



## COVERSHEET

<b>Minister</b>	Hon Jenny Salesa	<b>Portfolio</b>	Building and Construction
<b>Title of Cabinet paper</b>	<b>Streamlining processes for Crown built housing</b>	<b>Date to be published</b>	14 July 2020

<b>List of documents that have been proactively released</b>		
<b>Date</b>	<b>Title</b>	<b>Author</b>
27 May 2020	Cabinet Paper: Streamlining processes for Crown built housing	<i>Office of the Minister for Building and Construction</i>
27 May 2020	Minute of Decision: Streamlining Processes for Crown Built Housing DEV-20-MIN-0088	<i>Cabinet Office</i>

<b>Information redacted</b>	<b>YES / NO</b> <i>(please select)</i>
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## In Confidence

Office of the Minister of Housing

Office of the Minister of Local Government

Office of the Minister for Building and Construction

Cabinet Economic Development Committee

## Streamlining processes for Crown built housing

### Proposal

- 1 This paper responds to a request from Cabinet for joint Ministers to report back on possible changes to the building consent model, risk and liability and payment of development charges to support Crown built housing [CAB-20-MIN-0182 refers].

### Relation to government priorities

- 2 This report back has been generated by the COVID 19 response paper that canvassed changes to the Resource Management Act.

### Executive Summary

- 3 Cabinet has recently agreed to changes in the Resource Management Act to support fast tracking of resource consents for building and construction activity [CAB-20-MIN-0182]. In that paper, questions were raised about whether there are might be opportunities to address the Building Act to provide for fast-tracked, or streamlined, approaches to building consents for Crown built housing; how associated risk and liability issues might be addressed; and whether development contributions for Crown built housing could be deferred under the Local Government Act.


### *Consenting, Risk and Liability*

- 4 The current building consent process is designed to ensure that all buildings in New Zealand are constructed in a way that provides for safe and healthy homes. There are mechanisms in place – and more underway – to provide streamlining and improved consistency in building consent decision-making. Officials and the Construction Sector Accord are working together to look at improvements over and above those already provided for and underway.
- 5 Kāinga Ora is currently working through the process of becoming accredited and registered as a Building Consent Authority (BCA). If successful, this will see some public housing construction consented through the Crown entity. This would potentially drive both efficiency and consistency for those projects consented by Kāinga Ora.
- 6 Liability issues arising from building and construction works rest with the joint and several liability rule. The joint and several liability rule determines the liability of

multiple parties in civil proceedings where a person has suffered loss, and how responsibilities for the loss are allocated where there are several liable defendants.

- 7 Where two or more parties are liable for the same loss or damage to another party, because of separate wrongful acts, the joint and several liability rule holds both or all of the wrongdoers 100% liable for the loss caused. The party who suffered the loss can claim against one wrongdoer to recover the whole of the loss. That defendant can then seek contribution from any other wrongdoers. If Kāinga Ora becomes a BCA it could therefore become liable for damages associated with developments it is involved in. Conversely the local authority BCA that would otherwise be the consenting body would have no exposure to this risk.
- 8 Local Authority BCAs regularly raise concerns about their exposure to what they consider to be a disproportionate level of risk and liability arising from their building consenting function, particularly in an environment of joint and several liability. This risk is often cited as an explanation for the risk averse approach BCAs adopt. Appropriate warranty insurance products – which can shift the risk and liability burden – are now unavailable in New Zealand as the single remaining building insurance underwriter exited the market at the end of 2019.

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#### *Development contributions*

- 10 Costs associated with gaining a building consent include payment of a development contribution to the local council. Development contributions are a significant component of funding for growth-related infrastructure. The Crown is currently exempt from paying development contributions, but this exemption does not extend to Kāinga Ora.
- 11 We consider that Kāinga Ora should continue to be required to pay development contributions, as to shift away from this would have a negative impact on council's ability to fund infrastructure. As a result, councils may look to fund the shortfall from ratepayers or more likely from non-Crown developers, which in turn could adversely affect non-Crown development.

#### **Building Consents**

*The building consent process helps to manage the risks of non-compliance with the Building Code*

- 12 The Building Code sets out the minimum requirements buildings must meet to ensure they are healthy, durable and safe. All building work (including earthworks and other preparatory site work, and connections to services) must comply with the Building Code whether a building consent is required or not.

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- 13 The building consent process helps to ensure that the risks to people and property associated with non-compliance with the Building Code are managed. The process involves a check of plans, inspections during construction and the issue of a Code Compliance Certificate once building work has been completed.
- 14 All 67 territorial authorities act as BCAs for their district, with oversight of building consents<sup>1</sup>. There are five Accredited Organisations – these are privately run firms that are that have accreditation, but have not registered to become a private BCA. A BCA does not have to be a council, and in fact, as discussed below, Kāinga Ora is currently working through the process of becoming accredited.
- 15 BCAs issued over 77,535 building consents in total in the year to March 2020. This included 37,606 new dwellings, nearly \$2 billion alterations and additions and \$7.1 billion of non-residential building work<sup>2</sup>.
- 16 The Building Act 2004 requires BCAs to process applications for building consents within 20 working days. It is important to note that the processing time for the consent is only one measure by which to assess the efficiency of the overall process – other factors include the timing of BCA inspections during the construction process, the consistency of Building Code interpretation across the 67 BCAs and the issuing of the code compliance certificate at the completion of the work..

