a comment in the consultation document that the reference group raised questions about "whether all the principles are equally important". This raises the spectre of further stratification within the purposes and principles provisions, with some being considered more significant than others.

In our view, it will be critical to ensure that 'important' purposes and principles are not strengthened too much, becoming akin to the determinative purposes and principles set out in Part 2 of the Resource Management Act 1991, for example. Such an outcome has the potential to lead to disputes as to the proper interpretation or operation of the Act or the building code. With careful drafting, this situation ought to be avoided.

We also note that amendments to the purposes and principles so that they apply to *all* functions performed by territorial authorities or BCAs under the Act is likely to impose an upfront cost on the Council, as it will be necessary to devote resources to consider whether any changes to existing processes are required.

1: Does the reference to sustainable development in the purpose statement (Building Act 2004 Section 3(d)) provide clear and appropriate guidance to those administering the Act? If not, why not?

No. Sustainable has become the catchphrase of the last few decades and as such has come to mean all things to all people. Its meaning varies greatly depending on where it is used and who is using it. It can cover all, some or none of the following applications:

- Use, re-use and disposal of materials used in construction
- Immediate and long term impact on environment and economy
- Planning for a possible future scenario which may or may not eventuate
- Cost of construction and use of a building
- Cost of construction vs cost of using the building
- Impact on environment – short and long term
- Sourcing materials – local vs remote
- Cost and impact of supply chain
- The "greening" of buildings
- Efficiency and cost effectiveness (leading to on-going viability of business)

In effect, the interpretation and use of the word sustainable has become so broad that its use in a context which seeks to give clear guidance is in itself unclear.

The issue is not whether sustainable development is important or desirable; it is more that any reference must give clear guidance to those who administer the Act.

2: Should suitability for purpose be referred to in the purpose statement? If so, how should this be worded?

The use of such a qualitative statement without clear definition would not be helpful. However, any definition that is too closely focused on whether a building is "fit for purpose" (which we note is already recognised in the implied warranties provisions of the Act) could be at the expense of considerations which could have impact on the close or wider environment.

It is important that any definition relates to impacts of the physical construction and must not duplicate, overlap or conflict with considerations or decisions made under the Resource Management Act.

Our experience is that BCAs have started to develop and implement risk based processes and the proposal being consulted on will help this progress.

We note that changes in expectation in this area need to be reflected in the purposes and principles of the Act.

3: Should other changes be made to the purpose statement? If so, what are they?
The purpose statement should define the responsibilities of the different parties in the building process – the Chief Executive and department, building consent authority (BCA), territorial authority (TA), licensed building practitioner (LBP), product manufacturer and supplier, owner and consumer. Clear definition will help all parties to understand where their accountability and liability lies.
4: Do you agree that all of the 16 existing principles (Building Act 2004 Section 4) are necessary to guide those administering the Act? If not, which principles do you consider fundamental?
Different groups of people will have different areas of focus and the importance of individual principles will therefore vary accordingly. It is our view that the purposes need to be kept to a simple set of principles so that all users can understand. The proposed changes mean many new LBPs and building owners will be expected to understand these principles.
5: Should other matters be referred to in the principles? If so, what are they?
Refer above.
6: Do you agree that the purpose and principles should apply to local authorities in their administration of all, not just some, of their building control functions? If not, in which circumstances should they be able to make decisions without regard to the purpose and principles?
The Chief Executive and Department must consider the purposes and principles when designing/developing the Building Code so BCAs should not have to reconsider when assessing compliance with the code. The purposes and principles should apply to the BCA andTA functions, as long as there is clear guidance setting out their responsibilities. The proposed shift of responsibility to the LBP means that a BCA/TA may have only peripheral involvement in many building projects. For this reason the purposes and principles should also give clear guidance of the role and responsibilities of LBPs. BCAs/TAs should consider the purposes and principles when carrying out specific functions under the Act such as assessments under s71 – 74 Hazards, S75 – 77 Building over two or more allotments, s96 – 99 certificates of acceptance, s 362 – 364 public use buildings and when using discretionary powers under s112 alterations, s115 change the use, s67 waivers & modifications, and when assessing “as near as reasonably practicable”.

7: Do you have any other comments on the Building Act's purpose and principles?
The review proposes significant changes to requirements BCAs functions effectively devolving responsibilities for some functions from BCAs to LBPs through exempt work and streamlined processes. The Council questions the industry's understanding/ability/willingness to take on these functions. How does the review intend to ensure these functions (and the reasons behind them) are still met?

Part 1.2: Clearer requirements in, and improved access to, the Building Code and supporting information

General comments:

Wellington City Council supports a performance based code but considers the code needs to be balanced with some minimum standards and expectations. For example, there should be minimum standards in relation to residential amenity, such as access to daylight and natural ventilation that are maintained for the life of the building. Without minimum standards LBPs will each have their own interpretation which will then lead to national inconsistencies.

8: Do you agree that some Code performance requirements are ambiguous or unclear?
Many of the objectives and functional requirements are open to interpretation which leads to conflict between designers, BCAs and builders. Also, there are instances where the Building Act, the objectives and functional requirements of the building code and acceptable solutions do not support the same outcome. Examples of this are: • The Fencing of Swimming Pools Act is cited in the Building Act as the means of compliance for pool fencing. However, there are contradictions between code clause F4 Safety from falling and the Fencing of Swimming Pools Act. • The acceptable solution of Code Clause F2 Hazardous building materials cites NZS 4332 for Glazing. However, the compliance document and the standard do not align.
9: If so, what is the impact of this for you?
The lack of clarity in some areas of the code results in conflict between BCAs, designers and builders with time consuming negotiation to reach agreement on the best way forward. In some cases agreement cannot be reached without one of the parties resorting to seeking determination from the Chief Executive of the DBH. The end result is extended delays and time overruns for the owner/consumer and in some cases the need for rework and additional costs.

10: Which Code performance requirements do you think need to be clarified and which would you make top priority for clarification? (Note that work is under way on requirements related to visibility in escape routes and fire safety).

LBPs, in our experience, have little understanding of the code. Although most will have an understanding of the commonly used compliance documents and have an understanding of good trade practice, they do not relate them to the objectives of the code.

Clauses B2- Durability, E2 External Moisture, and E3 Internal Moisture should be a priority for clarification as these are the least understood by the wider industry.

It is unlikely that LBPs, without extensive up-skilling, and owners will understand any of the code performance requirements that use qualitative statements such as *adequate, appropriate, unlikely or reasonably foreseeable*. We believe that many BCAs and some department staff also struggle with interpreting the intent of such statements. Clarification and definition is needed in any area of the code where such statements are used.

DBH determination and technical review records give an indication of the areas of the code that are poorly understood or applied. A review of the determinations database strongly indicates that clause B2 Durability and E2 External Moisture are overdue for review and clarification.

11: Do you believe that Code performance requirements are well known to those who need to know them? If not, how could they be made better known?

BCAs and the design industry professionals (architects, engineers, draughts people) tend to have an understanding, although often limited, developed through training and familiarity gained by use.

Levels of understanding amongst trades people tend to be more focused on smaller knowledge sets and on compliance documents rather than code (eg a builder may be well versed in NZS3604 but have little awareness of clause B1: Structure or a plumber may have a good knowledge of AS/NZS3500 but have little knowledge of clause G13: Foul Water). As such they may rely more heavily on plans from designers backed up by personal knowledge and a hardcopy standard bought years ago and not updated and therefore not relevant.

There is limited understanding in the industry outside of BCAs of the difference between compliance documents (acceptable solutions or verification methods) and an alternative solution or how compliance with each is established. With the exception of a few professional industry groups (e.g. IPENZ, NZIA) there is little opportunity for designers or trades people to gain an understanding of how compliance with the code works.

For example, Wellington City Council, with other organisations, provides

support for a Registered Master Builders apprentices program. The support is through sponsorship and work experience/exposure to the BCA's role. We support this program to raise the awareness of apprentices about the building control regime. However, our experience is that "building code" is not something they are taught during their apprenticeship.

It is suggested that there needs to be an ongoing industry awareness programme developed as part of the proposals discussed in this consultation document. Given the proposed changes there will be a number of new users who will not be familiar with the code, how it works and what is expected. A robust education program needs to be considered, with consideration given to linking knowledge/understanding of the code to the LBP scheme.

12: Do you have any problems accessing Code performance requirements and supporting information (including compliance documents and Standards)? If so, what are the problems and what could be done about them?

The building code and compliance documents (except standards) are freely available on DBH website. Access to these documents is easy for office based practitioners who typically have use of computers and the internet – at work or even from home.

On site access to the same information is more limited and dependent on laptops with mobile connectivity, equipment which many of the smaller operators do not have. They are more likely to rely on hard copy documents. Lack of knowledge about changes to the code or compliance documents and the cost of replacing out-dated documents, especially standards, all contribute to the lack of current knowledge.

Standards are often cited in compliance documents, however they are not freely available and need to be bought or subscribed to and the cost is seen as prohibitive to small building companies.

