RiskSolutions Consultancy Pty Ltd

Independent Review of Section 363B of the Building Act 2004

A Report for the New Zealand Department of Building and Housing

May 2010

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1 Introduction

1.1 Background

Legislation

The Building Act 2004 ["the Act"] replaced the Building Act 1991. Like its predecessor, the Act regulates building work with the principal purpose of ensuring that buildings of all types will be healthy and safe for those who use them. At its broadest, the general scheme of the Act is that

- building work must not commence without a building consent,
- it must be undertaken in accordance with the terms of the consent,
- upon completion, it must be certified as conforming with those terms,
- any active safety systems required by the consent, must be kept in good order throughout the life of the building.

For some buildings, certain provisions of the Act are only able to ensure the health and safety of occupants if there is also compliance with other legislation - particularly the Fire Safety and Evacuation of Buildings Regulations 2006 - made pursuant to the Fire Service Act 1975. In such buildings, one piece of legislation effectively controls the physical characteristics of the building; the other regulates human behaviours. Alone, neither type of requirement can ensure safety.

Both the past and present Building Acts include potent remedial powers that can be applied to any buildings that are found not to be safe or healthy, irrespective of when the building was built. If such buildings create an immediate threat, ongoing occupancy can be stopped until the threat is remediated.

Despite their potency, the value of these latter provisions depends upon detection of unsafe and unhealthy buildings. Express provisions (which are discussed later) have therefore been included in both the Building Act and the Fire Service Act which provide both the power and opportunity for detection and reporting of unsafe buildings.

From the foregoing, it will be seen that risk to the health and safety of occupants is controlled through a matrix of provisions which depend on *the combination* of the provisions of the Building Act and the Fire Service Act. Although this legislative inter-dependency is not expressly acknowledged in the Building Act, it is nevertheless, of fundamental importance to the health and safety of the occupants of many buildings – particularly, as will be seen, those buildings to which this review applies.

This review

The review relates to risks to health and safety arising from public use of certain buildings constructed or commenced between 2 July 1992 and 31 March 2004 which, by virtue of not having been certified by 31 March 2010, became subject to offence provisions of the Building Act 2004 ["the Act"] from that date.

The buildings concerned are those that are intended for public use or which are being used by the public. The meaning of those terms is not defined in the Act.

Both the threat of prosecution and the coercive effect of hefty and ongoing fines appear intended to prevent faulty building work being a source of risk to health and safety of "public" occupants in these buildings. As noted already however, faulty building work is not the only source of risk to occupants. Even where building work is not faulty, occupants may also be at risk if

- active safety systems are not in good order,
- other changes have occurred which have not been subject to post completion scrutiny, or
- an adequate evacuation scheme, where required, is not in force.

In many cases, these sources of risk will be profoundly more significant than many types of faulty building work. That is especially the case in buildings to which the offence provisions apply but not only to that group of buildings. Similarly, the relative importance of the offence provisions as a form of risk control will depend upon the availability and effectiveness of the other forms of control outlined in the previous section.

Those other forms of control include

- the powers of building consent authorities (generally the territorial authority) to monitor building work as it progresses
- the powers to intervene if buildings are dangerous, unsanitary or earthquake prone and the exercise of associated powers which can lead to detection of such conditions
- the powers of the territorial authority (and the public) to monitor ongoing maintenance of active safety systems
- the powers to require approved evacuation schemes where these are required
- other offences

The review has therefore, quite appropriately, required consideration of the effect of the offence provisions which came into effect on 31 March this year on the overall risk, but taking into account other forms of control.

The offence provisions to which the review is addressed are set out at Section 363 of the Act. These apply to buildings built since the Act came into force however Section 363B was inserted by amendment of the Act in 2005 to extend those provisions retrospectively to the above described buildings (i.e. those, broadly speaking, built between 1992 and 2004).

The purpose of the review is to consider whether the offence provisions are an "efficient and effective" means of controlling the risk to human life and safety from faulty building work in the buildings to which s 363B refers.

Risk

The contemporary meaning of "risk" as specified in the Australian and New Zealand Standard on risk management[1] is *effect of uncertainty on objectives.* In any particular case,

[1] AS/NZS ISO 31000:2009 *Risk Management – Guidelines and Principles*

the nature and level of risk takes into account the sources of risk and associated uncertainties, as well as controls that modify the risk (and any uncertainties associated with those controls).

The Building Act establishes its "objectives" at Section 3 which reads as follows:

> The purpose of this Act is to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings, to ensure that—
> (a) **people who use buildings** can do so safely and without endangering their health; and
> (b) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of **the people who use them**; and
> (c) **people who use a building** can escape from the building if it is on fire; and
> (d) buildings are designed, constructed, and able to be used in ways that promote sustainable development

Emphasis has been added to highlight that so far as the protection of people are concerned, the interest of the Act concerns "the people who use buildings". Notably, however, s 363 does not apply to either all buildings or all people who use buildings.

Meaning of "public"

Section 363, is one of several sections prescribing offences relating to building controls. Its title is concerned with "*Protecting safety of **members of public** using premises open to **the public** or intended for **public use***". In general terms, it makes it an offence to allow the public to use a building for which

- A building consent is required but has not been issued
- A building consent has been issued but there is no code compliance certificate or a relevant certificate for public use

Emphasis has been added above to the expressions "the public", "members of the public", and "public use" as used in s 363. These expressions are central to defining the offence, but are not defined in the Act. Whatever their meaning, they were presumably intended to prescribe both a sub-group of persons in buildings (i.e. "public" persons) and a sub-group of buildings (those intended for "public" use).

As will be discussed, if it is assumed that "the public" does not include (as has been suggested by some) persons for whom the building concerned is their place of work, then even though the risk may be identical or even very similar for such persons, it would not be an offence for such persons to be in a building that has faulty building work.

There is no comparable offence to that created by Section 363 for buildings used by people who are not "members of the public" or for buildings which are not intended for public use. These sections therefore probably do not apply to single family dwellings.

Effect of s 363B

Section 363B specifies that from 31 March 2010, the offence created by s 363 (which was inserted on 14 April 2005 and which is punishable by a fine of up to $200,000 with a continuing daily penalty of $20,000) also applies to building work which either commenced before 31 March 2005 or was subject to a building consent issued before that date unless a certificate of acceptance has been issued by 31 March 2010.

Section 363 does not apply to building work which commenced before 1 July 1992 whether or not it was completed by that date.

Section 363B is thus retrospective in its effect. It defines an additional group of buildings to which the provisions of s 363 apply. Of itself, it does not control risk. Any control effect for those buildings comes from s 363 which as noted already, depends for its actual and relative effect on the effect of other controls.

1.2 Terms of reference for the review

The purpose of this review[2] is to advise the Department of Building and Housing as to whether Section 363B provides an "efficient and effective means of identifying and addressing uncertified building work undertaken prior to the enactment of the Building Act 2004 with the potential to result in harm to the health and safety of public users".

The reviewer is required, *inter alia* to consider

- the risk to public health and safety
- other provisions of the Act
- the manner of application and intended application

and to advise on

- the likely nature and materiality of the risks to public health and safety likely to be associated with uncertified building work undertaken under the previous Building Act 1991
- any issues likely to be associated with the implementation and ongoing operation of S 363B, and the implication of these issues for the overall effectiveness and efficiency of the provision in mitigating risks to public health and safety of uncertified building work undertaken under the Building Act 1991
- the effectiveness and efficiency of S 363B and whether there alternative means of addressing the risk such as those designed to address dangerous and unsanitary and earthquake prone buildings might be more effective

and to recommend any changes to s 363B or other sections of the Act necessary to provide and effective and efficient means of addressing risks to public health and safety of uncertified building work undertaken under the Building Act 1991.

