



MBIE Discussion paper – Building System Legislative Reform; Part 3 Occupational Regulation April 2019

New Zealand Registration Architects' Board Submission

Date: 14 June 2019

Executive Summary

The NZRAB advocates:

- restricted building work being extended to cover almost all buildings
- architects and other building designers being licensed by a single stand-alone entity
- restricted design work being delineated into permissible levels on the basis of complexity, difficulty and risk.

Submission

From the perspective of the New Zealand Registered Architects Board (NZRAB), the *MBIE Discussion paper – Building System Legislative Reform; Part 3 Occupational Regulation* is striking in that it pays no attention to design or designers.

Superficially, this is understandable, given that the discussion paper in part 3 focuses on the Licensed Building Practitioners (LBP) Scheme, Engineers, and Plumbers, Gasfitters and Drainlayers. However, a more careful reading suggests otherwise. This is because:

1. the LBP Scheme includes the LBP-Design classes
2. restricted building work as in the Building Act includes design
3. the quality of the design of buildings is material in terms of whether buildings are safe.

Given this, some of the proposals in the consultation document potentially have implications for architects and other building designers. We mean this in the sense that if they were adapted to include design, much could be gained.

Extending Restricted Work

The Cabinet Office circular *CO (99) 6: Policy Framework for Occupational Regulation* emphasises that a key factor when determining if occupational regulation is warranted is whether those potentially effected take on the risk of a service being provided negligently voluntarily or involuntarily. This is another way of saying that the state has a good reason to intervene when there is asymmetry of knowledge between the

practitioner and the client, patient or customer or others effected by the work being done.

This was the thinking behind restricted work in the Building Act only applying to stand-alone residential properties and small apartments. The argument was that private individuals commissioning the design and construction of a family home could not be expected to know whether the design and the construction were being done competently, whereas that expectation would be reasonable for a sophisticated developer constructing a tower block or a hotel or the like.

This made sense in the context of the leaky building crisis when the focus was on the costs to building owners. However, the Canterbury Earthquakes and the Grenfell Tower both grimly illustrated that many people can be impacted by a building failure in addition to the owner. Tenants and members of the public visiting a building cannot be expected to do due diligence on a building's design and construction before deciding to enter it.

This is why the NZRAB believes restricted building work should be extended.

On page 17, the consultation document says: "MBIE proposes that primary structure, weathertightness and fire safety systems remain the core elements of restricted building work under an updated definition." The NZRAB considers this to be too narrow.

Recent earthquakes have shown that if they fail a building's secondary elements can be deadly to occupants and passers-by. This is especially so in complex buildings. The NZRAB suggests a simpler and better approach would be for restricted work to cover all buildings apart from minor non-occupied structures as in Importance Level 1 in clause A3 of Schedule 1 in the Building Regulations 1992.

Tiered Licensing System for LBPs

The tiered licensing system for LBPs, as mooted in the consultation document, is a good idea. However, no mention is made of designers. Also, the concept of tiered licensing refers mainly to a distinction between being competent to do the work and competent to supervise the work. The NZRAB thinks tiering should also relate to levels of complexity, difficulty and risk in the work being done, i.e. who can do it.

The NZRAB believes that a tiered licensing system for building designers is highly desirable, and the best way to achieve this would be for LBP - Designers to come out of the LBP Scheme and instead to be licensed by a standalone entity that licenses all building designers, i.e. Registered Architects and those who at the moment are LBP-Design levels 1, 2 and 3.

From what the NZRAB can see, building designers are not a comfortable fit within the LBP Scheme which is primarily focussed on the trades. We believe that building designers who are currently LBPs would benefit if they were included with architects in a set of licensing arrangements that have interconnected minimum standards, overlapping professional development opportunities, overlapping accountability mechanisms, and interconnected ethical obligations. A capacity to supervise, as described in the consultation document, could also be factored into these arrangements.

A more subtle benefit could be that some long-standing and regrettable rivalries and even animosities between architects and other building designers would be remediated over time and more of a shared culture would emerge.