There is also confusion in the industry about cited and uncited standards. As citing by the Department confirms that the methods outlined in a standard are formally recognised to comply with the Building code, confusion increases when an acceptable solution, which cites a standard, is amended but the standard is not. An example of this is Clause F2 Hazardous building materials which cites NZS 4223 but the standard has a more onerous requirement than the code.

We suggest that Standards New Zealand and the Department work together to resolve the differences between standards, code and compliance documents.

We also suggest that building standards should be freely available via the DBH website and that guidance on how they apply is available for new users.

13: Do you agree that the label 'compliance document' creates an expectation that it must be used? If so, can you suggest a better label for this type of document?
The term "compliance document" and particularly the term "acceptable solution" cause confusion for those with limited understanding of the building code, as they infer that they are THE means of complying. In reality any proposal can be "acceptable" if there is sufficient evidence provided that it will comply with the objectives and functional requirements of the code. We suggest that the department should develop a set of "building code guidelines" or "design guides" as examples of ways to comply with the code. These would be similar to the current compliance documents in that if building work is designed and built in accordance with the guide it would be deemed to comply with the code. We suggest that these should be backed up by better guidance around alternative solutions and how compliance can be demonstrated.
14: Do you have any other comments on clarifying Code requirements or improving access to the Code requirements and supporting information?
We have no further comments.

Part 2.1: Lowest risk building work exempt from consent requirements

General Comments

Wellington City Council supports the proposal to exempt building work from the requirement to get a building consent where the risk and consequence of failure is low.

Careful consideration needs to be given to the wider implications of exempting more building work, including:

Property records

The Building Act requires TAs to keep records about buildings. If there is no building consent there will be no centrally held record of the work. These records are used in preparing Land Information Memoranda often sought by prospective purchasers.

Property sales

The proposal includes exemption for some work if it is done by an LBP. However, if the same work is not done by an LBP, building consent will be required. Without the consent process the onus will be on the owner to keep a record of who did the work, why it was exempt and how it complied. This information may not be supplied to the owner by the LBP or the information may not be passed on to later owners. Anecdotally, we have heard that the lack of a building consent or record of work for a property can become a bargaining point leading to a lower purchase price at the time the property is offered for sale.

Interface with other legislation

The building consent process provides a vital trigger for checking compliance with the TAs District Plan and therefore the requirements of the Resource Management Act. Without that trigger we anticipate higher levels of complaints and District Plan non-compliance and a resulting need for enforcement action against homeowners who may not have been made aware of their responsibilities. Similar issues arise with heritage buildings.

The consent process can also act as a trigger for other parts of Councils' regulatory business such as health and liquor licensing requirements or to bylaws (protection of or connection to utilities or services, protection of assets e.g. road land or public access to facilities).

Achieving code compliance

Many decisions about code compliance are dependent on features or conditions of the specific site or knowledge of existing building work and materials. Without the trigger of the building consent, homeowners or practitioners may be unaware of hazards on site (eg subject to flooding or slips), the need to make allowance for an exposure to stronger than normal winds, soil or ground conditions, site contamination, or the potential for hazardous substances on site (e.g. asbestos). There is also the need to ensure surface water control is sufficient to ensure neighbours are not impacted.

We propose that a notification process could be used to notify the Council that work will proceed and no building consent is required. This may also be a reasonable process for other low risk work. We understand that England uses a "building notice" process which is similar to what we are proposing.

This notification would form part of the record for the property without setting the expectation that the BCA/TA has checked for compliance with the code. It would also give opportunity for the Council to advise the owner of site specific conditions, district plan non-compliance or the need to comply with other legislation or bylaws.

We have made specific comments and suggestions about these matters in our responses below:

15: Do you agree the items or areas of work listed in Attachment 1 are low risk?

Table A: proposed additions to schedule 1

(A) Agree with this proposal and suggest that a notification process could be used to notify the Council that the work will proceed. We do not support that the installation of plumbing is low risk as the potential is too great for the development of substandard buildings that people will live in. Poor provision of storm water control can lead to stability issues in some areas.

(B) We have some concerns with this proposal as additions to existing dwellings are often complex as the impact on the existing building needs to be considered. If this proposal was to proceed then the work should be designed and built by LBPs. There is also the possibility that over time multiple additions or alternations will end up rebuilding the whole house and the risk of failure increases substantially. A notification process could be used to notify the Council that the work will proceed.

(C) Agree with this proposal and suggest that a notification process could be used to notify the Council that the work will proceed. This would then form part of the council record for the property and allow sufficient time for checking of hazards, RMA issues, etc, if any. We also suggest that some minimum audit inspections are required to ensure minimum safety standards.

(D) Agree with this proposal and suggest that a notification process could be used to notify the Council that the work is proceeding. We also suggest that some minimum audit inspections are required to ensure minimum safety standards.

(E) Agree with the proposal without limitations. Note: this could mean that work may be carried out to a lesser standard than now and possibly more damage after an earthquake.

(F) Agree with the proposal.

(G) Agree with the proposal.

(H) Agree with the proposal.

(I) Agree with the proposal.

(J) Agree with the proposal.

(K) Agree with the proposal.

(L) Agree and limit to very high wind speeds not specific design.

(M) Agree with the proposal.

(N) Agree with the proposal.

(O) Agree with the proposal.

(P) Agree with this proposal and suggest that a notification process could be used to notify the Council that the work will proceed.

(Q) Agree with the proposal with some limitations on height and area suggest no higher than 3 metres or larger than 20m^2 and a safety inspection before occupation. A notification process could be used to notify the Council that the work will proceed.

(R) Agree with the proposal with some limitations on height and area suggest no higher than 3 metres or larger than 20m^2 and a safety inspection before occupation. A notification process could be used to notify the Council that the work will proceed.

(S) Agree with this proposal.

Table B: further potential exceptions for discussion

(1) We are unsure about this proposal as we do not have a large rural area in our city. We are concerned that the provision of "not closer than 1m from the boundary" is more relevant to an urban area and suggest possibly not closer than 10m from a boundary would provide a better safety barrier in a rural zone. A notification process could be used to notify the Council that the work will proceed.

(2) We do not agree with this proposal as we consider a 100m^2 building is a substantial size and as such needs monitoring. We would agree to the construction of something like a hay barn in a rural area that was not closer than 10m from a boundary. A notification process could be used to notify the Council that the work will proceed.

(3) We agree with the proposal so long as the building already had existing sanitary plumbing and the new work is adding to an existing system (for example a second bathroom). We have concerns if the building work adds a second kitchen as it increases the risk of creating another household unit. A notification process could be used to notify the Council that the work will proceed.

(4) Agree with this proposal for equipment being installed in a publicly accessible place, including a school or play centre, and constructed in

accordance with NZS5828.

(5) Agree with this proposal if constructed in accordance with NZS5828 with a height limit of 1.5 m for safety reasons. This is on the basis that private property ground conditions are not usually to the same standard as a public playground.

(6) Agree with this proposal if installed by a member of the home heating association or other persons who have competence in this sort of work. Note: not all craftsman plumbers have this competence.

(7) Agree with this proposal. We suggest that a code of practice should be developed and before occupation, or the issue of a liquor licence, a safety inspection should be carried out by the TA.

(8) Agree with this proposal. We suggest that a code of practice should be developed and a safety inspection is carried out by the council before use by the public.

(9) Agree with this proposal. We suggest that a code of practice should be developed and a safety inspection is carried out by the council before use by the public.

(10) Agree with this proposal.

16: Are there any items or areas of work listed in Attachment 1 that should not be exempt from building consent requirements? If so, which ones (please use identification number/letter when commenting) and why should they be subject to building consent requirements? Are there any limitations or conditions that would address your concerns?

Please see our detailed response to question 15.

17: What other items or areas of work do you think should be added to Schedule 1 of the Act? Why are these low-risk?

- Demolition or removal of any single storey building that is not connected to public utilities and not containing any hazardous substances or materials. There is low likelihood of danger to the public so long as clear guidelines are first developed. A notification process could be used to notify the Council that the work will proceed.

- Installation of a solar water heating system installed by a certifying plumber (craftsman plumber). There is good guidance on solar water heaters, and plumbers are Licensed Building Practitioners.

18: Is there any essential or useful information that is currently gathered through building consent applications that would be unavailable under this proposal?

There is a range of essential information that would not be gathered if Council was not able to gather records such as:

- use of building, size and location,
- surface water connections,
- people involved such as LBPs
- confirmation of owner's knowledge/approval,
- assessment of District Plan compliance
- compliance with site specific conditions, consideration and compliance with Building Act requirements (e.g. S71 – 74, S75 – 77).

We suggest that there could be two types of exempt building work:

- **Very low risk** work where the lack of a record of the work is unlikely to cause concerns at a later date. This work could be completed without any record. Examples are the installation of a freestanding fire or solar water heating system.