[2] The full terms of reference are appended at Annex A

Although the terms of reference did not expressly refer to other legislation (such as the Fire Safety and Evacuation of Buildings Regulations 2006) on which achievement of the purposes of the Act in part depends (particularly in respect of ensuring the safety of persons in buildings), appropriate consideration has been given in this review to those inter-dependencies and their alignment. That has been necessary because of the inherent role of those provisions in determining risk to the health and safety of occupants and, therefore, the effect of any changes to s 363B on the level of risk.

In accordance with the terms of reference the review involved engagement with a range of stakeholders. These included officials of the Department of Building and Housing, building officials from a representative sampling of territorial authorities, senior officers of Standards New Zealand and the New Zealand Fire Service Commission.

2 Conclusions

The following are the main conclusions. Recommendations that reflect these conclusions are set out in Section 5.

a. The total number of buildings in New Zealand for which S 363B creates an offence is unknown but is estimated by extrapolation of data from a sample of territorial authorities at 15,000. For any individual territorial authority (i.e. Building Consent Authority) the range may range from less than 100 to several thousand and.

b. Neither the number of buildings for which S 363B creates an offence or the fact that an offence exists in the case of a particular building, is a useful indicator of the level of risk to those who use the building – "public" or otherwise. That is because

- it appears that the most common reason that certification has not occurred relates to administrative shortcomings by the owner in failing to apply for certification or failing to provide necessary documentation, rather than technical defects in the building which could lead to harm
- the general supervisory functions and powers of building inspectors – which are typically exercised during construction using a pragmatic, but risk-based approach have the effect of providing substantial (but certainly not complete) assurance that features of the building construction that are critical to health and safety are in accordance with the consent
- it is not just the construction of the building on which safety depends; there is also a strong dependency on other controls including compliance schedules and approved evacuation schemes as required by the Fire Service Act. Certification does not provide evidence that those controls are operating as intended

d. As a consequence of both a. and b. it appears unlikely that many, if any, territorial authorities intend to commence blanket prosecutions of the owners, occupiers or controllers of those buildings for which S 363B creates an offence.

The most common reasons given for not pursuing prosecutions are -

- that this would divert scarce resource with little commensurate improvement in risk in the subject buildings, and
- that doing so would divert resources from other more effective activities during construction of other buildings and the monitoring of compliance with building warrant of fitness provisions, and thus have the actual effect of either increasing risk or increasing compliance costs.
- the availability and potency of other powers (both in the Building Act and other legislation) to address buildings that are dangerous, earthquake-prone or insanitary or which require an approved evacuation scheme but do not have one.

e. Despite building safety depending on controls under both the Building Act and the Fire Service Act operating in unison, there is poor alignment both between the controls and between the agencies responsible for their exercise. Section 363B and s 363 do not acknowledge this interdependency and thereby create a false sense of assurance as to the level of safety. This alignment should be improved and the interrelationship expressly acknowledged. Doing so is unlikely to affect compliance costs but would require legislative adjustments.

f. The stated purpose of the Act is to protect all persons who use buildings. The vulnerability of those persons who use uncertified buildings built under the previous Building Act who may be characterised as "public" is essentially indistinguishable from those persons who use such buildings who are not "public".

To the extent that s 363 modifies risk, its restricted focus on those parts of a building falling within the undefined expression "public use" and those building users who are "members of the public" leaves at risk others who use buildings that are not certified whether or not these were commenced or constructed in the period of interest from 1992 to 2004. There is no rational basis for this distinction which should be changed.

g. In the light of the foregoing, Section 363B is not an effective means of revealing whether there are risks to the public arising from uncertified building work undertaken under the Building Act 1991 or whether the public are at risk in such buildings, nor is it an efficient means of controlling such risks. Other controls are potentially more effective and efficient and are also able to address sources of risk other than faulty building work.

3 The Risk

3.1 Risk to whom?

Sections 363 and 363B of the Act are concerned with protecting the safety of members of the public when using buildings open to the public or intended for public use. The meaning of "members of the public" and "public use" is not defined although the statute makes clear that public use may include use which involves payment of an admission fee.

These provisions were inserted in response to the 1995 report " *Commission of Inquiry into the Collapse of a Viewing Platform at Cave Creek Near Punakaiki on the West Coast*"[3] and in particular, to the following recommendation in that report:

> Recommendation
> That, after wide consultation with all of appropriate interested parties, consideration be given to amending Section 80 of the Building Act[4] so as to make it an offence to use, or permit to be used, any structure which is for public use and
> (a) For which a building consent has been issued, until a code compliance certificate is issued and
> (b) For which a building consent is required but for which no consent is held.

It is not clear whether in relating his recommendation to "structures" (rather the term "building" which is used by both the earlier and present Building Act) the Commissioner was intending to limit his recommendation to buildings such as the viewing platform which are not buildings in the ordinary sense.

In any event, the report of the Inquiry makes clear that this recommendation reflected a submission made to the Inquiry by the New Zealand Law Society. That submission, in proposing these special requirements for public use of "structures", did not explain why, despite the Building Act 1991 (the Act then current) in its statement of Purposes and Principles (s 6) being concerned with the wellbeing of "people" [Building Act 1991, s 6(2)(a)], the Society was only concerned that it might be "the public" that was exposed to hidden risk.

The limitation of assuming that "the public" are at risk in some distinctive way was tragically highlighted by the Cave Creek incident because one of those who lost their life was an employee of the Department of Conservation which owned the platform. Presumably, that deceased would not be classified as a member of "the public".

It can be inferred from the detailed findings of the Inquiry of the direct cause of structural failure, that the inherent design weaknesses of the viewing platform would have been no

[3] The collapse of the Department of Conservation's Cave Creek platform resulted in the deaths of 14 of the 17 people who had been standing on it at the time. No building consent for the platform had been sought or issued. The platform had major design and construction shortcomings.
[4] The Building Act referred to was the Building Act 1991, subsequently replaced by the Building Act 2004.

more obvious to the deceased DoC officer than they would have been to the 16 visitors who accompanied him on to the platform – 13 of whom also died and 4 of whom were seriously injured. And it can be assumed that those weaknesses would have been no less lethal had it been 17 DoC officials rather than 1 DoC official and 16 members of the public who had ventured on to the platform that day.

The Law Society made a similar submission to the Select Committee which considered the Bill to replace the Building Act 1991. Again, it did not explain why it differentiated between the interests of "the public" and that of other building users, particularly given the purposes of that Act.

3.2 Intent of the Act in relation to meaning of "public"

Officials of the Department of Building and Housing acknowledge the absence of a definition of "the public", "public use" or "members of the public" in the Act. Those officials spoken to suggested that an appropriate interpretation in this context, is that "the public" refers to persons in a building or part of a building who -

- do not own the building, or
- are not employed in the building, or
- are not in the building undertaking work as a contractor.

Section 362A provides that s 363 (and therefore s 363B) relates only to "premises" (not defined) that are either all, or parts, of a building that are "intended to be open to the public" or "are being used by members of the public" albeit that such use might involve a fee or be available only at certain times.

Officials noted that some areas of a building to which the public would not normally have access (for example, due to the presence of security barriers) or were not "intended" for public access, could have, nevertheless (per the criteria above) members of the public present by invitation.

At very least, therefore, there seem to be grey areas as to who is the public, what areas are intended for their use and (using the officials' criteria) what is the status of persons who are not owners, employees or contractors and yet, by invitation, are in parts of a building not intended or available for public use and what is the status of such parts of the building.

Another approach to determining the intent of s 363 *et seq* is to consider the issue from the perspective of risk. Did Parliament envisage that there was some risk associated with buildings used by the public or intended to be used by the public, which was distinctive and thus warranted specific provisions? The next section therefore considers potentially relevant sources of risk[5].

[5] The expression "source of risk" is used here with the same meaning to that given to the definition of "Risk Source "in AS/NZS ISO 31000:2009 – i.e. "element which alone or in combination has the intrinsic potential to give rise to risk"

3.3 Risk from what?

When the sources of risk to persons who are in buildings (other than single family dwellings) are considered, there is little to differentiate how those sources act upon persons generally, and persons who are members of the public (assuming the definition of "the public" as suggested by officials).