*Ongoing improvements are being made to the building consent model for the sector as a whole*

- 17 Officials and the wider sector (through the Construction Sector Accord) continue to look at how to streamline the building consent process. Some changes and areas of work are outlined below:
  - 17.1 *The Building Act provides for fast-tracking of consents in certain circumstances* - The national multiple-use approval (MultiProof) building plan approval process enables building designs to be approved as compliant with the Building Code once and then used multiple times at different sites. MultiProof buildings have a reduced consenting period of 10 working days (for the site specific building work) and assurance that the MultiProof design will gain consent. To date, over half of all MultiProof certificates issued have been to Kāinga Ora. There may also be opportunities for the private sector to make more use of the MultiProof approach. Officials have been asked to explore this question with industry through the Construction Sector Accord.
  - 17.2 *Legislative changes in front of the House* - The Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill, introduced to the House on Friday 8 May 2020 will provide for a new manufacturer certification and registration scheme. This scheme will provide faster, more consistent building consents for manufacturers that are able to meet quality and performance standards and have a demonstrated ability to

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<sup>1</sup> Under the Building Act, Regional Authorities are responsible for managing the consent process for new dams. These functions are presently administered by three regional authorities: Otago Regional Council, Environment Canterbury and Waikato Regional Council.

<sup>2</sup> Statistics New Zealand. Data excludes consents under \$5,000.

produce buildings and components that comply with the New Zealand Building Code. BCAs will have 10 working days to process an application for consent where the structure is a single modular component.

- 17.3 *BCAs seeking efficiency gains* - BCAs are increasingly working together to improve consistency and make better use of resources, to both manage peaks and troughs or fill capability gaps, particularly for more complex consent applications.

Approximately 70 per cent of all consent applications are now online, with twenty seven BCAs using a common platform for applications. This is driving greater consistency across BCAs and making it easier for BCAs to work together. BCAs are also testing technology that will support remote site inspections, which will also drive efficiencies into the system.

- 17.4 *Construction Sector Accord Transformation Plan* - the Construction Sector Accord has identified the need to look at the model for building consents in partnership with central and local government. The Accord leadership group will work with MBIE and Local Government NZ to develop a new model for building consenting.

The model will improve the process for providing assurance that building design and construction comply with performance requirements in the Building Code. In developing the model, the roles and behaviours of all participants in the process will be considered. Opportunities will be identified to improve the way people interact with the system and fulfil their responsibilities, such as by providing better quality information. The model will include better use of digital technology to promote speed and accuracy in the consenting process.

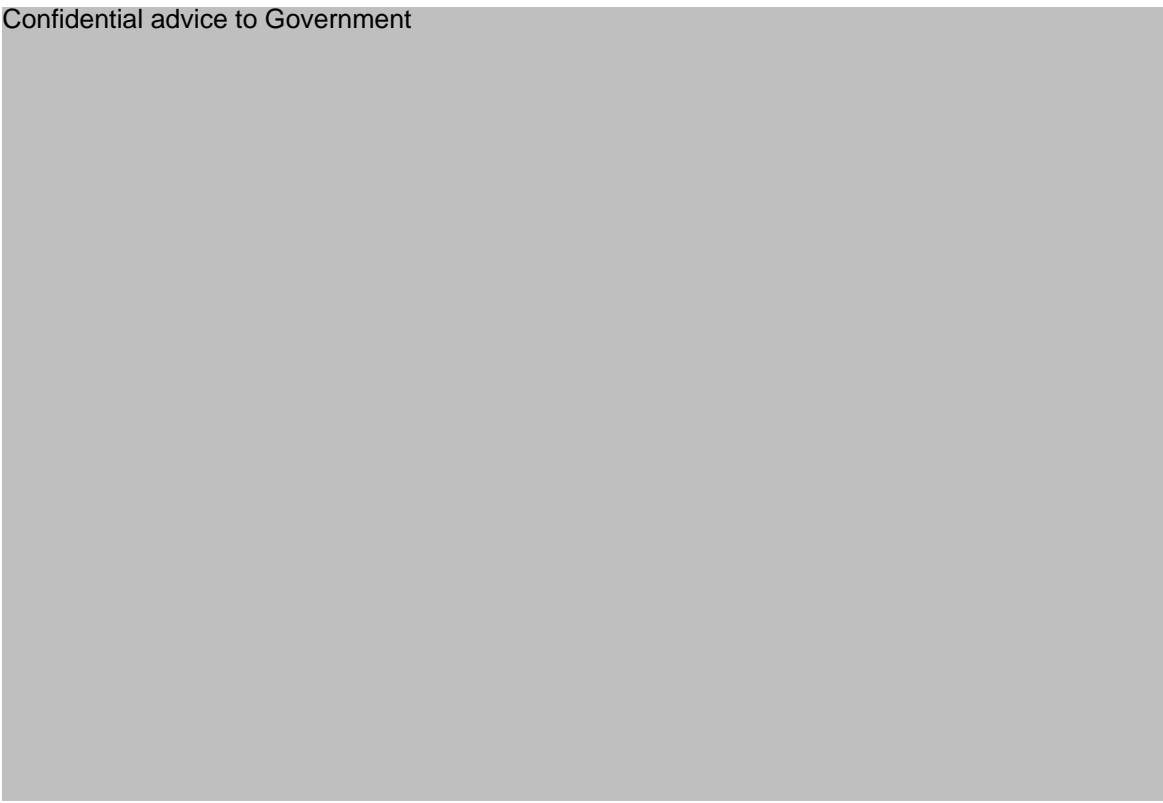
The Construction Sector Accord are due to report back to Cabinet on progress on the wider Transformation Plan by the end of this year.