- **Medium/low risk** work where there is a higher likelihood of non-compliance with District Plan rules or Bylaws such as additions to buildings or the erection of new buildings. Experience shows that a lack of record of this type of work is likely to cause problems if/when the property owner wishes to sell the property. Anecdotally we have heard that sometimes in the past owners have accepted their builder/designers word that consent was not required only to discover later that consent was required. It is also the type of work which mortgagors or insurers would want to have formally recorded.

A notification process could be used to notify the Council that the work will proceed.

The notification application should also include the reason the applicant thinks the work is exempt and the owner's agreement that they believe the work can be done without consent. The notification would enable the TA to identify any non-compliance with the District Plan or bylaws. It would also give the opportunity for the TA to identify any other site specific issues that would need to be addressed through the building consent process or any site specific issues (e.g. wind zone, ground conditions) that need to be taken into account at design stage.

The notification would create a record of the proposed work but would not create the expectation that the BCA has checked the proposal for building code compliance (and therefore should not create liability for the BCA if that expectation is set in legislation).

19: Do you have any other comments on exemptions for lowest risk building work?
The consultation document proposes to add more examples of exempt work to Schedule 1. As the list of potentially exempt work grows, so does the possibility of confusion and the risk of owners or their agents misinterpreting whether or not consent is required. We suggest that it would be more appropriate and provide more clarity if the definitions of what is and what is not a building (Building Act S8 & S9) and the definition of building work (section 7) were reviewed.

Part 2.2: A more streamlined process for low-risk residential building work

General Comments

Wellington City Council supports the development of streamlined processes for low-risk work provided the responsibilities and liability of those carrying out the work are clearly defined.

However, the Council is likely to continue to owe a duty of care to future owners in terms of its inspection role, albeit that the scope of that duty may be limited by the 'prescribed' inspection regime referred to in the discussion document.

It is also likely that the Council will owe a duty of care to future owners in respect of the new functions of checking that design and completion memoranda have been filed by appropriately qualified people. By analogy with case law concerning the acceptance of building certificates issued by private building certifiers under the Building Act 1991, the acceptance of memoranda that stray outside the scope of the issuer's licence may be sufficient to establish liability in negligence: *McNamara v Malcolm J Lusby Limited* (3 July 2009) unreported, HC Auckland, CIV-2006-404-2967, Christiansen AJ.

The submission document places heavy reliance on licensed building practitioners being ready and willing to take accountability and accept liability for their work. We consider that this willingness is not yet proven and as such is a potential weakness in the proposals. We also note that a large number of these potential licensed building practitioners currently do not understand building code requirements and as such rely heavily on the building consent authorities (BCAs) to ensure code compliance.

20: Do you agree that building consent authority oversight and control of a building or building work should be in proportion to the risk and consequences of failure? If not, why not?
Yes, we agree with a risk based approach for building control and that BCAs should not have to spend as much time on low risk proposals as they do with ones that have a higher risk of failure. The one-size-fits-all situation has arisen largely due to the need for BCAs to show how they were satisfied on reasonable grounds that all consents, regardless of size or complexity, comply with the building code including products and how the products will be used. In addition, the requirements set by the DBH through regulation and IANZ through interpretation of the regulations, have reinforced this type of one-size-fits-all approach in order to have processes approved during assessment. The courts and adjudicators have also imposed a very high duty of care on Councils and BCAs – often higher than the Councils ability or opportunity to control the risk.

Our experience is that BCAs have started to develop and implement risk based processes and the proposal being consulted on will help this progress.

We note that changes in expectation in this area need to be reflected in the purposes and principles of the Act.

21: Do you agree that licensed building practitioners should be able to be relied on to design and construct simple buildings that meet Building Code requirements without the level of third-party oversight currently applied? If not, why not?

There is a need for checks and balances in any system where the consumer is relying on others to deliver work of a required standard, especially where the consumer is unlikely to understand what those standards are or how they can be achieved. There is a risk to consumers if the process is left entirely up to the market to control and moderate.

BCAs/TAs should be able to rely on LBPs to design and/or build compliant work and to some extent we already rely on the competence within the construction industry as we are not clerks of work and so cannot be on site to see every detail that is built.

However, our experience shows that in more than half of all building consent applications the designer fails to design all aspects of the proposal to comply with the code. The reasons for this include:

- Failing (or forgetting) to consider an aspect of compliance.
- Supplying insufficient information or non-complying details.
- Failing to consider site specific conditions or features.
- Designing to out-dated code requirements.

In discussions with architects and design professionals, we have also found there is a general reluctance by designers to sign their name on the dotted line to confirm compliance. Our experience is that some designers (many of whom are architects and so, by default, Design 3 LBPs) use the BCAs to find out how little they can get away with.

Builders have publically stated during the consultation round that they rely on designers as they only build what is shown on the plans. This in itself indicates a lack of knowledge of code requirements and an inability to identify or accept liability for errors in plans. The cost of BCA monitoring may be substantially less than the cost of rectifying these errors once constructed.

The levels of reliance the discussion document places on LBPs for low risk work reminds us of the building certifier process under BA91. Under that process Councils were assured they were able to rely on a certifier's building certificate as evidence of compliance with the building code. However history shows that the faith in some building certifiers was ill-placed and the controls to ensure they were operating appropriately were minimal. The unfortunate, but avoidable result, is the number of owners (and Councils) who are still, years later, in the position of having uncertified and often non-compliant work with no building certifier in sight to help address the situation.

A transition period of at least five years may be needed to allow LBPs to develop the necessary knowledge and skills before we could confidently rely on their competence.

22: Do you agree that the proposed streamlined process is adequate to ensure simple buildings are Code compliant? If not, why not?

Prior to the BA04 and the BCA accreditation process Councils were able to use more discretion in the building consent process and would often issue building consents based on the view that the finished product would be built to comply even though the plans were not perfect.

It is worth noting that the Hunn report and resulting changes in legislation identified that getting the design right is key to a quality end product. It also pointed out the problems with on-site changes (eg changes to products, systems and construction details) which were a contributing factor to building failure.

However, this proposal appears to be advocating a return to a similar process based on a Design LBP sign off backed up by a Site LBP sign off with minimal third party checking.

We are concerned that this proposal appears to be advocating a return to the very processes that were identified as contributing to significant failure in the 1990's unless appropriate safe guards are built into any new system.

We are also concerned that this proposal will undermine changes made in the BA04 to ensure that compliance with code is assessed at the design/consent stage. Under the proposal compliance will be assessed at construction stage.

23: Do you have any comment on the indicative steps in Table 1, including the notes to the table?

Wellington City Council has concerns that this process appears to have been developed to facilitate a streamlined process for only a small percentage of all residential building consents. We also have a concern that an over-reliance on low risk or simplified design, by the design sector, in order to take advantage of the streamlined process will stifle innovation and product development.

In Wellington less than 3% of all consents issued between July 2009 and January 2010 would have fitted the "simple" criteria. On this basis this proposal will simplify the process for only a small percentage of total applications. We believe that other ways of identifying criteria for low risk work should be developed to enable the building consent process to be streamlined for more applications. We discuss these ideas in our answer to question 26.

We have concerns about the lack of detail in the table 1 proposal. There appears to be a lot of important information that has either not been considered or has been omitted from the proposal.

Table 1 does not make provision for consideration of Building Act requirements (hazards and building over two or more allotments) and site specific features like wind zone. We suggest that a PIM should be compulsory for all streamlined applications to ensure that designers have all the information they need to design the house.

Step 1 – The application needs to include details of the LBPs who will be involved in the construction. Under the proposed process, satisfaction that the proposed work will comply is based on the competence of the people who will do the construction. Without this information the BCA and the owner do not have the assurance that the project will be completed by competent people.

This requires a significant change to how the industry operates. It is common now for the design of a project to be completed before the builder or other trades have been selected. Having to nominate LBPs up front will add to the owners comfort about competence of contractors. It will add surety for contractors to forward plan work, engage and employ competent labour, manage finances and manage procurement.

Having the construction LBPs sign off on the design to confirm they believe they can construct the building, as designed, to comply will minimise the likelihood of significant oversights or errors on the part of the designer. Such errors could otherwise add significant cost to the owner (not to mention additional dispute management) especially if they are not identified until materials have been bought and the work partly constructed.

Designers should also have to have contracts and warranties in place covering their work so that owners are covered if the designer does make mistakes.

There does not appear to be any consideration in any part of the process that there could be a change of LBP during the project.

Step 2 – Many Councils see similarities between this proposal and the building certifier regime under the Building Act 1991. In spite of assurances from the BIA that Councils only needed to check a proposal was within the scope of the certifiers approval, Councils are still being pulled into ex-certifier claims purely because certifiers no longer exist.

Unless the Act clarifies liability and responsibility for all roles (designers, constructors, BCAs, TAs, manufacturers, suppliers, DBH) then it does not matter what the intention of the streamlined process is in terms of assigning responsibility – the courts will still hold Councils liable.

