Submission

By

THE NEW ZEALAND INITIATIVE

to Parliament's Transport and Infrastructure Committee

on the

Building Amendment Bill

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Prepared by:
Eric Crampton
Chief Economist
The New Zealand Initiative
PO Box 10147
Wellington 6143
eric.crampton@nzinitiative.org.nz

1. SUMMARY AND RECOMMENDATION

In this brief submission, the New Zealand Initiative notes a few issues that need clarification in the Building Amendment Bill. We also note the opportunity to simplify emergency strengthening works on heritage-designated buildings. We recommend that the Bill proceed, but that the Select Committee consider the issues raised here.

2. INTRODUCTION AND BACKGROUND

The New Zealand Initiative is a Wellington-based think tank supported by the membership subscriptions of many of the country's top companies. We have produced two reports recently on the policy lessons from the Christchurch earthquakes.

The first report, *Deadly Heritage*, co-authored with Deloitte, looked at the intersection of earthquake strengthening rules and heritage preservation regulations that jointly place many Wellington property owners in very a difficult position. We recommended revised approaches to heritage preservation to ease the burden for those owners and to make it simpler to strengthen buildings that pose risk to the public.

The second report, *Recipe for Disaster: Building Policy on Shaky Ground*, drew broader policy lessons from the Christchurch earthquakes. It noted that the post-quake Christchurch experience could have the perverse consequence of discouraging earthquake strengthening works. Cordons around places like High Street ensured that those owners who had diligently strengthened their buildings against earthquakes saw no benefit from their investment: The risk posed by adjacent buildings meant that the government barred access. Stronger measures facilitating removal and remediation of risky building post-disaster is an appropriate response to this problem.

Overall, we support the government's efforts in this Bill. Setting the rules for post-disaster scenarios well in advance of their being needed allows for a far better process in developing those rules.

We note issues here in a few areas where our research has suggested the legislation could be improved or clarified. Overall, the Bill provides scope for substantial improvements in post-earthquake processes, but the discretion afforded to decision-makers also brings risk.

3. SPECIFIC ISSUES IN THE BILL

133BN The principles for the exercise of powers put paramount weight on protecting human life and safety, but note that actions taken should be proportionate to the risks being managed and should result in minimal restrictions. Those principles seem to be in conflict; we worry that the responsible person will see part (a), the paramountcy of protecting human life, as trumping all other considerations where it is described as "paramount". The section risks being interpreted in excessively cautionary ways.

When assessing whether roading improvements to reduce road fatalities pass cost-benefit assessment, the Ministry of Transport assesses the cost of each fatality at $4.21 million. This kind of calculation is necessary to ensure that government makes investments that do the most good in protecting lives. Spending $10,000,000 to save a life would be a tragedy if spending that $10,000,000 elsewhere could have saved 20 lives.

Consider, by way of example, an earthquake damaged building that has one chance in a thousand of collapsing during aftershocks. If the building collapsed, five people would likely die. A 1/1000 chance of five fatalities then has an expected cost of loss of life, using the current government value of a statistical life, of just over $21,000. The owner of the building

wishes to continue to use the building while shifting to alternative premises and scheduling works; the cost of loss of business continuity, to the owner, is $10,000,000.

By construction in this example, there is real risk of fatalities, but the cost of business interruption far outweighs that risk. There will be ways of spending $10,000,000 in real resource costs that would do more to improve safety and protect lives than preventing a 1/1000 risk of five fatalities.

But if the paramount consideration is protecting human life and safety, then the responsible person might invoke 133BQ requiring evacuation; 133BR requiring measures to keep people at a safe distance; and either 133BU or 133BV compelling remediation works or demolition. All those actions would be disproportionate to the scale of the risk given the magnitude of the economic cost.

If the responsible person instead takes actions proportionate to the risks being managed, and minimally restricts the ability to use and occupy property, the responsible person might simply require notice be placed on the building under 133BS.

Whether the responsible person's actions are proportionate or disproportionate depend not only on the risk imposed by the building but also on the cost imposed by barring access to the building. If the risk of building collapse is sufficiently high, the decision is simple – tear down the building; if the risk of collapse is sufficiently low, the decision should also be simple – require works but not in haste. In intermediate cases, we worry that the responsible person may weigh too heavily considerations in 133BN(a) and give too little consideration to the wishes of building owners willing to voluntarily assume risks in using their own buildings.

This matters. Business continuity insurance will insure against damage to a building that prevents access, but not against acts of Crown limiting access to a building the insurer otherwise views as functional. The costs of loss of business continuity should weigh in assessments.

We suggest strengthening 133BN(c) to affirm the right to voluntarily assume risk. There is a difference between protecting passers-by from harms about which they might be unaware, and protecting those voluntarily assuming risk. The section should be amended to affirm that building owners and their agents should always have right of access to their own property. We also suggest amending 133BN(a) to avoid excessively cautious application.

We also note that adopting liability rules may help determine whether a building and access to it should be cordoned. If the building owner in the hypothetical case above were liable for deaths caused by the building to passers-by, and required to carry insurance against the likely costs should the building collapse, the owner will prefer a cordon when the cordon is efficient and will prefer to remain open when the building's risks are relatively minor.

133BR Section (3) requires owners of buildings imposing risks on passers-by to pay for the measures put in place protecting the public against those risks after a 3-month period has passed. The intention presumably is to encourage owners to proceed with works expeditiously, providing for a grace period for repairs. We note that where measures limiting public access also impede or bar access to safe buildings, owners of those safe buildings also bear costs that can be well in excess of the cost of maintaining a fence or cordon. We note that business continuity insurance, after the Christchurch earthquakes, often did not

compensate owners where access to the building was due to an act of Council or CERA rather than due to the earthquake's effect on the insured building.