The link between extending restricted work and tiered licensing

From the NZRAB's perspective, extending restricted work and tiered licensing are linked and indeed both are needed together to gain the maximum benefit.

Thus the NZRAB advocates that the extension of restricted work in regard to design include a sectioning of the restricted work into various levels of complexity, difficulty and risk, so that only architects could do the most complex, difficult and risk laden work, while the other levels would be restricted to work with lower levels of complexity, difficulty and risk.

Critics of this may say that some LBP designers are fully competent to design buildings that are complex, difficult and risk laden. The NZRAB accepts this.

For that reason, were such a reform to occur, a rationalisation would be required, so that highly competent designers could become architects without too much difficulty. Active arrangements for this would be required during the establishment phase.

Engineers and Safety Critical Work

The consultation document proposes that Chartered Professional Engineers be replaced by a voluntary statutory certification scheme and that separately there be a set of licensing arrangements around engineers who are competent to do specified safety critical work.

The NZRAB sees merit in applying a similar criterion to architects, so that through an assessment process those architects competent to do safety critical design work for complex buildings would be specifically licensed and then only they could do that work.

There would also be merit in looking at how much those skills and knowledge overlap with the skills and knowledge required of engineers doing equivalent safety critical work so that some licensing arrangements might overlap or be shared.

Other matters

Sector wide institutional arrangements

On page 8, the consultation document posits possible future work by MBIE on a pan-sector approach to disciplinary procedures. The NZRAB supports this and favours the establishment of a Building Practitioners Disciplinary Tribunal along the lines of the Health Practitioners Disciplinary Tribunal. The NZRAB is currently reforming its complaints procedures so that most complaints will be dealt with using low-cost inquisitorial processes, but for a minority of complaints, where the stakes are especially high, a formal adversarial disciplinary process will still be required. In this regard, access to a professionally operated pan-sector tribunal would be especially helpful.

The NZRAB says this in the context of a broader view that occupational regulation in the building sector should be reorganised to match the institutional arrangements that currently apply in the medical sector.

Thus, in the building sector there would be:

- a single occupational regulation statute
- standalone registration entities that set professional standards, make registration assessments and decisions, administer public registers, and investigate complaints
- a single disciplinary tribunal to conduct hearings into serious complaints.

In 2015, the government of the day was reviewing occupational regulation in the building sector and in response the Association Representing Consulting & Engineering in NZ (ACENZ), the Institution of Professional Engineers New Zealand (IPENZ – now ENZ), the New Zealand Institute of Architects (NZIA) and the NZRAB prepared a joint position paper on these matters proposing arrangements as described above, which is attached (attachment 1). Engineering New Zealand in its submission has drawn attention to this reform proposal too, and we concur with their comments.

We note also that in the medical sector the overarching legislation makes it relatively easy to regulate additional occupations should that be required – possible examples in the building sector being Project Managers, Quantity Surveyors and Building Consent Authority Inspectors.

Building Levy

The Consultation document proposes that the Building Levy rate should be reduced from \$2.01 to \$1.50 per \$1000. The NZRAB believes this would be a mistake. Rather we would see the levy retained at its present level and the funds utilised more widely to extend and grow capacity in the sector.

The current definition of what the Building Levy Fund can be used for is too narrow. This has resulted in a fund surplus which cannot be tapped into, despite the building industry having many issues which need to be resolved. This has led to frustration among building industry stakeholders, who do not have the financial capacity on their own to undertake research and other initiatives and programmes to push the sector forward. Thus, the proposal that the definition be broadened to wider 'building sector stewardship' is supported.

The building industry needs to have access to a funding pool that can support meaningful research, initiatives or programmes that promote better outcomes for the industry and/or lift performance and solve industry issues. The existing Building Levy should provide that funding.

Risk and Liability

The New Zealand Institute of Architects (NZIA) in its submission supports the proposal to require a guarantee and insurance product and also the proposal to leave the liability settings for Building Consent Authorities unchanged. The NZIA submission also notes the limitations of these measures and suggests further refinements. This is supported.

Conclusion

The MBIE consultation document on page 26 says of the proposed reforms: “The public will benefit from better quality building work and safer buildings.” The NZRAB concurs with this sentiment.