The principal sources of severe risk to the health, safety and wellbeing for all persons inside a building are:

- building collapse
- building systems that are hazardous (for example, elevators)
- conditions resulting from a fire (such as heat and smoke) which prevent occupants escaping to safety if it is necessary for their safety to do so
- insanitary conditions due particularly to hazardous air quality or water quality
- presence of hazardous materials (such as toxic or explosive gas)

These are not the only sources of risk to occupants but are distinctive because they are the sources that could result in the injury or death of many people – sometimes, even, (as was the case of the Cave Creek platform) *all* of the people in "the building" (as that platform was properly characterised).

Most building occupants, whether or not a member of the public, are unable to recognise the features of a building that generate such risk sources (for example, defective design, intrinsic properties of the building as constructed or a defective safety system). Nor are such people able to recognise or evaluate features that serve as risk controls[6].

Even if occupants had the technical ability to assess risk arising from these sources (which most don't) or to assess the effect of particular controls, they are generally precluded from doing so as most of the features of both the risk sources and any risk controls are hidden from view. For example, reinforcing steel is embedded in concrete; sprinkler pipes are usually located above ceilings; framing timbers are behind walls; and safety controls for potentially hazardous plant (lift machinery or air conditioning chillers) are in areas to which access is restricted. And on the Cave Creek platform, the nails in the structural timbers that should have been bolts were concealed by the decking material.

With one exception, perhaps, the five sources of severe risk listed above neither arise from the presence of persons who are "the public" nor are unique to buildings or part thereof that are intended for use by the public.

The possible exception, which was suggested by some of those spoken to in the course of the review, was that risk might be higher for "the public" by virtue of the assumed lack of familiarity of the public when they are in such buildings or the lesser degree of control over

[6] The expression "risk controls" is used here (and elsewhere in this report) with the same meaning to that given to the definition of "control" in AS/NZS ISO 31000:2009 *Risk Management – Principles and Guidelines* – i.e. "measure that is modifying risk"

the public (than, for example, employees). The common (and only) example given of how such unfamiliarity or lesser level of control had a bearing on risk, was unfamiliarity with the location of exits should it be necessary to escape from the effects of fire.
However, this "familiarity" factor has fundamental limitations if it is relied upon to explain why s 363 applies only to the public. For example -

- For sources of risk other than the presence of lethal smoke, neither the public nor those who are not the public are either advantaged or disadvantaged in detecting the presence of the risk source or are any more or less vulnerable to its effects. (For example the presence of *legionella pneumophila* can only be detected by laboratory analysis and to the extent that its effects are discriminatory, are more likely to be experienced by smokers – whether or not members of the public - rather than non smokers.)

- Occupants who are not "the public" may or may not be familiar with the exit system. For example, an employee who normally works on one floor of a multi-floor tenancy may not be familiar with the location of the exits when visiting another floor. The same might apply in a large multi-functional building such as an airport terminal where an employee's security card might give access to all areas and not just the area in which the employee would normally work. The often perfunctory induction procedures now common for visiting contractors when entering a building will usually leave them with little more familiarity than "the public" would have.

- Such risk as might arise from unfamiliarity is explicitly controlled by the Building Code which requires that exits and other emergency features are sign-posted in prescribed ways. Additionally, the Fire Service Act 1975 requires "relevant buildings" to have an approved scheme for evacuation that complies with the Evacuation of Buildings Regulations 2006. (Such buildings are explicitly defined by s 21A of the Fire Service Act but generally are those which either have many occupants or the occupants are of a type likely to be disadvantaged in the event of a fire.) Such schemes must have regard to the actual nature of building occupancy and will be different for buildings in which the "public" is present in large numbers than for, say, an office.

It is appropriate to note here, although it is discussed in greater detail later, that safe evacuation of occupants is dependent on the combination of features of the building and effective evacuation procedures. One without the other will not ensure safety.

It is concluded from the above, that s 363 notwithstanding, the risk to which the public are exposed in buildings, is not materially different to the risk for all building users. And that risk is not wholly dependent on the adequacy of building work.

The effectiveness of s 363 (and other aspects of the building controls regime) is therefore considered on this basis.

3.4 Progressive occupancy

Some building work that is the subject of a single building consent is completed progressively – for example, successive fit out of floors of a multi-storeyed building – and the owners seek economic or functional use of the completed area.
However, until the whole building is completed, it is not possible to issue a Code Compliance Certificate for the work. Under the Building Act 2004 as originally enacted, any such use by "the public" of a building constructed under the Act before a certificate had been issued would have amounted to an offence.

This situation (which may have rendered some refurbished parts of the Parliament buildings and a major new hospital unable to be occupied) led to amendment of s 363 and the insertion of s 363B which provided for a certificate for public use to be issued in situations where the territorial authority deemed the "premises" or part thereof could be used by the public safely even though a Code Compliance Certificate had not been issued.

An important element of the provisions for a certificate for public use is that issuance can be subject to conditions. This provides the territorial authority with the power to assess and treat (through imposition of conditions) any risks to the safety of the public which arise from the incomplete building work not conforming in all respects with the Building Consent.

Aside from the obvious limitations in relation to the meaning of "public use" (and related expressions) that have been discussed already, an obvious limitation of s 363B is that this legislative device is not available to both permit and control progressive occupancy of buildings to which the public does not have access or are not intended to have access. As noted already, there is no discernible difference in the risk to persons who may be "public" or any other occupants.

On the other hand, the issue of progressive occupancy will become increasingly less significant for buildings to which s 363B refers. That is because six years on from when the last of those buildings to which it applies was commenced, there are probably very few which are not complete and thus available for full occupancy. There may, however, still be some.

3.5 How many buildings became liable to prosecution at 31 March 2010?

It is not possible to say how many buildings in New Zealand became liable to prosecution on 31 March 2010 by virtue of not having an appropriate form of certification of building work commenced or completed between 2 July 1992 and 31 March 2004.

It is evident from speaking to experienced territorial authority building officials, that many – and probably the great majority - of the buildings in this category are there because the building owner has not applied for a code compliance certificate rather than because the building work is not in compliance with the consent.

There is no central register of buildings to which s 363B applies that do not have one of the forms of certification contemplated by s 363. Hence, there is no central register of

- buildings that were constructed or commenced between 2 July 1992 and 31 March 2004,
- buildings constructed or commenced during this period that are used by the public or intended to be used by the public, or
- buildings constructed or commenced during this period that are used by the public or intended to be used by the public but do not have certification.

It should be noted that there is no requirement in the Building Act for such a register to exist or for the numbers of buildings in each category to be collated or monitored.

Enquiries made of a sampling of metropolitan and provincial territorial authorities, indicates that such information is not necessarily available at the local level either. In anticipation of the 31 March 2010 trigger for the offence provisions, at least some territorial authorities took steps (with varying levels of success) to compile this information and encourage compliance before that date.

The following information was obtained from four territorial authorities:

Type of Territorial Authority	Estimated number of buildings committing an offence at 31 March 2010
Large metropolitan	25,000 Note 1
Large metropolitan	2,500 Note 2
Provincial North Island	100 Note 3
Provincial South Island	405 Note 4

Note1 Estimated that 40% are commercial buildings with some public access

Note2 Few of these buildings believed to be of a type intended for public use

Note3 Includes all buildings as the TA considers the definition of "public use" etc is not clear. Sustained effort by a senior compliance officer has reduced this number to 39.

Note4 As at January 2010. Includes all buildings as the TA considers the definition of "public" is unclear and so has taken the view that it includes all occupants except building workers.