A process that relies on LBPs signing off on their part of the process will only work if there is a robust and effective LBP complaints and disciplinary process. Although a complaint/disciplinary process has been set up it has not yet been tested. We note that the building certifier process also had a complaint/disciplinary process, however this ended up being ineffective in addressing concerns raised by owners and Councils.

Step 3 – Given that BCAs will not have reviewed the plans prior to

construction (see step 2) we foresee a higher chance of conflict between BCAs and construction LBPs about whether compliance with the code has been achieved. If anything the proposal seems to be promoting conflict where the BCA and builder do not agree with the design LBP's interpretation of code at the time of construction. This difficult situation will be exacerbated by the fact that at the time any non-compliance is identified the work will be partly or fully constructed and the cost of rectification will be higher than if the potential non-compliance was identified at the design phase.

There does not seem to be any consideration that a change during construction could mean the dwelling would move out of the simple category into complex (for example a change to an untried or unproven cladding product).

Step 4 – We comment again that significant on-site changes during construction were identified in the Hunn report as being a contributor to failure. There is no indication in table 1 that a design LBP must sign off on changes during construction as complying with code.

The proposal does not consider the New Zealand do-it-yourself attitude where owners will undertake to complete certain parts of the work to minimise costs. The most common of these would be interior painting including wet areas (bathrooms, kitchens, laundries) but it may also include laying or arranging flooring (bathrooms, laundries, kitchens), external painting or completing landscaping (barriers). Although this would impact even more in additions and alterations to an existing dwelling, it can also apply to new builds.

LBPs will face a conflict in these situations. Their part of the contract will be completed but they would be unable to produce a memorandum saying all the work complies. Owners may withhold payments pending the issue of a memorandum but the builders may not be in the position to influence the speed at which the work is completed.

Step 5 – The proposal does not indicate that the BCA will carry out a final inspection but they will still have to certify the work. See comments above about clarity of roles and liability.

24: Are there any other steps that should be part of a streamlined process for simple, low-risk residential building work?

We have no further comments.

25: Do you agree that the foundations, framing and insulation, plumbing, drainage, claddings and flashings are critical elements that would still need to be inspected by building consent authorities in a streamlined process? If not, what elements do you think would still need to be inspected?

We agree to the suggested inspections and suggest an "occupation" inspection should also be added to the streamlined process to avoid buildings being occupied before they are safe and have sufficient sanitary facilities operating.

26: Do you agree with the criteria for buildings to be covered by the proposed streamlined process for simple, low-risk residential building work? If not, which criteria would you change and why?

Wellington City Council does not agree with the criteria.

Any risk based streamlined process should take into account all types of low risk work rather than just new simple dwellings. Rather than creating a process just for simple new dwellings the review should develop and implement a process for identifying the level of risk in any proposed work and then make a decision about what the acceptable levels of risk are. This would ensure that streamlined processes could apply to any project where the level of risk is low and the risks have been mitigated. As such the benefits of a streamlined process would not be limited to only a small percentage of all consents.

We propose that a risk assessment tool or some other method be developed to enable LBPs and BCAs to identify projects that could be handled in a streamlined process. The planning portal in England has developed this approach for simple planning consents.

We believe the key steps in assessing the risk of any project are:

1. Identify the risk areas involved in the project (consequence & likelihood)
    - type of work (single residential, multi-residential, commercial use, mixed use, industrial, community, importance/significance of building, public vs private use)
    - intended use and occupancy of the building
    - site specific conditions (wind, soil, features of land, corrosion, snow loadings)
    - scope of work (bathroom refit vs additional storey vs new building)
    - complexity of design (weathertightness risk matrix, products, multiple specific engineered features or cutting edge engineering design).

2. Then consider the risk mitigation/controls in place:
    - PIM information obtained prior to design
    - people involved in all stages of project (LBPs, architects, engineers) are working within their competence and providing memoranda
    - peer review of design by suitably qualified people who provide memoranda
    - standard design used (acceptable solutions with minimal deviation), Multiproof approval
    - certified/appraised products used within scope of approval
    - quality assurance in place (self monitoring, monitored by designer)
    - independent monitoring e.g. clerk of works, cladding specialist, FPIS, structural engineer
    - Means of redress identified and owner understanding assured (contracts, warranties, surety, PI indemnity, insurance for negligence/poor workmanship).

3. Define what level of residual risk that is acceptable – this would be defined by regulation. Any residual risk over the acceptable level requires third party intervention i.e. BCA checks and monitoring.

This risk assessment process could be carried out by the designers who would record how they reached their decision. BCAs would then check the designer's assessment and if the assessment process has been carried out correctly then the consent would follow the streamlined process.

If the residual risk was over the acceptable level the consent would be processed, monitored and certified by the BCA.

27: Should the proposed streamlined process apply to buildings covered by a MultiProof approval?

We note that Multiproof approvals already have their own streamlined building consent process. They could also be assessed as streamlined under our suggested risk assessment process.

28: Should the proposed streamlined process apply to any other low-risk buildings or building work? If so, how would you define which buildings or building work?

Refer answer to question 26.

29: Does the proposed process align appropriately with the rules on restricted building work? If not, why not?

We have no further comments.

30: Do you have any other comments on the proposed streamlined process for simple, low-risk residential building work?

We have concerns about whether the industry is ready to accept the liability created by this approach.

We note that acceptance of the concepts in this discussion document by the national level of organisations like Certified Builders or Master Builders does not automatically lead to understanding or acceptance at the practitioner level.

It is our understanding that while many designers and builders express a desire to have less BCA input into their projects they have also expressed concern about taking on more liability for their work as a result. Concerns about builder liability were expressed by many potential LBPs during consultation sessions.

Part 2.3: A more streamlined process for complex commercial building work

General Comments

Wellington City Council supports the development of streamlined processes for complex commercial work provided the responsibilities and liability of those carrying out the work are clearly defined.

This is on the basis that the Council does not currently owe a duty of care in respect of commercial building work, with regard to its functions under the Act as commercial building developers/owners/occupiers are generally better placed to protect themselves contractually and thus are not 'vulnerable' in the same sense as their residential counterparts.

The proposed changes to the consent process for complex commercial building work appear to reflect the Courts' view of the capability of commercial parties, although recognition is also given to the independent technical advice usually provided for complex building projects. The Council's statutory role is consequently reduced to verification of quality assurance processes. While a statutory duty will exist in relation to this function, we consider it unlikely that the Council would be found to owe a duty of care to commercial building owners or occupiers in relation to acts of negligence.

31: Do you agree that people commissioning complex commercial buildings and building work are generally better informed and better equipped to hold contractors to account than consumers of residential building work? If not, why not?
We agree that in many cases these consumers are better informed and protected by robust contracts, but not in all cases.
32: Do you agree that chartered professional engineers, registered architects and other licensed or certified professionals should be able to be relied on to design and supervise complex building projects that comply with the Building Code, without the current level of building consent authority review? If not, why not?
We agree, although even the best professionals can and do benefit from third party review. It is important to note however, that not every complex commercial new building which is designed and built by professionals achieves the same standards. Many large commercial projects are built where the budgets or timetables are very tight and decisions are sometimes made on the basis of cost/time rather than compliance or safety. We suggest that these projects should be subject to some level of BCA monitoring with inspections similar to the proposed simple house process plus a safety inspection prior to public occupation.

33: Do you agree that the proposed streamlined process for complex building work is adequate to ensure buildings are Code compliant? If not, why not?

This proposal relates only to complex new commercial buildings. New buildings of this scope represented less than 1% of building consents issued in Wellington in 2009. As the proposal will streamline the process for a very small proportion of all building consents we do not believe the proposal will result in a significant improvement for the industry as a whole.

The proposal does not consider other complex commercial work that makes up the bulk of commercial building consents in Wellington or the decisions TAs must make when approving consents such as:

- alterations or change of use to existing commercial buildings and triggers for upgrade of accessibility, fire, means of escape, structure
- natural hazards (s71 – 74 BA04)
- building work over two or more allotments (s75 – 78 BA04)
- occupation of buildings intended for public use.

These are the decisions that often create conflict between designers, owners, engineers and the Council. Designers/owners tend to approach these decisions from a cost perspective (money and time), while the Council must, in its role as a TA, make other considerations such as safety and amenity for users and the need in some cases for existing building stock to be upgraded.

The complex commercial streamlined process is silent on how the staging of a complex commercial project is often handled. Typically a new large commercial project will include the construction of commercial spaces for letting to tenants (cafes, shops) and these spaces will be subject to consents to fit out the space according to its intended use.

Often at the time the building as a whole is designed and constructed it is not known who will take on the leases and what the use of the space will be.

34: Do you have any comment on the indicative steps in Table 2 including the notes to the table?

Table 2 does not make provision for consideration of Building Act requirements (hazards and building over two or more allotments) and site specific features (wind zone, seismicity).

Step 1 – It is unclear who, if anyone, will define whether the professionals involved in a project have suitable experience or even which professionals are acceptable for which roles in a large project.

Step 2 – QA processes cannot be judged to be operating effectively until they are in operation so the BCA cannot check this before construction has started.

