

25 October 2018

To: **Secretariat  
Transport and Infrastructure Committee  
Parliament House  
Wellington**

## **SUBMISSION OF THE CHRISTCHURCH CITY COUNCIL ON THE BUILDING AMENDMENT BILL**

### **Introduction and background**

1. The Christchurch City Council (**the Council**) thanks the Committee for the opportunity to make this submission.
2. The Council wishes to appear in support of its submission. Council would like to appear in person and asks the Select Committee to consider holding a hearing in Christchurch, given the experience and knowledge of the particular issues in this region. Council's representatives will be the Mayor, Lianne Dalziel, or the Mayor's delegate, and Robert Wright, Head of Building Consenting.
3. The Council is pleased that the proposals in this Bill will fill some of the gaps in the legislation that were evident when it was dealing with the aftermath of the Canterbury earthquakes. At that time the 'gaps' were filled by emergency legislation urgently put in place.
4. This Bill provides a more considered response to powers that may be needed in a range of emergency situations. The Council is pleased that many of the recommendations made by the Royal Commission on the Canterbury Earthquakes, the Regulations Review Committee in its Inquiry into Parliament's Legislative Response to Future National Emergencies, and in Council's 2015 submission on the Building Act Emergency Management Proposals Consultation document, have been adopted for inclusion in this Bill.
5. The Council has some key submissions to make regarding the Bill, and several suggestions for minor improvements to the Bill. However, one major concern it wishes to bring to the Select Committee's attention are the gaps in the legislation that have not yet been resolved in relation to dangerous buildings.

### **Key Submissions**

#### ***Sections 133BU, BV and BW***

6. The Council is pleased the building management powers in new subpart 6B do not rely on buildings needing to be identified as dangerous, earthquake-prone or insanitary. The Council also supports the ability to recover the costs from the building owner when the responsible person (the controller, the recovery manager, or a territorial authority) is the one who carries out works on the building.
7. However, it believes the three sections (133BU, 133BV and 133BW) that set out the powers of the responsible person in relation to 'works' on a building need to be clarified. The three powers are:

- for the responsible person to do urgent works that are reasonably necessary to remove or reduce risks, that must be done without delay (section 133BU(1));
  - for the responsible person to do works (this power is only available for six months, and a possible one-time three month extension, after the designation comes into force), **or** direct the owner to do the works. In both cases the works must be reasonably necessary to remove or reduce risks, but be a situation when the urgency in s133BU(1) doesn't apply (section 133BV(1)); and
  - to direct the owner to do works reasonably necessary to remove or reduce risks, in situations where sections 133BU(1) and s133BV(1) do not apply.
8. Each section refers to the works being '*reasonably necessary to remove or reduce risks*' posed by the building, but there are different requirements applying when exercising the powers in each section. When the same basic test (reasonably necessary to remove or reduce risks) applies in each case, it might easily be argued the responsible person has used the wrong section; the level of urgency was not at the level the responsible person decided.
  9. Responsible persons need more certainty about which 'works' power should be used in which type of situation. While this might be achieved in guidance provided by the Ministry, examples provided in the legislation would provide more robust direction for the person having to apply these powers.
  10. The Council notes the addition of responsible persons and persons they engage or authorise, to section 390 ('*Civil proceedings may not be brought...*'), so there is some protection for responsible persons in making their decisions, provided they act in good faith. However, the Council submits these sections should be made clearer that the discretion as to which power is appropriate to use in any case lies with the responsible person.
  11. The powers might also be clearer if they are separated into the powers to direct an owner to do works and the powers for the responsible person to do the works and then recover the costs from the owner.
  12. Council also notes that section 133BV(3)(b) requires that before deciding to carry out works, or direct they be carried out, the responsible person must, among other things, '*consider alternative approaches to demolishing the building*'. This seems to assume any initial proposal for 'works' to be carried or directed will automatically be to demolish the building.
  13. However that should not be the case given one of the principles to be applied in exercising these powers (set out in section 133BN) requires the responsible person to take actions that are proportionate to the risks being managed. The Council's experience in the Canterbury earthquakes was that works to reduce or remove risks to a building might include propping the building.
  14. The Council recommends the wording of subsection 133BV(3)(b) be reviewed, either to remove this provision altogether (in light of section 133BN) or possibly to add at the start of the subsection, '*if the works proposed are to demolish the building*'.