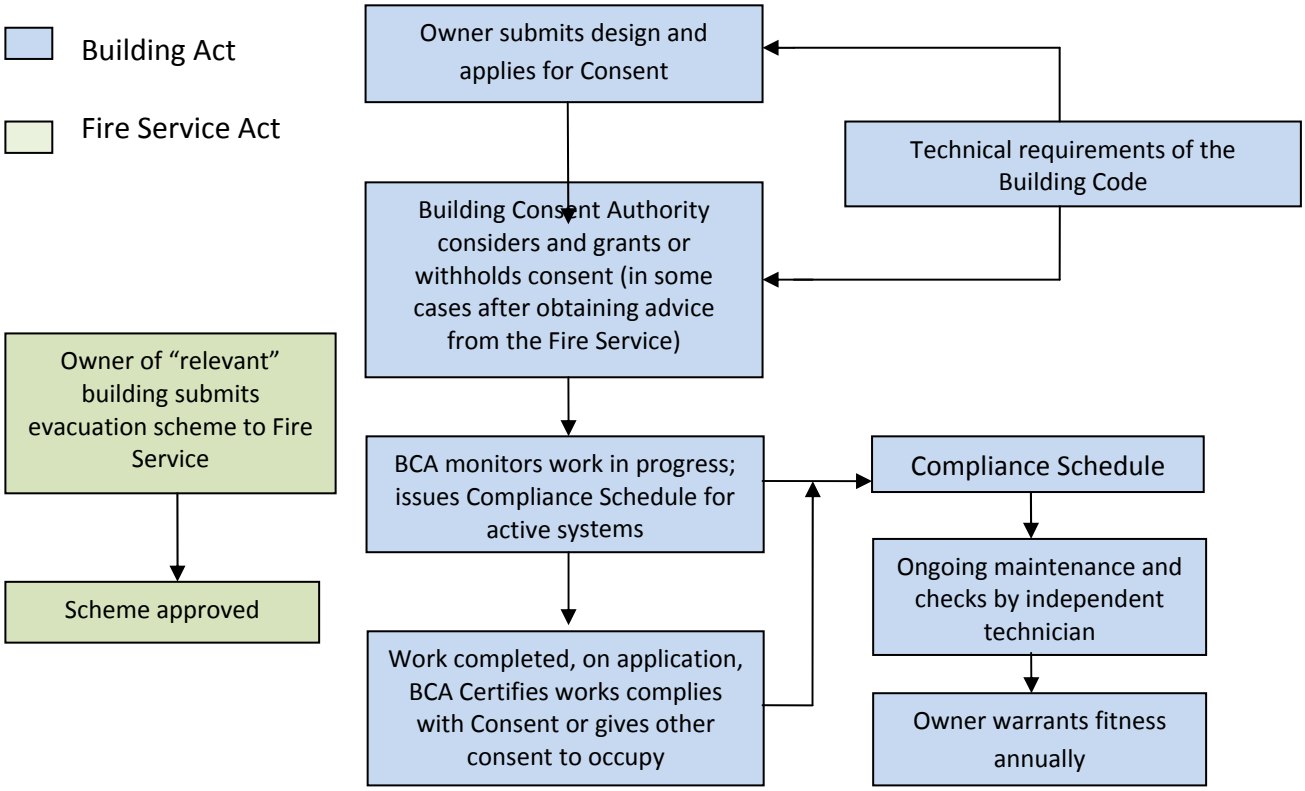
From this it might be estimated by extrapolation that the total number of buildings in New Zealand for which prosecutions could be commenced may be in the order of 15,000.

4 Risk Controls

4.1 How are risks to building occupants controlled?

The general scheme of risk control to protect building occupants can be thought of as having both routine and remedial elements.

The "routine" elements through which building occupants are protected can be summarised thus:



As well as the above routine risk control architecture (which applies to all new building work), both the Building Act and the Fire Service Act have other remedial provisions which provide the opportunity for further control and/or enforcement of the above control. These include:

- **Offences in relation to building control –** involving provisions of the Building Act to which this review applies, imposing substantial and on-going penalties where a building intended for public use is occupied without building work having been certified or other occupancy consent granted; and also other offences (for example, failing to apply for a building consent, using a banned building material or technique, displaying a false or misleading building warrant of fitness).

- **Power to close "relevant" buildings without approved evacuation scheme** – involving provisions of the Fire Service Act under which a court can order a building closed if requirements in relation to approved evacuation schemes have not been met.

- **Dangerous, earthquake prone, and insanitary buildings** – involving provisions of the Building Act (ss 121-132) whereby a territorial authority can force an owner of any building (emphasis added), by notice, to either remedy (or pay for the authority to remedy) or cease to use a building meeting these descriptors as defined. If the danger is immediate, the chief executive of the authority may by warrant exercise wide-ranging powers to remove the danger.

- **Certain persons involved in 'restricted' building work to be licensed as 'building practitioners' and obliged to report breaches of building consent –** provisions ss 84-89 of the Building Act, intended to ensure competency and disclosure

- **Fire Service to have access to land and buildings (other than household units)** – provisions of the Fire Service Act 1975 entitling the Fire Service to enter buildings for the purposes of pre-incident planning and post-incident investigation which also require the Fire Service (emphasis added) when exercising such powers, to report perceived non compliance with the Building Act 2004 to the territorial authority

- **Statutory obligations and imperatives for consultation between the Chief Executive and the Fire Service Commission –** provisions in the Building Act [s 170(a)] and the Fire Service Act [ss 20 and 21] intended to ensure close cooperation and unity and completeness of fire safety law and practice

It is also relevant to note in the matrix of controls, the significance of the Standards Act 1988. That is because many of the details of the prescriptive method of complying with the Building Code (i.e. via the "Acceptable Solutions" option) are provided in cited New Zealand Standards.

The quality of the process for standards development overseen by the Standards Council is thus of considerable importance. Some concern was expressed that there had been insufficient coordination between Standards New Zealand and the Department of Building and Housing and that this could adversely affect the adequacy and efficiency of development of standards that are to be cited. Although it is understood that appropriate consultation is now occurring as part of the present Review of the Building Act, a recommendation is made to consider a statutory imperative to ensure ongoing consultation and coordination between the "ministry" and the Standards Council in future [see Recommendation **o**].

4.2 Effectiveness of controls

A significant "note" to the definition of "control" in the Australian and New Zealand risk management standard[7] reads "Controls may not always exert the intended or assumed modifying effect". This not only means that controls may prove defective or ineffective and thus modify the risk to a lesser degree than intended but may also operate through proxies.

For example, it may be

- *threatened* prosecution, rather than actual prosecution and conviction, or
- the insistence of conveyancing lawyers that buildings offered for sale have the required certification, or
- the insistence of the licensing authority pursuant to the Sale of Liquor Act 1989 that licensed premises have a code compliance certificate,

which has more effect than the offence provisions of the Act in ensuring compliance.

The way in which the above forms of control are aligned and work in practice was therefore examined as part of the review. This also helped to

- understand the relative importance of s 363 and its related provisions both generally and in relation to the buildings to which s 363B applies in particular (for example, if other controls were effective in ensuring, reasonably, the safety of building occupants, then controls which provided for prosecution and penalty would be less important)
- identify controls which were inefficient because their application consumed significant resource with minimal change in risk and drew away resources from more potent controls
- identify possible additions, improvements, re-alignments or deletions to existing controls which would improve either effectiveness or efficiency or both.

In considering this issue, it is necessary to also consider the context in which building control operates in New Zealand as the "context" – which is to say the internal and external environment in which the building control regime operates – has an effect on how controls function in practice. Five aspects of "context" are worthy of note:

- the statutory surveillance and advisory role of the Department of Building and Housing and the broad regulatory powers invested in the Chief Executive
- the very low levels of corruption across society and its institutions in New Zealand
- the professional standards and systems of qualification that apply to most of the important participants in the building sector
- the various forums for professional exchange between building officials and the relative stability (and thus institutional knowledge and experience) of this workforce
- the still recent and salutary experience of the leaky buildings problem

[7] The first international standard on risk management ISO 31000:2009 was adopted by Australia and New Zealand and published as AS/NZS ISO 31000:2009 *Risk Management – Principles and Guidelines*

These factors appear to combine to increase the likelihood that the system of controls acts as intended. The importance of these factors should be kept in mind however, as any change in such elements of context could be expected to change the effect of controls – forseeably, to a profound degree.