Step 3 – There does not appear to be any requirement for independent

review of the QA systems to ensure they have been implemented and are operating effectively. Identifying that the QA processes were not followed at the end of a project is likely to add far more cost and risk than that incurred by third party/BCA monitoring during construction. For consistency with the accreditation processes for BCAs, there should be an audit/check of the QA process "in operation" rather than just relying on the process put forward on paper.

As with the low-risk residential dwelling proposal there is no indication that designers must sign off on changes during construction to confirm the altered construction method will comply.

In fact the proposal appears to promote the potential for conflict where the builder of other interested parties disagree with the design LBPs interpretation of code once construction has started. This in turn undermines the changes under BA04 to assess compliance with code at consent time rather than re-interpreting code compliance during construction.

Step 4 – information supplied to the BCA should include QA so that this information is held by an independent party in the case of dispute at a later date.

Information supplied should also specifically mention compliance schedule confirmation so that the BWOF process can be initiated.

We have some concerns that the proposal for a memorandum from the site LBP does not reflect the reality of the commercial construction sector which is more likely to take a team approach to managing the project.

Typically these projects are managed by a large company who may have a site supervisor managing the co-ordination of all the trades on site. However there would not be one individual responsible for monitoring and overseeing all aspects of the project and so signoff would more likely be from the company not an individual.

Likewise they may have a project manager coordinating the administrative aspects of the job including contract management, the collection of QA records, sub-trade sign offs. Project managers are likely to compile and submit documentation to the BCA. Project managers may or may not have technical expertise relating to confirming compliance with the code.

Step 5 – We suggest that an occupation inspection should be carried out by the BCA. There is no indication of how compliance with the public use requirements of the Act would be met.

In the commercial sector a contract will often not finish until a year or longer after agreed completion. This means that occupation of the building may take place long before the LBP or other memoranda are issued.

The proposal does not indicate that the BCA will carry out a final inspection but will still have to certify the work. See earlier comments about clarity of roles and liability.

Many Councils will see similarities between this proposal and the building certifier regime under the Building Act 1991. In spite of assurances from the BIA that Councils only needed to check a proposal was within the scope of the certifiers approval, Councils are still being pulled into ex-certifier claims purely because certifiers no longer exist.

Unless the Act clarifies liability and responsibility for all roles (designers, constructors, BCAs, TAs, manufacturers, suppliers, DBH) then it does not matter what the intention of the streamlined process is in terms of assigning responsibility – the courts will still hold Councils liable.

A process that relies on LBPs signing off on their part of the process will only work if there is a robust and effective LBP complaints and disciplinary process. Although a complaint/disciplinary process has been set up it has not yet been tested. We note that the building certifier process also had a complaint/disciplinary process, however this ended up being ineffective in addressing concerns raised by owners and Councils.

35: Are there other building projects with the necessary quality assurance systems in place that could also be subject to the proposed streamlined process for complex commercial buildings?

Please refer to our risk assessment proposal in question 26.

We consider that all building projects would benefit from robust QA processes particularly weathertightness remediation.

36: Do you have any other comments on the proposed streamlined process for complex commercial building work?

We note that not all new complex commercial buildings are designed or built by building industry professionals.

We are also concerned that the proposal is not in tune with the current industry practice of all professionals. For example, very few architects will provide statements of compliance or site supervision. We do not believe the industry is ready for this proposal and suggest an implementation period of at least 5 years may be needed.

Part 2.4: Public infrastructure works

37: Do you agree that the building control system provides an appropriate means of ensuring the safety and quality of all public infrastructure works? If not, why not?
Wellington City Council does not believe that the current building control system adds value to public infrastructure works. Public safety and quality of outputs is assured through robust contract management, procurement rules, codes of practice, QA processes, the asset management plan process and public accountability. Decisions about spending on public infrastructure projects face more robust review than private projects. However, we consider clear guidance is required about where public infrastructure must provide for minimum requirements for public safety (e.g. bridges, tunnels, etc.
38: Are there some categories of public infrastructure work where other arrangements may more efficiently and effectively ensure safety and quality? If so, what types of works and what sort of arrangements?
There are overseas models for inter-agency agreements which should be investigated. Road Transport projects involving Transit New Zealand already have comprehensive audit processes in place.

Part 2.5: Streamlined process for reviewing fire safety of building plans

General Comments

Wellington City Council supports the proposed streamlined process for reviewing fire safety of building plans.

39: At what point in building design and construction is Fire Service Commission involvement most useful? Please explain why.
We believe that early involvement with the FSC will reduce rework and redesign, however the FSC needs to become more dynamic in its decision making especially in relation to existing buildings. For new buildings the FSC needs to be prepared to participate proactively in the international fire engineering guidelines. They also need to ensure national consistency through all levels of the fire service not only through the FSC Design Review Unit (DRU) interface.
40: What weight should be given to Fire Service Commission's advice – for example, should it be treated as consultative input, should following the advice be mandatory, or should the weight given depend on the circumstances? Please explain why
NZFS's focus seems to be on trying to get designers to design only to the acceptable solutions. As such their advice should be treated as consultative input only. Where a designer has not incorporated DRU advice into the design they should have to provide an explanation of why and how they have mitigated any risk. The acceptance of the explanation would then be at the discretion of the BCA and could still be subject to determination by the Chief Executive if any party does not agree.
41: Do you have any other comments on fire safety review of building plans?
The FSC's ability to comment on proposals is restricted in regulation (although does not stop them commenting wider than their mandate). Consideration should be given to whether their powers to comment should be wider. There appears to have been no consideration given to the interface between the DRU and complex commercial projects under the streamlined process.

Part 2.6: Improved process for building warrants of fitness

42: Do you agree that the administration of the building warrant of fitness and compliance schedule requirements is more complex or costly than necessary? If so, what issues does this cause for you?
We agree that the process could be streamlined. However we feel that some of the current perceived complexities may be due to the lack of up-to-date BWOF processes and information in use across the nation. The cost of any process should reflect the actual cost of a TA ensuring a building is compliant. We consider that the current cost of the BWOF process in relation to the value of a building and the safety of its users is low in comparison to the relative cost of the car WOF process.
43: Do you agree that there is a lack of clarity about building warrants of fitness and compliance schedules? If so, what is unclear and what issues does this cause for you?
We agree there is a lack of clarity. TAs have faced uncertainty and confusion over the status of specified systems listed on compliance schedules under the 1991 Act. While efforts have been made to update compliance schedules for the new list of systems there is a definite lack of understanding by owners about the changed requirements. This confusion is likely to increase if further changes are made as part of this review.
44: What changes should be made to the requirements to simplify administration while still ensuring critical systems are maintained and inspected? You may want to comment on the description of specified systems in the regulation, the definition of 'independent qualified person', or any other issues.
One possible solution would be a national database for all compliance schedules and building warrants of fitness (similar to that in place for vehicles). This should then be backed up with a national register for IQPs (again similar to the vehicle regime where only approved mechanics can test for an issue car WOFs). Enforcement could still be carried out by TAs through a mix of random checks and targeted audits.
45: Do you have any other comments on the building warrant of fitness and compliance schedule requirements?
We have no further comments.

Part 2.7: More efficient building control administration

46: Do you agree that the number of building consent authorities and the variation in size is causing issues as outlined in section 2.7? If not, why not?

The Council agrees that the number of BCAs is an issue in respect of ongoing financial sustainability for some because of their size. However, it should be noted that not all issues or perceived issues are necessarily caused by the number or size of BCAs.

The aggregation of BCAs would not necessarily eliminate the inconsistency referred to in the consultation document. Each council has to carry their own risk analysis for the area they work in. For example, Wellington City Council has a greater exposure to leaky building problems due to higher wind loads within Wellington than other BCA areas. Similarly, Wellington's proximity to multiple faults introduces issues that other BCAs do not have to consider.

We suggest that the Department and IANZ, through their technical review, determinations and accreditation processes, have a much greater influence on individual BCA practices than any "local accountability to ratepayers".

In terms of inconsistency, the Wellington Regional Cluster Group worked hard to develop and implement common processes. The accreditation of Building Consent Authorities has added a little in support of this, but in some cases work required to satisfy IANZ has forced BCAs away from previously established shared regional processes.

Councils are being given mixed messages from the Department and IANZ. The most recent example occurred during the recent accreditation round when the well-established industry practice (which had been in place many years) of conditions on consents was deemed to be unacceptable to the Department and IANZ. The implementation of the requirement to not use conditions on consents to address relatively minor issues has added unnecessary bureaucracy to the consent process and resulted in significant adverse response from our customers. BCAs yet to go through the second round of accreditation may still be allowing for conditions on their consents, leading to inconsistency in the sector. Customers do not realise that this requirement has been imposed upon us and generally blame the Council for this added bureaucracy.

We suggest that if the DBH and IANZ were to develop better working relationships with the current BCAs and to do further work on developing nationally accepted common processes then a lot of the perceived inconsistency and bureaucracy could easily be resolved.