Indeed, we would argue that occupational regulation should always be about more than just protecting the public from incompetence, essential thought that is. The NZRAB asserts that occupational regulation should also enhance and extend the contribution that regulated practitioners make, both to their immediate clients or customers, and to society as a whole.

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If further information or any clarification is required, please contact Paul Jackman, CE NZRAB at 04 9388 177 or paul@nzrab.org.nz

Attachment 1

Association Representing Consulting & Engineering in NZ (ACENZ)

Institution of Professional Engineers New Zealand (IPENZ)

New Zealand Institute of Architects (NZIA)

New Zealand Registered Architects Board (NZRAB)

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Joint Engineers and Architects Position Paper In Regard to the Building Sector Occupational Regulation Review 2015

Executive Summary

The Government is reviewing occupational regulation in the building sector.

In response, ACENZ, IPENZ, NZIA and NZRAB favour reform which would see occupational regulation in the building sector organised in a similar way to occupational regulation in the health sector. Thus there would be:

- a single occupational regulation statute
- standalone registration entities that set professional standards, make registration assessments and decisions, administer public Registers, and investigate complaints
- a single disciplinary tribunal to conduct hearings into serious complaints.

This would ensure improved consistency, and enhanced accountability so the public can trust and have confidence in competent practitioners, while still allowing for self-regulation.

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Background

The Government has announced that occupational regulation in the building sector is to be reviewed. The review is to span the institutional arrangements that apply to the occupational regulation of Licensed Building Practitioners (LBPs), Electrical Workers, Plumbers Gasfitters and Drainlayers, Registered Architects, Chartered Professional Engineers, Registered Engineering Associates and, possibly, other occupations in the sector.

To contribute to the review, the entities that represent and register engineers and architects have undertaken a first-principles review of occupational regulation in the building sector in terms of best advancing the public interest.

Their conclusion is that the institutional arrangements that apply to occupational regulation in the building sector can be materially improved, and to achieve that suggest the following.

Principles

Our work on this issue began by considering whether or not occupational regulation in the building sector is still required at all, tested against the government's Policy Framework for Occupational Regulation.¹ The conclusion reached was that occupational regulation is still required, given:

- the risk to the immediate consumer (client, owner, resident, occupier, passer-by etc.) of significant and irreversible harm (physical, psychological and financial) if services in this sector are provided incompetently
- the broader risk to the public in general of significant and irreversible harm (physical, financial and productivity loss) if services in this sector are provided incompetently.

A brief was then developed as to what occupational regulation in the building sector should deliver. In summary, this brief was that any new institutional arrangements should:

- protect the public
- enable people to trust and have confidence in competent practitioners from regulated occupations
- contribute to improving the quality of the built environment over time
- encourage the right people to do the right work throughout the sector
- raise standards and encourage collaboration between practitioners
- be simple
- be extendable and therefore potentially inclusive of the sector as a whole
- be flexible, so that within statutory parameters registration entities can determine how best to carry out their functions
- provide clear accountability for practitioners and former practitioners
- promote synergies and encourage life-long learning
- preserve the identities of the regulated occupations
- not stifle innovation in the sector
- be at least cost neutral to NZ Inc. and practitioners
- build on the intellectual capital of the registration entities currently providing occupational regulation in the sector
- provide for performance auditing and robust reporting.

Proposal

Currently occupational regulation in the building sector is derived from multiple statutes with different histories and different requirements, reflecting the contexts and concerns that applied when they were enacted.

These statutes include:

- Building Act 2004, part 4
- Electricity Act 1992, parts 10 to 13
- Plumbers, Gasfitters, and Drainlayers Act 2006
- Registered Architects Act 2005
- Chartered Professional Engineers Act 2002
- Engineering Associates Act 1961.

¹ <http://www.dpmc.govt.nz/cabinet/circulars/co99/6>

In order to meet the brief outlined above, it is suggested that these statutes should be repealed either entirely or where they apply to occupational regulation.