4.3 How the various controls operate in practice

Building compliance officials spoken to in the course of this review were asked about which legislative controls and which of their related activities have the greatest importance in ensuring that buildings were safe. These can be thought of as being in two groups –

- controls which lead to compliance
- controls which address non-compliance (such as s 363)

In this section, both types of control are discussed.

The following appear to be the most important controls for producing and maintaining compliant buildings:

a) that building consents are applied for, competently evaluated and that building work is undertaken in compliance with the terms of the consent
b) that building safety systems are under the umbrella of the Compliance Schedule regime from the time of occupancy
c) that buildings that require an approved evacuation scheme, have such a scheme

The following appear to be the most important factors and activities in ensuring that those controls operate as intended:

Sector intelligence

Local intelligence about building activities and building participants (developers, builders, designers, sub-trades) may be the most valuable tool in ensuring that building work complies with the building code. That is especially the case where there is a single building consent authority in the area (such as the territorial authority) as this provides a more complete data base of information and greater sharing of information between building officials. Such "sector intelligence" helps ensure that building work does not commence without a consent having been applied for and helps the building consent authority to apply its inspection resources during construction using a risk-based approach. Overall, this helps to keep down compliance costs while still maintaining effective control.

Sector liaison

Some territorial authorities make considerable effort through their web-sites and publications to help both building owners and building sector participants to understand what is required. They also attempt to work closely with large building firms and consultants to help ensure that compliance obligations are fulfilled efficiently – thus freeing up resources that can be applied to monitor smaller or more troublesome sector participants.

Compliance Schedules and Building Warrants of Fitness

Most building consent authorities issue compliance schedules at the time that buildings for which compliance schedules apply, are occupied. This helps ensure that one of the areas of greatest uncertainty – namely that active safety systems will function as intended – is controlled even though a code compliance certificate (or equivalent) may not have been issued.

Surprisingly, given the considerable importance of these provisions, the Building Act does not create an offence where the owner of a building fails to fulfil their obligations regarding compliance schedules as set out at s 105. A recommendation is made in relation to this.

Such safety systems are typically complex, sensitive in their effect to changes in building layout or occupancy if consequential changes are not also made to the system, and of *critical* importance in terms of ensuring safety of the building. If the system does not work, the building will be unsafe.

A report funded by the Fire Service Commission's contestable research fund[8] examined the reliability of active fire safety systems such as sprinkler systems and smoke management systems in New Zealand. The research considered the issues of 'availability' and 'reliability' and 'efficacy'. The results were both reassuring (sprinkler systems were very reliable) and alarming (reliability of smoke management systems were low). The report observed that the reliability of systems was strongly dependent on ongoing testing maintenance as well as initial design and commissioning activities. It serves to again emphasise the importance of the Compliance Schedule regime.

It was unfortunate to learn, therefore that one territorial authority reported that the independent external auditing firm which recently evaluated their systems and performance in relation to accreditation (pursuant to s 215 of the Act) insisted that the correct interpretation of s 102 *precluded* a Compliance Schedule being issued before a Code Compliance Certificate had been issued. Accordingly, the territorial authority ceased their earlier practice.

Notwithstanding that the auditor's interpretation seems questionable (despite the unfortunate wording of the heading of s 102) for the reasons noted above, this seems a most undesirable practice. A recommendation is made that this should be clarified [see Recommendation **d**].

Associated with Compliance Schedules, is the requirement for issue of annual Building Warrants of Fitness by the building owner. In broad terms, the owner is warranting to the building consent authority (and for the public record) that the system has been properly maintained by an independent qualified party (a licensed building practitioner) and remains compliant. Most territorial authorities had adopted a system to monitor timely receipt of such warrants and follow up procedures if this had not occurred.

However, there appears to be a mismatch in the wording of s 108(2) which explains the purpose of the warrant and the wording of s 108(3)(b) which sets out what must be

[8] *Effectiveness of Fire Safety Systems for Use in Quantitative Risk Assessments*, Marsh, 2008

warranted. While the latter requires the owner to warrant that the 'maintenance' procedures specified in the Compliance Schedule have been fully complied with, it does not necessarily follow that deficiencies (such as could arise from internal partitioning changes) have been made good. Consequently there appears to be some uncertainty as to whether the warrant can be relied upon as evidence that the system is fully compliant at the time that the warrant is issued. A recommendation is made to align these requirements [see Recommendation **g**].

Buildings constructed under the previous Building Act were also subject to compliance schedule and building warrant of fitness requirements and remain so.

Approved Evacuation Schemes

As noted already, the safety of many buildings of the type to which s 363 applies depends on the combination of –

- the building complying with the building code,
- the safety systems being maintained in accordance with the Compliance Schedule, and
- the building having an approved evacuation scheme.

Although the latter requirement arises from the Fire Service Act rather than the Building Act and is administered by the Fire Service rather than the building consent authority, the stated purpose of the Building Act (to ensure, inter alia, the safety of persons in buildings) cannot be achieved without this provision.

It seems inadequate, therefore, that there is not specific reference to the need for approved evacuation schemes in the Building Act – for example, by including the requirement for such schemes to be stated in the Compliance Schedule. This would also recognise that evacuation schemes require ongoing 'maintenance'. A recommendation is made to this effect [see Recommendation **e**].

The Fire Service Act and the related regulations for evacuation schemes were amended in 2006 following enactment of the Building Act 2004 however in general terms, similar requirements to have approved evacuation schemes applied between the period 1992 and 2004 – in other words, to the buildings to which s 363B applies.

Regulation 23 of the Fire Safety and Evacuation of Buildings Regulations 2006 requires the National Commander of the Fire Service (in whom the authority to consider and approve evacuation schemes is vested) to either approve a scheme when submitted to him or her or to set out the amendments to the scheme which are required before the scheme can be approved. However reg 23(4) requires that any amendment required by the National Commander

> (a) must be an amendment to the scheme, not a modification of the building; and
> (b) must not require the building to meet performance criteria that exceed the requirements of the building code

It is understood that these restrictions on the National Commander addressed a concern by some that the effect of the Fire Service's application of the previous evacuation scheme requirements could result in a further layer of building controls – for example, if the Fire Service required installation of a sprinkler system or modifications to smoke control doors before approving the evacuation scheme.

On the other hand, whether or not it was permitted by the law as then it stood (prior to 2006), the Fire Service practice at the time reflected two notably tragic fires (a hotel and a rest home) in which multiple fatalities (6 deaths and 3 deaths respectively) had occurred in buildings with approved evacuation schemes. Both buildings were in compliance with the controls then current. Post incident analysis of those fires showed that the combination of the evacuation scheme (or any other evacuation scheme for that matter) and the characteristics of the building were manifestly unable to ensure the safety of occupants.

In enacting the 2006 amendments, the assumption, no doubt, was that the provisions of the building code, when combined with an evacuation scheme would result in a safe building and that the building controls regime would ensure that buildings complied with the code.

Unfortunately, the revised legislative arrangements for evacuation schemes have four obvious shortcomings:

- although s 21D of the Fire Service Act sets out the performance criteria which must be met before the National Commander exercises the power conferred by this section to *exempt* a building from the requirements to have an evacuation scheme ("if there is a fire within the building, people may evacuate safely from it") nowhere does either the statute or the regulations set out the criteria to be applied by the National Commander in deciding *whether* to approve a scheme
- although the National Commander may decline to approve a scheme as submitted, reg 23(3) requires that in those circumstances, the applicant is notified of the amendments required in order that it can be approved – but as noted above, these may not include changes to the building
- there are no obligations for the National Commander to establish whether the building complies with the building code
- while reg 23(4)(b) appears concerned about the performance criteria of the building code being *exceeded* there is no recognition that there might be a building (for example, a building which predated the Building Act 2004) which required an evacuation scheme but which did *not* meet those performance criteria

Discussions with the National Commander of the Fire Service confirmed that the practical effect of the above is that a building can have an approved evacuation scheme which, in a fire, will not necessarily ensure that people will evacuate safely from it. It seems that whatever their ideological or administrative intent, the amendments in 2006 went too far.