47: Are there any other issues or problems resulting from the current administrative arrangements that have not been identified in this document?

We consider that many practitioners have very little understanding of building code requirements and play the blame game if they get "caught out" by a BCA. This relates closely to our earlier comments that many designers will submit the minimum to see what they can get away with.

To a large extent it has been left to BCAs to educate the industry using resources developed by each BCA individually and by managing practitioner behaviors through rejection of applications – which incidentally leads to further complaints about BCA inconsistency and performance.

We acknowledge that recently there has been more published guidance material from the Department which has been helpful.

We also consider that a large number of customer issues relating to the regulatory process arise from the customers lack of understanding of the different legislation involved and the lack of consideration of related legislative processes. For example, building practitioners often complain about the process of obtaining building consent and delays in being able to start work. However investigation often reveals that the delays have been caused be a lack of consideration of RMA issues or delays in the resource consent process.

We acknowledge that further work is being done to more closely align Building Act and Resource Management Act requirements and processes.

48: Do you see benefits in greater cooperation between building consent authorities, or clustering or consolidation of building control functions? What would be the main benefits?

This is a process that is developing across New Zealand for example the new Auckland "super city" and the investigation into shared services in the Wellington region. The Council sees a number of benefits which could be gained by greater cooperation between BCAs:

- consistency, particularly in code interpretation
- increased efficiencies
- reduced costs
- more skilled work force
- better customer service
- improved opportunity for staff training
- ability to provide a career path for staff

While, there may be benefits for customers through increased consistency of process and decision making, a similar result could also be achieved through the proposed national online consenting project and better guidance and education for building practitioners.

49: Do you see costs and risks associated with greater cooperation between building consent authorities, or clustering or consolidation of building control functions? What would be the main costs and risks?

Some of the proposals in the discussion document, if enacted, will make the BCA function difficult to manage efficiently for some smaller BCAs. Proposals such as making more building work exempt and a streamlined process for simple housing will result in a drop in income and smaller BCAs will lack critical mass of technical expertise within their organisations. Therefore, as a result of the proposals there would be benefits for BCAs in clustering, consolidating or contracting.

However, consolidating or clustering BCAs is not a simple matter of establishing an office and transferring staff from neighbouring BCAs to it. Initial set up costs for establishing regional groups would be significant, as are the consultation and approval processes that Councils must go through.

Another significant risk would be the loss of the local touch. There could be a risk of becoming a faceless entity to key stakeholders and the loss of local interaction has the potential to increase non-compliance.

The transfer of building control functions amongst territorial and regional authorities has the potential to generate costs and liabilities for services rendered beyond the Council's jurisdictional boundaries. We assume that these matters will be the subject of careful analysis in the course of the project identified in the discussion document.

Larger Councils who currently run satellite offices will already know the challenges of achieving consistency when officers do not work together. Smaller BCAs with large territories will know the challenges of travel and isolation for their officers.

The development of our most skilled officers tends to be through the progression from simple residential to complex residential/simple commercial to complex commercial. Many of our most skilled officers may decide that the reduced involvement in simple residential coupled with the often contentious complex residential work would be a less attractive employment proposition without the added challenge of the complex commercial work.

Telling these officers that they must also adjust to a change in workplace may see an exodus of our most skilled officers from the building control industry.

50: What, if any, role should the private sector have in the administration of building controls?

The Council does not support the private sector involvement in building controls and would like to remind the Department of the significant work load and costs that TAs faced as a result of the demise of "Private Building Certifiers" established under the previous Building Act.

Administration of building controls are split into two separate functions TA and BCA, some interchangeable, many are not. We have found during the review of shared services in the Wellington region that one of the biggest challenges is separating the TA functions from the BCA functions. Where the one entity is carrying out both sets of functions, this has not been an issue.

Private BCAs when accredited and registered have the ability to carry out functions (BCA) as currently allowed for in the Act. However, private BCAs could lead to duplication of functions and resources, which is against one of the stated aims of the review.

Other concerns regarding the private sector involvement is based on our past experience with building certifiers. Our experience was that the certifier regime was not well regulated by the Building Industry Authority and that when the building certifiers closed down their businesses the councils were left to sort out the resulting mess.

The Council has always held the view that commercial activities and a regulatory role are not compatible and will sometimes lead to profitability overriding the regulatory function. Past experience with building certifiers was that people would approach all of the certifiers and use the one who applied the less costly solution without any thought as to what was required by BA91. This led to inconsistency of decisions and work being carried out contrary to the requirements of the BA91.

We would suggest that BA04 already has provision to allow for private BCAs, which as we understand is not viable at the present time due to them not being able to show they can provide for the 10 years of potential liability.

If the proposals in this document alter that situation then private BCAs may emerge in the future. Councils will want assurances they will not have to bear the cost of private BCA business failures as was the case with building certifiers.

51: Which elements of building control require local input and why?

The Council believes that a number of building control elements would benefit from local input including:

- Building compliance matters – inspections
- Building Act complaints
- Local knowledge of building use and changes of use
- Site conditions (soil conditions, seismicity, wind, snow loadings, coastal erosion, etc)
- Hazard identification
- District Plan compliance (which impacts on building design)
- Heritage buildings
- Earthquake prone building policies (due to proximity to faults)
- Local building practitioners (whether LBPs or not)
- Auditing building warrants of fitness and pool fencing

- Notification of work (refer our suggestions in Part 2.1.

52: Which elements of building control would most benefit from a national approach?

The Council suggests that building consent processing would most benefit from a national approach, probably through regional hubs, and supported by a nationally funded online electronic consent system (as this will help ensure national consistency).

The challenges of geography would make a national inspecting and enforcement approach difficult.

53: Do you have any other comments on options for more efficient building control administration?

Education and proactive advice to the industry would be helpful.

Other areas to enhance efficiencies include reviewing the current BCA accreditation requirements, which in our view are overly focussed on process rather than outcomes. A number of interpretations of requirements by IANZ have led to impacts on customers that are at odds to what the Government are aiming to achieve through this proposal.

An example of where IANZ requirements have added costs (and time) to the building consent process is the requirement that building consents cannot be issued subject to conditions other than those specifically allowed for in BA04. This was a widely accepted practice in the industry that had developed over time to allow for sensible risk based approach to approving a building consent.

Further, it is our belief that the use of conditions on consents has not led to subsequent quality issues. The industry is full of experienced officers and practitioners able to verify that conditions on building permits and consents have been used effectively throughout that time.

Wellington City Council can attest to the impact on customers from such rigid interpretation of requirements. In 2009 IANZ issued us a corrective action that required us to stop putting conditions on building consents.

For example, we used to have a condition on the building consent that fire alarms must be installed, which would be subsequently checked during the inspection stage that the condition has been complied with. Now, consent may be held from being issued while confirmation is received from the applicant that they will be installed. While very simple, it can easily add a few days to the timeframe of issuing consents.

This has lead to an increase in bureaucracy, extra costs which are being passed on to applicants and delays in issuing building consents which all seem contrary to the current government thinking. A far more practical and pragmatic approach to this issue is for the consent to be issued with specific, helpful comments about how compliance is to be achieved. We note that this is now the central premise of changes contained in this discussion document.

Other areas that the Council believes could lead to more efficient building control include:

- the Department providing more national solutions to building categories, competency levels, IQP and other professionals or contractors performance and competence.
- a more active participation by the Department to enhance the "product certification' process.

Part 3.1: Well-informed consumers

54: Do you agree the Government should do more to inform consumers about their responsibilities and rights in relation to residential building projects? If so, why?

We agree that consumers need more consistent messages and the DBH can help in this area. Messages from the DBH can be seen to have independence rather than sounding like TAs pushing their favourite messages or being risk averse.

Typically consumers only hear a message when it has special meaning or relevance for them. For the majority of building consent applicants, this is only when they need a building consent, which is generally not often. For this reason information about consumer rights and responsibilities in relation to building work needs to be available through lawyers, mortgage lenders and real estate agents to help ensure consumers make an informed decision.

55: What further information do consumers need?

Our experience in this area is that consumers, in this context, are difficult to reach. We suggest that there are some targeted generalised advertising campaigns (accepting that this will only reach a small percentage of consumers). There also needs to be a programme of "just in time" information that consumers can access when they need it. For this reason information should be available through hardware stores, building product suppliers, LBPs, trades, industry organisation, lenders, and online from the DBH and other major industry players.

We also suggest that making it a requirement that consumers confirm they have seen the information as part of the standard contract process would be helpful.

56: Should the government publish information on acceptable standards of workmanship for residential building work?

The building code and compliance documents deal with acceptable standards to achieve compliance however consumers need a plain language guide to understand what is required and to recognise whether their contractor is delivering.

The DBH needs to be careful that in starting to give out information about acceptable standards of "workmanship" that this infers that the code can mandate the acceptable standards of work and limits design of alternative solutions.

The DBH needs to be able to explain workmanship is a contractual matter between the consumer and the contractor and can include standards of workmanship in excess of compliance with the code.