### **Section 133BQ/BT**

15. Section 133BQ gives the responsible person power to evacuate a building, if they are '*satisfied it is necessary*' to prevent the death or injury of any person in the designated area. Section 133BT provides for a responsible person to direct an owner to provide information about their building. In some cases the responsible person may have a suspicion about a building that cannot be confirmed (to the point of being satisfied it is necessary to evacuate) until the owner provides the information requested under section 133BT.
16. The Council submits the power to evacuate a building under section 133BQ should be extended to a situation where the owner is still to provide the responsible person with information requested under section 133BT, but the responsible person has 'reasonable cause to suspect it is necessary' to evacuate the building to prevent the death or injury of any person in the designated area. (However, also see the Council's submission below at paragraphs 25 to 34.)

### **Section 133BR**

17. The powers in this section, allowing a responsible person to put measures in place to keep people a safe distance from a building, or protect a building in a designated area from being damaged, should be clarified so that, where needed, the responsible person can go on to private land to put those measures in place. It is not always possible for the safety measures to be kept on the same land as the building, or erected on public land.
18. The Council also submits that the owner of the building should be required to pay for the measures after they have been in place for more than one month, rather than three months. Building owners should be responsible for their own buildings as soon as possible, instead of the ratepayers paying to be kept safe/other buildings kept from being damaged.
19. Where the measures put in place intrude on neighbouring private land or into public space, the owner should also be required to enter into any agreements necessary with their neighbours and/or the relevant Council or the Crown, for the use of that land, until they have been able to fix or demolish the building (or the responsible person has done so under any powers in new subpart 6B).

### **Remaining Gaps in the Legislation**

20. The Council considers there are unresolved 'gaps' in the legislation. The **first gap** concerns action that can be taken **outside of an emergency event** in respect of earthquake-prone buildings. Generally, these buildings do not also fall within the definition of a dangerous building<sup>1</sup> so, even though the Council will have issued earthquake-prone building notices for these buildings, it may be some years before the buildings are remediated.
21. Council submits that the definition of dangerous building in section 121(1) of the Act should be amended so that in a high seismic risk area, as defined in section

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<sup>1</sup> In the Canterbury Earthquakes Building Act Orders in Council of 2010 and 2011, the definition of dangerous building in the Act was amended so action could be taken in respect of earthquake-prone buildings that may not have met the ordinary definition of dangerous building. The Bill will allow action to be taken on such buildings after an emergency event has occurred, but not before.

133AD of the Act, the following words: *'(excluding the occurrence of an earthquake),'* are not read into the definition.

22. That would allow Councils in high seismic risk areas to take action in respect of 'dangerous' parts of an earthquake-prone building (that present a risk in an earthquake) more quickly than other work on the building (or on the whole building if the whole building is dangerous).
23. If that submission is not accepted the Council has an alternative submission. Although a 'dangerous' earthquake-prone building is an issue for users of that building, they are at least aware of the earthquake-prone nature of the building as a result of the notice which must be placed on the building. But an earthquake-prone building that would damage a neighbouring building if the building or part of it collapsed in an earthquake, is different. There is no notice placed on the other building, and so there is no alert to users of that other building. There is no power to require anything be done on the earthquake-prone building more quickly simply because it will affect a neighbouring building in an earthquake.
24. Council's alternative submission is that powers be included in the Building Act to enable Councils to treat an earthquake-prone building (that, if it collapsed in an earthquake would affect a neighbouring building), as a dangerous building under section 121 (with appropriate amendments to subpart 6A) so more immediate remedial action can be required in respect of that building.
25. The **second gap** in the legislation is that following an emergency event there is no legal obligation on building owners to ensure their buildings are safe for occupation and use. There are better powers proposed for authorities but building owners also need to know they have responsibilities. Relying on other legislation such as the Health and Safety at Work Act is not sufficient because not all buildings will be workplaces/building owners won't always be an employer.
26. While building owners commit an offence under section 116B when they 'knowingly' use or allow the use of a building that is not safe or not sanitary, or that has inadequate means of escape from fire, many will not have the required knowledge to commit an offence.
27. Some responsible building owners (such as Councils and Government departments) have put in place thresholds, such as a certain magnitude earthquake, for engineering assessments to be carried out before they will allow reoccupation of their buildings. (For example, see this Council's suggested procedure for building owners after a significant seismic event: <https://ccc.govt.nz/consents-and-licences/earthquake-prone-buildings/what-building-owners-should-do-after-an-earthquake>.)
28. Something of this nature should be a mandatory requirement for all building owners. The Council submits there should be an amendment to section 14B, to add to the responsibilities of owners, that they must ensure the safety of their buildings following an event. The Council also recommends further provisions added to new subpart 6B.
29. In some emergency events there will be insufficient time for the appropriate authorities to fully inspect buildings, and exercise the powers proposed in the Bill, before people start to reoccupy /reuse a building.