Possibly because they believe they are precluded from doing so, it also appears that it is not the practice of the Fire Service when considering applications for approval of evacuation schemes to either enquire of the territorial authority whether a Code Compliance Certificate

has been issued or to obtain a copy of any compliance schedule issued in respect of the building.

Furthermore, although s 21F of the Fire Service Act (which was inserted in the 2006 amendments) gives to the National Commander express rights of entry to buildings which are required to have an evacuation scheme (and which would allow the Fire Service to consider the proposed evacuation scheme in an holistic way) those rights are not normally exercised when evacuation schemes are considered for approval.

Another limitation of the overall scheme under which the approved evacuation plan operates, is that there is no certain way by which the Fire Service can identify buildings which require an evacuation scheme. In fact, in the discussions with the Fire Service that formed part of this review, the Fire Service contended that it was not its role to identify such buildings. Given provisions of their act which shortly will be quoted, this seems surprising.

In any event, the Fire Service has given considerable publicity to what it calls its "station management system" – the broad purposes of which include the crews at fire stations becoming familiar with the area and buildings in which they provide the primary response. However when asked, the Fire Service said that despite it being in existence for some years, the way the station management system operates in practice does not in fact reliably identify buildings which require an evacuation scheme.

This seems unfortunate particularly in view of the considerable importance of evacuation schemes to treating the risk to the safety of persons in buildings and the strong imperatives at s 20 of the Fire Service Act which read in part

> (1) It shall be a matter of prime importance for the Commission to take an active and co-ordinating role in the promotion of fire safety in New Zealand.
> (2) In so promoting fire safety, the Commission shall be concerned to—
> (a) reduce continually the incidence of fire and the attendant risk to life and property:

Even though the effectiveness of the station management system in detecting buildings which require an evacuation scheme could no doubt be improved, it would also be helpful if the provisions regarding building warrants of fitness required the building owner to warrant, each year, whether or not the building was a "relevant" building as defined by s 21A of the Fire Service Act.

Recommendations [see Recommendations **e, k** and **m]** are made in relation to these matters with the purpose of

- explicitly acknowledging the symbiotic dependencies of the provisions of the two statutes
- ensuring that evacuation schemes are only approved when this will ensure people can escape safely and must take into account the actual features of the building

- providing a mechanism for ensuring that if alterations to the building or its safety systems are necessary in order for an evacuation system to ensure safe evacuation, such alterations are made
- ensuring that information regarding the state of compliance of a building with the building code and the presence of a compliance schedule is taken into account by the fire service when considering an evacuation scheme
- improving detection and identification of buildings that require an evacuation scheme

As well as practices and legislative provisions which seek to ensure that buildings are constructed and occupied in a way that is safe, there are also coercive and corrective controls as follows:

Dangerous, earthquake-prone, and insanitary buildings

These provisions (which are similar to those that applied under the previous Building Act) appear to work well although as will be noted, the legislation is not quite as clear as it could be in relation to situations in which there is immediate danger.

The provisions apply to all buildings and are thus able to address a situation in which a building which, for example, pre-dated the Building Act 1991, had become a danger to its occupants (or insanitary).

Very importantly in the context of the terms of reference for this review, these provisions provide a much more potent and immediate redress than does s 363 for a building constructed under the previous Building Act which puts at risk its occupants – "public" or otherwise. That is so irrespective of whether the source of risk is faulty building work.

The general scheme of the enforcement provisions is to alert the public to the danger through the use of notices placed on the building and to provide a short period during which the owner must implement corrective action. If the danger is immediate, the Chief Executive of the territorial authority has almost unlimited powers to remove the danger.

In practice, these provisions are often exercised through urgent discussion with the owner who, having heard the options available to the territorial authority and its Chief Executive, become willing to implement remedial action. The "easy way or the hard way" was how one Council official put it. Indeed, some very experienced and senior building officials could recall only one or two instances where it was necessary to take formal action. One described the provisions as a "very powerful tool".

Rather than regard these provisions merely as a means of addressing a reported danger, some territorial authorities see them as facilitating a more proactive approach – for example, by routinely visiting nightclubs (either alone or in the company of the Fire Service) and actively checking whether danger exists. These provisions ultimately enable dangerous situations to be immediately addressed.

In reviewing these provisions of the Act it appeared that they could benefit from redrafting to more clearly relate the provisions of s 124 *et seq* which concern dangerous buildings generally and s 129 which deals with the situation in which the danger is "immediate". It would also seem preferable that the power of the Chief Executive to require a building to be vacated immediately should be explicitly stated and that the Chief Executive be explicitly empowered having issued such a warrant, to require the assistance of the Police in its execution – such as is provided at s 32 of the Fire Service Act. Recommendations are made to this effect [see Recommendations **h** and **i]**.

Exercise of Fire Service rights of entry for the purposes of pre-incident planning

Section 29 of the Fire Service Act provides the Fire Service with the power to enter buildings (other than dwellings). This has importance not only to fire service operations that might need to be conducted in such buildings but is also specifically intended to provide a form of surveillance of compliance with the Building Act. These latter powers, at least, do not appear to be being used to the full extent possible.

Section 29 empowers the Fire Service "to obtain information required for fire fighting planning purposes (including the planned evacuation of persons from the premises....)". These powers also apply to buildings to which s 363B applies.

Subsection 29(5) requires that a person who has access to buildings under s 29 and believes that any building or sitework does not comply with the Building Act 2004, must report that belief to the territorial authority.

Several points regarding these provisions warrant noting. These include –

- that (with the strong encouragement of the Fire Service) s 4(2) of the Building Act at sub (h) requires that the reasonable expectations of fire fighters to be protected from injury while undertaking firefighting be taken into account by those responsible for administration of the Act
- the building code contains express provisions in relation to the foregoing
- it is therefore certain features of the building which provide safety to fire fighters and facilitate the planned evacuation of occupants
- while there is nothing in the statute to require that the Fire Service become expert in all aspects of building control (for example structural engineering), the provisions of subsection (5) combined with the potency of the inspection powers, seem plainly intended to provide a further check and remedy to detect and redress buildings that are not safe from fire

It could be expected therefore that the intelligent and planned exercise of their powers under s 29 would be of considerable importance to the Fire Service from the perspective of their own safety, and to ensure that they exercise this important added leg to the system of effective building control in order to ensure the safety of building users.

However, the report of the Fire Service inquiry[9] into the fire at the Icepak premises in Tamahere in which a firefighter was killed and several colleagues were seriously injured was strongly critical that these powers had not been exercised at the premises in question. Recommendation 4 said, in part

> The National Commander and the National Rural Fire Officer need to undertake an analysis of current rural/urban fire legislation in relation to risk planning and control of fires in buildings throughout New Zealand.

Inquiries made as part of this review regarding the present situation, indicate that when the Fire Service exercise these powers, it is not their practice to ascertain from the territorial authority whether the building has a code compliance or other certificate, or to obtain a copy of the Compliance Schedule, or to examine, in the course of the visit, the current building warrant of fitness. This may reflect a belief that the Fire Service does not have a right to such information. Whether or not this is so, the practice should change. A recommendation is made accordingly [see Recommendation **j**].

When asked whether the Fire Service regarded s 29(5) as having importance in their efforts to protect people and property from fire and whether there was a culture of trying to identify dangerous buildings, the Fire Service expressed the view that they were "not the compliance police". Such a view would seem to disregard Parliament's intent.

In summary, therefore, the various types of control that protect people in buildings would be more effective and buildings therefore safer if there was better alignment, and statutory recognition, of the mix of controls on which safety depends.