Notwithstanding these comments, there will still be many consumers who

place full reliance on the contractor to deliver to the required standards.
57: Are there other steps that would help consumers commission residential building work knowledgeably and with confidence? If so, what are they?
Good, free, publicly available information and contracts so that consumers make informed choices.
58: Do you have any other comments about consumer knowledge and behaviour in relation to residential building work?
Current knowledge is that consumers often make their decisions solely on price. They do not have sufficient knowledge and are often not prepared to pay for professional advice until it is too late.
Part 3.2: Improved contracting practices
The proposals for improved contractual arrangements will not directly affect the Council in its role as a BCA, as it will not be a party to those contracts.
59: Do you agree that contracting arrangements between consumers and principal building contractors for residential building projects need to be strengthened? If so, why?
Yes as consumers generally have little knowledge of the building process or what quality is necessary to ensure the building work does not fail.
60: Do you agree that all contracts between consumers and principal building contractors for residential building work should have to be in writing and signed by both/all parties? If not, in what circumstances, or for what type of building projects, should written contracts not be required?
While written contracts are desirable and will help reduce disputes, Contract law also allows for verbal contracts.
61: Do you have any comments on the proposed minimum terms for contracts as set out in Part 3.2? Please indicate what, if any, information you would like to see added to or removed from the proposed list.
We agree with the proposal.

62: Do you have any comments on the proposed required disclosures for residential building projects? Please indicate whether there is any information you would like to see added to or removed from the proposed list of required disclosures.
We have no specific comments.
63: How should information required to be disclosed be provided?
We have no specific comments.
64: Are there other steps the government could take to improve contracting practices for residential building projects? If so, please indicate what additional measures should be taken.
We have no specific comments.
65: Do you have any other comments about contracting practices for residential building work?
We have no specific comments.

Part 3.3: Develop more effective warranties

Amended statutory warranties

The existence of a warranty, or any other form of contractual remedy for faulty building work, does not prevent an owner from simultaneously pursuing a claim based in tort (i.e. without the need for a contractual relationship). This is often seen in leaky building litigation, where owners pursue the builder or other tradesmen on the basis of a contractual relationship, while also claiming against other persons with whom there is no contractual relationship (such as territorial authorities) via the tort of negligence.

The apparent intent of the proposals set out in the discussion document is to enhance the prospect that effective warranties will be available to homeowners. We are conscious that the adequacy or otherwise of the existing statutory warranties is a relative unknown, however, we note that the following matters raised in the discussion document may arguably improve the effectiveness of the warranties:

a. Provisions that bring cost and duration certainty to the statutory warranties, increasing the likelihood that they will be honoured:
    i. Stratification of warranty lapse periods to reflect different types of building work (analogous to the different durability periods specified in clause B2 of the building code).
    ii. Imposition of a cap on the maximum value of work carried out under a warranty.
    iii. Specification of circumstances where a warranty will be voided. We note that the scenarios raised in the discussion document (change of use from residential to commercial, or actions/inactions on the part of an owner)

b. Provisions that expand the scope of the statutory warranties, increasing the likelihood that homeowners will rely on them:
    i. Expansion of the scope of a warranty to cover: standard of work (beyond the threshold of mere code compliance, although this cannot be reconciled with section 18 of the Act), suitability of the premises for habitation, reasonable diligence (no undue delay and completion assured), calculation of provisional sums, loss of deposit.

66: Do you agree there should be a mandatory warranty for residential building work? Please give reasons.
We support the proposal of mandatory warranties as this will help ensure buildings remain fit for purpose and stops developers structuring a deal to avoid giving a warranty.

67: Which of the options for warranty listed in section 2.3 should do you prefer? Which do you disagree with? Please comment on:

- Length
- Cap
- Coverage
- Loss of deposit and non-completion
- Circumstances where the warranty service obligation could be voided
- Projects covered

- Agree. Length needs to align with the ongoing liability for those involved in the building work including the Councils.
- Agree. Cap should align with the value of the building work and any damages, capped at the original build price
- Agree in part. Coverage needs to cover compliance with legal requirements and terms of a standard contract which could be developed similar to those used by real estate agents.
- Agree. Loss of deposit and non-completion needs to be covered so as partially completed work can be completed.
- Agree in part. Circumstances where the warranty service obligation could be voided - this needs careful consideration. Ongoing maintenance needs to covered, as is with a new car.
- Agree. Projects covered - residential dwellings including apartments

68: Should the building owner be able to renounce the offer of a warranty by a building contractor by signing a notice revoking the warranty?

Yes, so long as they also revoke their ability to sue for damages in tort. Councils should also not be subject to claims for damages or repairs beyond the extent of council involvement; that is to pick up the pieces for an informed (but incorrect) decision made earlier.

The notice revoking the warranty should include confirmation from the owner that they have sought independent advice prior to signing the revocation and the notice of revocation should become part of the record for the building work.

Issues of revocation under duress should be addressed. One solution may be to allow for a “cooling off” period similar to those in place on door to door sales contracts to enable owners to opt back in to the warranty within a set period if they have second thoughts.

69: Should developers be required by law to provide third-party warranty cover?

Yes, as this helps assure consumer protection.

70: Should owner-builders, or those who renounce the offer of a warranty, be obliged to:

- **disclose that no warranty is offered**
- **purchase a third-party warranty on sale of the building?**

Owner builders should be required to purchase third-party warranty cover if they sell within 2 years of completing building work.

After that time, so long as the purchaser makes an informed decision and cannot sue under tort for damages then we would support either proposal.

There should also be a mechanism that enables the non existence of a warranty to be recorded on a LIM.

71: Should building contractors upon retiring or winding up their company be required to transfer warranty service obligations to another party:

- **with prior notice to affected building owners**
- **with prior consent of building owners?**

Warranties when offered should be on the basis of a fully funded warranty as builders will just close up one company and start another to avoid their responsibilities.

72: Do you have any other comments on warranties?

In our view, the mandatory provision of surety in respect of statutory warranties would significantly increase the benefit of such warranties to homeowners.

Part 3.4: Surety as a financial backstop for warranties

The proposed introduction of a mandatory surety regime in support of the statutory warranties discussed above harks back to the Building Industry Commission's original call for a 'housing guarantee scheme' to ensure that dwellings are built and completed in accordance with the building code.

In our view, the mandatory provision of surety in respect of statutory warranties would significantly increase the benefit of such warranties to homeowners. For the reasons discussed in the warranties section, we consider that this would also indirectly benefit councils, which in turn enables councils to take a more appropriate risk based approach in their work.

The only potential risk to the Council arising from the mandatory provision of a surety for statutory warranties is that a surety provider, such as an insurance or bond provider, may be more inclined to pursue litigation against the other persons involved in a building project (such as the Council) via rights of subrogation than an individual homeowner. In this regard, we note the comment in the discussion document that (at page 38):

> *If surety were to be mandatory, consideration would also be required as to whether or not surety providers would be allowed to pursue other negligent parties such as building consent authorities.*

In our view, a statutory bar on the pursuit of other parties is suggested on the grounds that a surety is able to tailor its fee structure in response to the risk associated with any particular project, off-setting the prospect that it will be called on to honour a statutory warranty upon the default of the relevant developer or contractor.

It would be contrary to the intent of the warranty/surety regime if homeowners were drawn into subsequent litigation brought on by the surety, through claims for contribution made by other parties.

73: Do you agree that building contractors should have to disclose whether they have surety backing? If not, why not?
We agree with this proposal as this ensures that consumers are able to make fully informed decisions about the long term quality of the warranty being offered by the building contractor.
74: Do you agree that building contractors should be obliged by law to have surety backing? If not, why not?
We agree with this proposal as the mandatory provision of surety in respect of statutory warranties would significantly increase the benefit of such warranties to homeowners.

75: What do you see as the benefits and/or costs of mandatory surety? What is your view on when the benefits would outweigh the costs?

The mandatory provision of surety in respect of statutory warranties would significantly increase the benefit of such warranties to homeowners. We have seen with the leaky building issue that the cost of fixing poor quality homes can be billions of dollars. The benefits from providing surety must easily outweigh the potential cost of not having surety if it avoids a repeat of the weathertightness issue.

76: Do you agree with the proposed list of required disclosures about surety? Is there is any information that should be added to or removed?

We agree with the proposed list of required disclosures and in addition, suggest the value of the cover is made explicit.

77: If surety were to be mandatory, should surety providers be restricted in their ability to pursue other negligent parties such as building consent authorities?

Yes, otherwise surety providers would likely pursue other parties and this would place councils back in a similar position they are now.

However, there is a risk if the risk turns out to be significantly different than anticipated, the surety fee structure may not be sufficient to cover the risks on an ongoing basis. If this occurs, then it is unlikely that they would continue providing surety after a number of large claims are paid. In this regard, they would be similar to the insurance companies who have recently deemed it too risky (ie unprofitable) to continue to provide weathertightness cover.