30. It is not good enough, in certain events or for certain buildings, for the occupiers of the building to be allowed back into the building in reliance on a sticker that effectively says this building has been given a 'once over lightly'. In light of lessons learned after the September 2010 and February 2011 earthquakes, we need to be slow to allow people back into buildings, particularly in larger scale events, on these initial assessments.
31. The Council recommends that after a certain scale or type of event, for certain types of buildings there should be a blanket ban on reoccupation of those buildings/reopening those buildings to the public until the building owner has obtained a detailed engineering assessment.
32. The assessment must then be provided to the responsible person with their approval required, before reoccupation of the building. These provisions should apply automatically (in the 'set' circumstances) without the responsible person having carried out a post event assessment under section 133BP or required information under section 133BT. Evacuations or notices can be erected to prevent entry/use until the assessment has been provided
33. The decision on what type or scale of event, and which buildings it will apply to, for these new 'automatic' provisions to apply should be a decision for the responsible person to make, even if they are yet to designate an area under subpart 6B.
34. The Council would be happy to provide further assistance as to how such additional provisions might best work.

#### **Other submissions**

35. The Council supports most of the remaining proposals in the Bill, however, there are some improvements the Council suggests will further support and/or clarify the Bill:
  - **Section 133BC:** The Council recommends that section 133(2)(b) is amended to require the Minister to consult with the relevant territorial authority(ies) before the Minister designates an area under new subpart 6A, on the Minister's own initiative. (There is also a typo in subsection (2).)
  - **Section 133BL:** The Council notes the potential uncertainty with the use of the words 'necessary or desirable' in this section, as to a responsible person's decision to use CDEM Act powers instead of the powers in new subpart 6B (once a designation decision has been made). The use of this wording may have the unintended consequence of making it more desirable for a responsible person to delay making a designation decision at all, so they don't have to identify (and potentially make the wrong decision) as to whether it is 'necessary or desirable' to use CDEM Act powers instead of the new subpart 6B powers.
  - **Section 133BM:** The Council submits that prescribed notices should be prepared that can be used as both CDEM notices and notices issued under subpart 6B; if that were done there would be no need to include subsection (4) in this section, to describe what an '*equivalent CDEM Act notice*' means.

- **Section 133BT:** The Council recommends this section is amended to provide for the owner to apply for a determination from the Ministry, instead of appeal to the District Court (as to whether the direction given to an owner to provide information is unreasonable). A corresponding amendment would be needed to section 16 of the Bill (amendment to section 177). The Ministry's determinations process provides a quicker and cheaper forum for the matter to be addressed. In the event there is still disagreement the Ministry's decision can then be appealed to the District Court.
  - **Section 133BZ:** This section references notices/actions taken in respect of dangerous and insanitary buildings under subpart 6 of the Act, and earthquake-prone buildings under part 6A, and how these are affected by the exercise of any powers in new subpart 6B. While subsection (3) says a due date in an earthquake-prone building notice can be brought forward if needed as a result of the emergency powers, the same does not apply in the event of a notice issued under section 124(2)(c) of the Building Act for a dangerous or insanitary building. It may be desirable for the dangerous or insanitary building to also be dealt with more quickly or in a different way. Council submits that appropriate amendments be made to section 133BZ (and/or new section 123B) to allow for this, or to at least provide that for the avoidance of doubt powers under the CDEM Act can still be exercised if necessary in respect of such buildings.
36. The Council also recommends the guidance document prepared by the Ministry of Business, Innovation and Employment '*Managing Buildings in an Emergency*' be updated prior to the Building Act amendments coming into force.
37. While it notes there are additional offences provided for in relation to new powers in the Bill, the Council submits that there should also be corresponding infringement offences added to the Building (Infringement Offences, Fees, and Forms) Regulations 2007.

## Conclusion

38. If you require clarification of any points raised in this submission, or any additional information, please contact Judith Cheyne, (Associate General Counsel, Legal Services Unit, phone 03 941-8649, email: [judith.cheyne@ccc.govt.nz](mailto:judith.cheyne@ccc.govt.nz)).

Yours faithfully



**Lianne Dalziel**  
**Mayor**  
**CHRISTCHURCH CITY COUNCIL**