It is easy to imagine cases where stalling by the owner of a dangerous building imposes substantial costs on the owners and users of adjacent buildings who are unable to use their building, either because of the real risk imposed by the dangerous building or because of overzealous mitigation measures. It seems unreasonable that those costs should be borne entirely by the owners and users of the safe buildings imposed upon. Parliament should consider appropriate liability regimes to encourage due haste in effecting repairs.

Section (4) here provides criminal penalty for entering a building, but there seems no provision to allow a building owner to access the building under restricted conditions. In Christchurch, this approach meant that building owners were not allowed into their buildings even if they had their own search and rescue teams with them. The consequence of this approach is that owners or their agents will have strong incentives to sneak into risky buildings to rescue important computer servers or files – at great risk. Here in Wellington, I even know of one government department where a sneaky mission to rescue computer servers was undertaken despite a post-Kaikoura cordon. Approaches that prohibit and criminalise access and provide no other way of gaining access will discourage some entry, but will also ensure that any access attempted will be attempted with fewer safety measures. It is harder to be safe while being sneaky.

133BU Section (1) allows the responsible person to carry out works if the responsible person believes the works to be reasonably necessary to remove or reduce risks. We hope that the proportionality condition in 133BN will apply; it could perhaps be re-emphasised here.

Sections (3)–(5) require providing notifications to Heritage New Zealand and that the responsible person consult with Heritage New Zealand before approving or carrying out works on specified heritage-listed buildings. The section does not specify what veto rights Heritage New Zealand may have, if any. If Heritage New Zealand fails to respond to the responsible person and the Bill requires consultation, can the responsible person then proceed? Or do they need to wait for Heritage New Zealand to reply?

Parliament should make clear that works can proceed in the absence of reply by Heritage New Zealand. If Heritage New Zealand objects to demolition, insisting (for example) that the building is the country's sole example of a concrete social housing apartment tower designed by a particular architect in the 1950s and that expensive and difficult preservation works are instead necessary, can the responsible person proceed nonetheless? We would hope that the principles in 133BN would prevail, but we note that urgent demolition works in Christchurch on Colombo Street were prevented by inappropriate Council decisions around heritage amenities – and 12 people died as a direct consequence, with no criminal or civil liability falling on any of the Council officers whose views about heritage prevented the owner from proceeding with demolition. The wishes of building owners should have more weight.

Section (6) makes the owner of the building liable for the costs of the works. This is appropriate. But what if Heritage New Zealand insists on strengthening approaches that are far more costly? Urgent repair and demolition are always more expensive than works undertaken in less haste, but they can be necessary in emergencies. Undertaking those repairs to a heritage standard can be far more expensive.

We consequently suggest:

a) Emphasising that risk and cost considerations prevail over heritage considerations, and that while Heritage New Zealand may provide advice about the works, its advice need not be heeded by the responsible person;
b) That section (4) be amended to require consultation with Heritage New Zealand "at least 24 hours before" only where reasonably practicable. If a building poses imminent danger, waiting 24 hours on heritage consultation and notification seems unreasonable.
c) That provision be made for notifying the building owner where such notification is reasonably practicable. We note that it may take days to source the equipment and workers necessary to effect works, and that those delays could provide opportunity for notification and consultation with the owner of the building. As this section stands, there is no provision at all for notification of or consultation with the building owner.
d) Requiring that if the responsible person requires works more expensive than the lowest-cost strengthening or demolition because of heritage considerations, those extra costs should be borne by the Crown or by Heritage New Zealand rather than by the owner.

We also suggest that there could be value in establishing a (voluntary) registry of the insurers of substantial buildings in earthquake-prone places like Wellington so the relevant insurer can quickly be informed about urgent works in cases where the owner is difficult to find on short notice.

133BV The concerns we have about heritage consultation in 133BU, above, apply here as well – especially the concerns around who bears the incremental cost of strengthening to a heritage standard in a post-disaster environment.

In all of this, Parliament might have the view that insurance will cover things so there is no reason to insist that the Crown take on the extra costs of heritage preservation. We note that insurance premiums for historic buildings, and for historic churches in particular, have become incredibly costly because insurers expect that they will be required to repair those buildings to a heritage standard in a post-disaster cost environment. Our meetings with owners of heritage churches subsequent to our report on the costs of heritage preservation led us to believe that many of these buildings are heavily underinsured, as full insurance is far too expensive for small-congregation rural churches – they would instead insure to a capped payment that would be insufficient to rebuild to a heritage-required standard.

In the view of some owners of heritage buildings, it would be better that an earthquake destroy a building beyond repair rather than that it leave the building in a repairable state. In the latter case, rebuilding to a heritage standard would be impossibly expensive; fewer heritage restrictions would apply to a pile of rubble. These incentives could easily lead to underinvestment in strengthening relative to the strengthening that might be undertaken if the building owners could repair to a reasonable standard post disaster.

After a disaster, there will be a lot of broken old stone churches and no resource to rebuild them to a standard that heritage preservationists might expect. Allowing repair to a more reasonable standard could do a lot of good.

We suggest that Parliament may wish more generally to facilitate post-disaster reconstruction by either easing the requirements around heritage provisions in repair works, or by directly contributing towards the extra cost imposed by repairing buildings to a standard that preserves heritage characteristics.

4. CONCLUSION

The Bill forms an important part of preparing for the next natural disaster. We thank you for the opportunity to contribute to improving the Bill.