78: Do you have any other comments on surety?

The costs associated with warranties and sureties are likely to be high relative to the cost of a residential dwelling and also likely to be passed on to consumers.

The New Zealand Qualifications Authority set similar consumer protection requirements on all private training establishments. What ended up as the most effective solution was the depositing of student funds into trust accounts (with the Public Trust the main trust account provider) and those funds being released as the training progressed.

In the case of residential building, the surety would be deposited in a trust account and only released after the 10 year period has passed. This would ensure that the surety is held independently so that if the warranty failed or the builder was no longer in operation, the surety would be available to meet the cost of repairs.

An alternative may be for the Department to add the costs of the surety to the

existing levies collected by BCAs, which are collected as part of the consent. This may be particularly useful if private surety providers come forth and the Department is serious about moving the liability and responsibility away from TAs to the people doing the work.

In addition, we have raise concerns about the readiness of LBPs to take on the additional responsibility outlined in these proposals. As a longer term strategy, the Government could underwrite councils/practitioners during the transition period.

Part 3.5: Better access to dispute resolution

79: Do you agree that consumers currently face barriers or problems in resolving disputes with building contractors? If so, why?
The legal process usually requires solicitors and experts because homeowners are otherwise are acting uninformed and would usually not have sufficient knowledge to successfully pursue a claim. Unfortunately, we see many cases where these costs exceed the total amount of the successful claim. The problem for most home owners is that they will not understand this until considerable amounts of dollars have been spent or they are persuaded by "experts" that their chances of success are higher than what they are in reality. Building disputes are seen by some as a cash cow and an industry has grown around this. In addition, the ability of building contractors to establish and wind up companies related to specific development projects, makes it difficult for consumers to resolve disputes as the other party is no longer in existence.
80: Do you agree that consumers need more information about options for resolving disputes with building contractors? If so, how could this be provided?
The DBH could provide guidance documents. In addition, if the surety provider option is enacted then those organisations could be instrumental in the dissemination of consumer information. Other avenues include the BCAs, libraries, Citizens Advice Bureaus and law firms. Information should be in hard copy and electronically available via the internet.
81: Do you think there are adequate services available to resolve disputes between consumers and building contractors? If not, what other dispute resolution services do you suggest?
Inadequate services are available for minor disputes which are over the value for the disputes tribunal, but less than what is financially viable to take court action. As the amount of any claim can be large any alternative arrangements will need careful consideration, including the need to ensure natural justice to all parties and ensuring any new system will be cost effective. There is the risk of setting up an alternative system, such as a tribunal, which is no quicker or cheaper than the current process through the courts.

82: What would be the characteristics of an appropriate dispute resolution service?

Independence,
Impartiality and fairness,
Credibility of the review process,
Timeliness
Accessible
Cost minimal
Plain English
Outcome rather than process driven

83: Do you have any other comments about disputes between homeowners and building contractors?

The discussion document does not set out details of any preferred alternative dispute resolution mechanism. Instead, feedback is sought as to whether such a mechanism is necessary for the building industry, and if so, what form it might take.

Avoidance of the significant process costs associated with judicial or quasi-judicial (e.g. Weathertight Homes Tribunal) proceedings is generally of benefit to all parties to a dispute.

Any process will need to take account of existing dispute resolution mechanisms, including: the determination and complaint processes available under the Act, adjudication under the Construction Contracts Act 2002, reference of a dispute to the Disputes Tribunal, contractual provisions requiring the reference of a dispute to mediation or arbitration in the first instance.

While the discussion document focuses on disputes between homeowners and builders/contractors, there may be situations where the Council has an interest in being involved in alternative dispute resolution processes. Consequently, it would be desirable if any proposed system allowed for the invitation of additional parties who may be able to contribute to the resolution of a dispute. At this stage, we do not go so far as to advocate for mandatory participation by BCAs (or other parties) in all circumstances. Whether that is appropriate will depend on the nature of the dispute resolution mechanism advanced through the reform process.

Part 4: Impacts of improving building control

84: Is it realistic to assume residential consumers, building professionals and tradespeople and building control authorities would behave differently if this package of proposals was introduced? Please comment.

This package will only result in people behaving differently if implemented in its entirety. It is dependent on the people who do the work being held accountable for that work, including taking responsibility for any failures that may result.

These proposals place a significant amount of reliance on LBPs. Our experience with those who will potentially be LBPs is that they have varying degrees of skill level and are driven by the need to make a profit to stay in business. Many also see building as a way to make a quick dollar. The drive to stay in business leads to competition on price and this results in corner cutting, a reduction in profitability and little financial backup for when something goes wrong. Many have structured their business and personal affairs so as to avoid any liability. As a result many are not ready to accept the liability that goes with less regulatory intervention.

While at a national level sectors of the industry are saying they are ready for the added accountability, our experience with designers and builders is that they are not ready. There is still a reliance on hiding behind a company structure with all their assets being held in a trust thus leaving their employees to take on the longer term liability, often unknowingly, as is the case now with some leaky building claims.

Consumers often make decisions based on advice from a designer or builder who tells the consumer what they want to hear rather than what is required. This is evidenced by the number of applications for certificates of acceptance were the owner was told by the builder they did not need a building consent or applications for CCC several years after the work has been completed (but now required by most buyers as the banks now require a CCC in order to obtain a mortgage.

85: Have the main benefits of the package of proposals been identified above and, if not, what is missing?

We support the proposals as a package although we have reservations about the lack of detail in many areas. We do have concerns regarding any self certification and believe this needs to be balanced by third party inspections at defined stages such as foundations, preline and occupation.

86: Which benefits do you expect to be most significant and why?

From a council viewpoint, the biggest benefits will come from the effective transfer of responsibility and accountability back to the building sector as presently the DBH/IANZ, adjudicators and the courts place too much reliance on BCA inspections. If this is achieved, then Councils will be able to take a more appropriate risk based approach to building consents. However, as previously noted, the entire set of proposals must be implemented as a complete package for the proposals to work.

87: Have the main costs of the package of proposals been identified above? If not, what is missing?

We have heard that the building sector is concerned that the proposals will increase costs and that insurance will be costly or not available. There is concern that the proposals will reduce costs in one area only to add even more in others.

There needs to be education about responsibilities of all those involved in the building process and some cost as to the likely rise in building consent fees if councils were to continue to bear substantial cost of litigations because they are the "last man standing". A reduction in the number of building consents will see these costs borne by a smaller number of applicants.

88: Which costs do you expect to be most significant and why?

The most significant costs are likely to be insurance costs for building practitioners, as the risks are unknown. LBPs are new, have no proven track record and so insurance companies are likely to be very risk averse with this type of cover, if they provide it at all.

Councils are likely to incur greater cost in providing information for work that may not need a building consent and with enforcement action responding to complaints from neighbours for work that may or may not be done in accordance with the Building Act. An example of this is where an owner builds a building that may be exempt building work and their neighbour complains. We will need to investigate and if work is exempt from needing building a consent we will not be able to charge for our time. Additional costs will be borne if the work is exempt from building consent requirements but does not meet District Plan rules resulting in enforcement under the RMA.

There is likely to be elements of cost transference in the building control system as costs saved in the building consent process are offset by increased costs of education, insurance/surety and upskilling of LBPs. Ultimately, these costs will be passed on to the consumer.

89: What are the main risks associated with the package of proposals?

The main risks are:

- Whether building practitioners are ready for the additional accountability and liability.
- Will there be sufficient LBPs for these proposals to be worthwhile?
- Will LBPs be able to get insurance and/or be able to provide a warranty that covers the fixing of defects when they can or will not?
- The ability to implement all the proposed changes at once, and the risk of failure if it's not implemented as a complete package.
- The workability of the warranty and surety scheme.
- The ability of consumers to really understand the consequences of some of the decisions they have to make or accept.
- Transference of costs from regulatory oversight to insurance/surety provision.
- This proposal will undermine changes made in the BA04 to ensure that compliance with code is assessed at the design/consent stage. Under the proposal compliance will be assessed at construction stage which is significantly more costly than if identified at the earlier stage.
- Lack of clear definition of accountabilities of all parties.
- LBP understanding of all Code/Act requirements.
- Homeowner/LBP lack of awareness of site specific hazards could impact on quality.

The expectation that BCAs will be able to receive plans and specifications under the proposed 'streamlined' consenting processes for 'low-risk residential building work' and 'complex commercial building work' without checking those documents is unrealistic as BCAs will necessarily be required to conduct a general review of those documents to ensure that the proposed work is within the scope of relevant licensing requirements and/or that effective quality assurance processes are in place.

The building consent process provides a vital trigger for checking compliance with the TAs District Plan and therefore the requirements of the Resource Management Act. Without that trigger we anticipate higher levels of complaints and District Plan non-compliance and a resulting need for enforcement action against homeowners who may not have been made aware of their responsibilities. Similar issues arise with heritage buildings.

Proposals are silent on non new building work such as alterations and additions, change of use and old outstanding consents.