4.4 Should Section 363B be retained?

As noted already, the sole effect of s 363B is to extend the provisions of s 363, to buildings commenced or completed in the period 1 July 1992 and 31 March 2005. Section 363B was inserted in the Act after it became apparent that s 363 could not have retrospective effect and apply to building work undertaken before the commencement of the (new) Act.

Any modifying effect that s 363B has on the risk that buildings commenced or completed in this earlier period are unsafe (whether to all occupants or just those who are members of the public) is dependent on the provisions of s 363. Those provisions are to create an offence for work that is not certified as compliant. However, merely creating an offence or even securing a conviction does not necessarily mean that the actual risk has changed.

That is because the reasons for which certification has not occurred may have no practical effect on the safety and healthiness of either "the public" or other users while they are in the building. There are three reasons for this:

[9] Inquiry into the Explosion and Fire at Icepak Coolstores, Tamahere, on 5 April 2008, New Zealand Fire Service September 2008

(a) The reasons that a certificate has not been issued may relate to administrative requirements rather than safety or health requirements or have only marginal relevance to safety and health.

(b) To the extent that buildings commenced between 1992 and 2005 had features that were unsafe or unhealthy, it seems highly likely that the mix of controls (formal and informal) described earlier, when taken together with the passage of time, have had the effect in the meantime of sufficiently controlling those risks.

    Furthermore, if preparation of prosecutions pursuant to s 363 and s 363B revealed that a building was dangerous, the most obvious method to remedy this would be through immediate exercise of the provisions for dangerous and unsanitary buildings rather than endure the inevitable delay, and uncertainty of outcome associated with any type of prosecution.

(c) The issuance of a code compliance or other certificate does not of itself ensure safety. As noted, safety may be profoundly dependent on the owner's ongoing fulfilment of obligations in the Compliance Schedule and on ensuring that where required, there is an approved evacuation scheme. Neither of these issues is dealt with by a code compliance certificate.

Territorial authorities spoken to regarding their intentions post 31 March 2010 for buildings to which s 363B applied, were notably unenthusiastic about the prospect of commencing numerous (and in some cases, thousands of) prosecutions. It was seen as being very consuming of resources, very difficult in some cases to locate owners and serve proceedings, very time consuming in the preparation of briefs of evidence and uncertain in terms of outcome as to the willingness of courts to impose deterrent penalties where there was an absence of demonstrable risk.

Those territorial authorities spoken to that had invested effort to press owners of buildings without code compliance certificates to obtain a certificate attested to the intensity of the effort required, the amount of time needed and the mixed results – notwithstanding that liability to prosecution was imminent (from 31 March 2010). One territorial authority with about 400 occupied buildings without code compliance certificates made considerable efforts to call a public meeting to discuss and explain the provisions. They were surprised to find that only 12 building owners attended.

It is concluded therefore that s 363B creates an impotent form of risk control - even more so if the other controls which either help ensure that building work is safe operate as intended or enable buildings which are found to be unsafe, insanitary or earthquake prone to be addressed are applied. It is not worth retaining. A recommendation is made to this effect [see Recommendation **a**].

Unfortunately, if s 363B is to remain, it may be perceived as leaving a territorial authority vulnerable to (albeit unwarranted) criticism (for example, if injury was to occur in a building which did not have a code compliance certificate and which the council had not prosecuted). Such concerns could result in scarce resources being diverted to eliminate this

vulnerability (by initiating prosecution preparation and action) despite it having little if any effect on safety. On balance, that seems to be an undesirable outcome, further advancing the case for repeal of this section.

If s 363B was to remain, it becomes even more desirable that s 363 is amended to address its shortcomings already described. A recommendation is made to this effect [see Recommendation **b**] however this recommendation would also contribute to the safety and health of the occupants of all buildings other than single family dwellings.

5 Recommendations

Recommendations are numbered sequentially and are arranged in three groups:

1. Those directly concerned with the ongoing status of s 363B;

2. Those that should apply if s 363B remains (and, in terms of the purposes of the Act, should possibly apply anyway);

3. Those that will improve control of risks to safety and health in buildings built between 1992 and 2004 under the previous Building Act;

1 Recommendations regarding Section 363B

a. Section 363B of the Act should be repealed as soon as possible in order to avoid diversion of resources to investigations and pursuit of prosecution.

2 Recommendations if Section 363B remains (but also may be desirable anyway to ensure buildings are safe for all occupants)

b. Sections 362A, 363, 363A and 363C of the Act should be amended so that

   i. their effect applies to all buildings (other than single family dwellings) that are used by persons and not just those used by the public or which are intended for use by the public, and

   ii. the Certificate for Public Use is replaced with some other administrative device which is available, where the facts warrant, to allow progressive occupancy of a building and which can be progressively amended as further parts of the building can be safely occupied

3 Recommendations to improve other controls relating to safety and health in those buildings (other than single family dwellings) built between 1992 and 2004 (These also have the effect of ensuring that such buildings built after 2004 are safe for occupants.)

c. The Building Act should explicitly recognise the case for progressive occupancy so that appropriate criteria for each stage of occupancy (including any requirement for interim compliance schedules) form part of the consent. [**Note**: It is foreseeable, although unlikely, that there may be some buildings commenced under the previous Building Act which are not yet complete but are being progressively occupied.]

d. The Compliance Schedule regime of the Act should be amended to make clear

i. that a Compliance Schedule may be issued irrespective of whether a Code Compliance Certificate has been issued, and
ii. that if a Compliance Schedule has not already been issued, it shall be issued at the time a Code Compliance Certificate is issued and,
iii. to the extent that the operability of certain systems or parts of systems are material to the decision to issue a Certificate of Acceptance, or the proposed replacement of the Certificate for Public Use (refer Recommendation b) a Compliance Schedule in relation to those systems is to be issued at the same time.

e. The present concept of and content of Compliance Schedules should be broadened to include all mandated risk controls (whether required by the Building Act or some other legislation) that are critical to achieving the purposes of the Building Act but requiring on-going monitoring throughout the life of the building. This includes approved Evacuation Schemes where required pursuant to s 21B of the Fire Service Act 1975

f. An offence should be established where the owner of a building fails to discharge their obligations in relation to compliance schedules.

g. Building warrants of fitness should warrant that all corrective actions required to ensure that the specified systems stated in the compliance schedule are performing and will continue to perform to the performance standards for those systems (as set out in the relevant building consent) have been implemented.

h. Section 124 and s 129 of the Act should be better aligned to make it clearer that when a building that is dangerous, unsanitary or earthquake prone presents an immediate danger, the powers of the territorial authority under s 124 include the powers under s 129.

i. The Act should make clear that where a building presents an immediate danger, the Chief Executive may (by warrant) require the building to be evacuated immediately and to obtain the assistance of the police to give effect to such a requirement.

j. Information about the state of Building Act compliance in the case of any particular building (other than a single family dwelling) should be available to other agencies that play a statutory role in achieving the purposes of the Act, whether or not that role is prescribed in the Act. For example, the Act could explicitly require building consent authorities, upon request, to furnish information to the Fire Service and to any health authority as to whether a Code Compliance Certificate, a Certificate of Acceptance, or other instrument relating to compliance of building work has been issued in respect of a particular building and, if requested, supply a copy of any Compliance Schedule for that building together with information relating to the currency of the related building warrant of fitness.

k. Where other agencies have a role in the overall scheme of achieving the purposes of the Building Act, those agencies should, under their own legislation, be expressly empowered – or required – to obtain information from the relevant building consent authority about the state of compliance of any building which is (pursuant to that role) the subject of their interest. Such powers should be aligned to those recommended in (j) above. For example, Section 29 of the Fire Service Act 1975 should be amended to empower the Chief Fire Officer or other authorised person to obtain such information in relation to any building which is to be accessed pursuant to this section.

l. To further align the various components of the statutory architecture for ensuring buildings are healthy and safe,

i. The purposes of the building warrant of fitness should be extended to include a declaration as to whether a building that is required to have an approved evacuation scheme, has such a scheme, and

ii. an application for approval of an evacuation scheme should require a copy of any form of certification that permits occupancy and a copy of any Compliance Schedule relevant to that building.

m. The required outcome to be achieved by an approved evacuation scheme (for example, "ensuring building occupants can safely reach a place of safety in the event of a fire") should be clearly stated in the legislation as the basis on which approval is to be considered and either granted or withheld. Such consideration should include consideration of the state of compliance of the building work. For example, the Fire Safety and Evacuation of Buildings Regulations could:

i. require the National Commander when considering whether to approve an evacuation scheme, to give prime consideration to determining whether the combination of
- the provisions of the scheme,
- the features of the building,
- the provisions of any compliance schedule, and
- the occupancy of the building

can be expected to ensure that all persons will safely reach a place of safety in the event of a fire

ii. require the National Commander to decline to approve an evacuation scheme if such reasonable expectation cannot be formed

iii. empower the National Commander to obtain information from the relevant Building Consent Authority as to the state of compliance of the building with the Building Act and take into account such information in considering the application.