Instead, a single statute would be enacted which would cover occupational regulation in the building sector as a whole. This would deliver the following:

- The single statute would include a schedule that names the occupations to be regulated and the respective registration entities that would regulate each profession and trade.
- The Minister, with input from the regulated occupations, would make appointments to the governance boards of the respective registration entities where applicable.
- Each of the registration entities would be tasked with the following:
 - setting the competence standards for entering into and staying in the regulated occupation
 - creating and operating the assessment systems used to determine who may enter and stay in the regulated occupation
 - operating a register and communicating with the public in regard to how that occupation is regulated
 - operating its own governance arrangements as specified by the Act, including reporting
 - receiving and conducting initial investigations into complaints against members and former members of the regulated occupation and resolving complaints where the issues involved are minor
 - where an initial investigation into a complaint reveals that there is a case to answer but the matter is of modest significance, dealing with it as a dispute resolution and/or an opportunity to help the practitioner avoid similar problems in the future
 - where an initial investigation into a complaint reveals that there is a case to answer and the matter is substantial, laying a charge before the disciplinary tribunal (referred to below)
 - providing the regulated occupation with guidance derived from complaints received and disciplinary decisions taken.
- A disciplinary tribunal would conduct hearings and determine fault and penalty in regard to serious complaints against members and former members of the regulated occupations.

Reform of occupational regulation in the building sector would also be an opportunity to better link relevant professions with relevant technical practitioners. For example, a single registration entity should regulate engineers and engineering technicians and a separate single registration entity should regulate architects, architectural designers and architectural technicians.

The statute would stand alone and complete unto itself, so that the registration entities would NOT have their own divergent regulations.

This proposal is derived from and modelled in principle on the institutional arrangements that apply to occupational regulation in the health sector under the Health Practitioners Competence Assurance Act 2003.

A schematic of the proposal is attached (attachment 1).

Benefits

The benefits of this reform over the current situation would include the following:

- The Minister and policy makers would only have to deal with one statute when making decisions in regard to occupational regulation in the building sector.
- Inconsistencies between the current legislation would be eliminated.
- Where it is currently lacking, ministerial input and accountability would be improved by the Minister appointing the governance boards of the registration entities, and more rigorous reporting requirements.
- The registration entities in the sector would be spared from the expensive and convoluted process of drafting and seeking rule changes.
- Communities of interest would be encouraged between professionals and related technicians which would encourage upskilling, stair-casing, and thus productivity gains for NZ Inc.
- The registration entities would have a much stronger incentive to share information and cooperate than at present, given that they would all be operating under the same legislation (e.g. legal opinions in regard to statutory interpretation would be worth sharing).
- The sector would have a properly-resourced, professionally-managed independent disciplinary tribunal holding practitioners and former practitioners to account.

At the same time the strengths of the current arrangements would be retained, most notably the strong identification and willingness to voluntarily contribute that many practitioners have with their individual registration entities. IPENZ and the NZRAB benefit substantially from the input of practitioners “giving back” to their professions.

Issues

The following are observations in regard to some consequential issues.

The statute and the system it would create would have to accommodate registration entities that are standalone (e.g. NZRAB, Plumbers Gasfitters and Drainlayers Board), registration entities that are linked to entities that engage in professional representation (e.g. IPENZ, Registered Engineering Associates (REA)), and registration entities that operate inside the core public service (e.g. LBP Scheme, Electrical Workers Registration Board).

The statute and the system it would create would have to accommodate occupations with different cultures and behavioural expectations. It would also have to manage the fact that many chartered engineers work in areas of the economy outside the building sector. The same applies to many electricians, plumbers, gas fitters and drain layers.

The issue of whether particular kinds of building sector work should only be performed by specified occupations (e.g. restricted work) is a separate policy issue and probably, though not inevitably, would be managed through other legislation.

Representatives of ACENZ, IPENZ, NZIA and NZRAB are available to discuss this proposal as required.

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Attachment 1:**Graphic of proposed institutional arrangements for occupational regulation in the building sector**

This graphic shows the proposed new arrangements as they would apply to each registration entity in the sector, i.e. for each entity a shared statute, a shared disciplinary tribunal, and all other elements stand-alone.