Regulation 23(4) of the Fire Safety and Evacuation of Buildings Regulation 2006 should be amended by deleting sub-reg (a).

n. Appropriate amendments should be made to the Fire Service Act to require the Commission, the Chief Executive and the National Commander to allocate resources and discharge their duties based on assessment of the risk to people and property.

o. There should be either statutory encouragement or a statutory imperative to ensure there is ongoing cooperation and coordination between the “ministry” and the Standards Council in relation to the development and publication of New Zealand standards in support of the building controls regime.

Annex A

TERMS OF REFERENCE – SECTION 363 REVIEW

Section 363B of the Building Act makes it an offence for a building owner to permit any part of a building to be used that is intended to be open to or used by members of the public for which building work was undertaken between 1 July 1992 and 31 March 2005 but a code compliance certificate never issued for the work.

As part of the Building Act Review, the Department of Building and Housing wishes to engage a suitably qualified and experienced person to undertake a review of Section 363B, including the relationship of this section to other sections of the Building Act that were designed to address dangerous or unsanitary or earthquake prone buildings and non-code compliant buildings constructed prior to the enactment of the Building Act.

Background

The Building Act Review

In August 2009 the Minister for Building and Construction announced a review of the Building Act 2004 (the Act) in response to concerns about:

- the Act's implementation at local government / consent authority level
- the costs and complexity associated with the building consent process
- consumer confidence in the technical capability of practitioners
- the allocation of risk and liability between the parties involved in the building control system.

The aim of the review is to identify reforms to the Act and its associated regulation and administration to reduce the costs associated with the building control system without compromising building quality. The review therefore seeks to achieve the following results:

- quality homes and buildings are produced through a business-enabling and efficient regulatory framework
- consumers make informed decisions and have confidence transacting in the building and housing market
- homes and buildings are produced cost-effectively by a productive sector with the right skills and knowledge
- an efficient and cost-effective regulatory system.

Section 363

Section 363 of the Building Act was originally drafted to address the cave Creek Inquiry's recommendations by requiring councils to confirm the safety of the parts of premises

intended for public use that are affected by building work. It originally did this by making it an offence to allow a building affected by building work to be used by the public prior to the issuing of a Code Compliance Certificate - the policy intent being to provide a means of ensuring the safety of completed building work prior to its public use so as to minimise risks to human life and safety of faulty building work.

S363 was subsequently amended to provide for a certificate of public use, so as to provide a safe and practical means of allowing public activity to occur within a building concurrently with building work.
In order to clarify doubt as to whether or not S363 applied to building work undertaken under the previous Building Act 1991 the section was also amended (through the addition of S363B) to require owners of public premises where building work was undertaken between 1 July 1992 and 31 March 2005 and for which a building consent was required but a code compliance certificate never issued, to apply for a code compliance certificate, a certificate of acceptance or a certificate of public use (if the building work was never completed) by 1 July 2010. Section 363 provides for a fine not exceeding $200,000 for owners that fail to meet the requirement.

Concerns were raised during the course of the Building Act review as to the likely effectiveness and efficiency of S363B, and whether there may be a more effective and efficient means of achieving its policy intent. In particular concerns were raised that:

- S363B is broad in scope and captures a large number of buildings that were the subject of building work undertaken without a consent or code compliance certificate prior to 2005 (such as shop fit outs and minor interior alterations)
- That while some of this uncertified building work might represent a material risk to public health and safety much will not
- There appears to be poor awareness of the S363B requirement
- There is no plan or strategy for how S363B will be implemented by 73 local authorities
- It is unclear whether and how local authorities actively and consistently enforce compliance with s363B
- There is no certainty that S363 it will provide an effective and efficient means of identifying and addressing uncertified building work likely to pose a threat to public health and safety
- The Act provides other means for local authorities to address buildings that pose threats to public health and safety, such as the Act's provisions for local authorities to identify, inspect and address dangerous, unsanitary and earthquake prone buildings.

In considering the findings of the Building Act review, Cabinet directed the Department of Building and Housing to review the retrospective application of section 363 of the Building Act, including consideration of an effective means of identifying and addressing non-compliant and dangerous building work in buildings built between 1 July 1992 and 31 March 2005.

Purpose

The purpose of the review is to provide the Department of Building and Housing with well informed and robust advice on whether or not s363B provides an efficient and effective means of identifying and addressing uncertified building work undertaken prior to enactment of the Building Act 2004 with the potential to result in harm to the health and safety of public users.

The reviewer is required to:

- familiarise themselves with:

    - the risks and potential consequences to public health and safety of uncertified building work undertaken prior to the enactment of the Building Act 2004 under the previous Building Act 1991
    - s363B and the various other provisions of the Building Act 2004 and other pieces of legislation that scan be used to address any such risks – including the dangerous, unsanitary, earthquake prone provisions of the Act
    - how these various provisions are currently being applied (or are planned to be applied) by the Department of Building and Housing and local authorities – including whether or not they are being applied in a manner that is strategic, proactive and consistent across local authorities
- advise on the likely nature and materiality of risks to public health and safety likely to be associated with uncertified building work undertaken under the previous Building Act 1991
- identify and describe any issues associated with (or likely to be associated with) the implementation and ongoing operation of s363B, and the implications of these issues for the overall effectiveness and efficiency of the provision in mitigating risks to public health and safety of uncertified building work undertaken under the Building Act 1991
- advise on whether or not s363B is an effective and efficient means of addressing these risks to public health and safety or whether other means, such as those designed to address dangerous and unsanitary and earthquake prone provisions might be more effective
- recommend any changes to s363B (or other sections of the Act), necessary to provide an effective and efficient means of address any risks to public health and safety of uncertified building work undertaken under the Building Act 1991.

Stakeholder engagement

In undertaking this review, the reviewer is expected to engage with representative of the Department of Building and Housing, local authorities and other persons and organisations with knowledge needed to inform the analysis.

The reviewer must, however, form their own independent view on the substance and significance of any issues identified in discussions with stakeholders during the course of the review.

Timing and Reporting

Time is of the essence. The review must be completed by the end of April 2010.

The product of the review will be a short written report that clearly sets out the reviewers:

- advice on the likely nature and materiality of risks to public health and safety likely to be associated with uncertified building work undertaken under the previous Building Act 1991
- advice on any issues associated with (or likely to be associated with) the implementation and ongoing operation of s363B, and the implications of these issues for the overall effectiveness and efficiency of the provision in mitigating risks to public health and safety of uncertified building work undertaken under the Building Act 1991
- advice on whether or not s363B is an effective and efficient means of addressing any such risks to public health and safety or whether other means, such as those designed to address dangerous and unsanitary and earthquake prone provisions might be more effective

- recommendations on any changes to s363B (or other sections of the Act), necessary to provide an effective and efficient means of address any risks to public health and safety of uncertified building work undertaken under the Building Act 1991.

Independence

The review must be conducted by a suitably experienced and qualified person who is independent on the particular interests of stakeholders and persons affected by the implementation and operation of S363B.

29 February 2010