### **Risk and liability**

- 18 Local Authority BCAs regularly raise the issue of the risk and liability they carry as having a significant impact on the efficiency of the consenting processes. This risk is often cited as an explanation for the risk averse approach BCAs adopt. The concern is that there is an underlying tension between the need to build reliable buildings, and demands for an efficient consenting process to deal with the growing demand for construction in New Zealand (which can be seen as trading off quality and rigour in the consenting process). The critical question is whether or not rebalancing councils' risk and liability will encourage a more efficient consenting process.
- 19 All participants in the building and construction process have responsibilities for ensuring that the quality of a building is appropriate. BCAs have an explicit quality assurance role because of the substantial control that they have over building work, through the issuing of building consents, undertaking inspections, and granting codes of compliance, to ensure that it complies with the Building Code.

- 20 In New Zealand the principal liability rule is “joint and several” liability. This means that where two or more people have caused a particular loss, each party can be held liable for the full extent of that loss. BCAs continue to express concerns about the application of joint and several liability, as they may be held liable for the whole loss in civil proceedings where other parties are absent because of insolvency or other reasons.
- 21 In 2014, the Law Commission concluded that for construction claims, joint and several liability is clearly the preferable system and recommended it remain the general rule. The Commission concluded that a shift to “proportionate” liability simply moves the responsibility for the uncollected share from the liable defendants (including BCAs) on to the blameless plaintiff or homeowner.
- 22 As identified in this paper there are measures in place, underway or proposed, that will support greater efficiency and consistency of consenting. These measures will also directly and indirectly mitigate the level of risk in the sector.
- 23 Warranty insurance is one way that risk and liability can be transferred to another party in the market. An appropriate insurance product is no longer available in New Zealand as the sole remaining underwriter for this insurance left the market at the end of 2019. Insurers have been reluctant to provide cover in part because of the unique long tail of liability of 10 years, and the variation in quality of builds and local authority controls mean that insurers are not able to predict their losses and therefore price the product. Additionally, these products have not always performed well internationally and the size of New Zealand’s premium pool is small.
- 24 Without an insurance product to cover deficiencies in new residential building work home owners do still have some protections: a guarantee product is available from some builders and there are implied warranties in the Building Act 2004.

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### Implications for Crown built housing

*There are different funding and ownership models for “Crown built” housing*

- 27 Cabinet’s request for further advice centred on “Crown built” housing. Officials note that defining “Crown built” is not straight forward. This is because of the variety of ways the land and any housing on it can be owned and developed. For example, land may be developed on behalf of the Crown or developed by an entity as an agent of the Crown, or development could be funded by the Crown.
- 28 Proposals for Kāinga Ora taking on a consenting role, and options for managing the consequent risks and liabilities will be dependent on what definition of “Crown built” housing is used. We propose, therefore, that officials be asked to report back to joint Ministers at the end of June on how best to define “Crown built” housing in the context of the scope of consenting that Kāinga Ora intends to undertake and the wider risk and liability work.


*Kāinga Ora as a consenting body*

- 29 Over the last year and a half, Kāinga Ora has been developing its internal quality assurance function (improving consent applications and looking for efficiencies in the consenting process), with the potential of transitioning this function into a BCA. Kāinga Ora is expecting to complete the process of becoming accredited as a BCA in the coming months. Once accredited it will need to be registered by MBIE in order to issue building consents. This step includes considering the organisation’s ability to cover any civil liabilities that may arise.
- 30 There may be some potential benefits from Kāinga Ora establishing and implementing a BCA function. These include the potential for some efficiencies to be gained through providing economies of scale and being able to develop processes that are well suited to consent the use of innovative building methods. It is also likely that increased consistency in decision making will occur, which lead to reliable and predictable outcomes for Kāinga Ora.
- 31 There is a natural incentive, as the end client, for Kāinga Ora to ensure its buildings are safe and durable. We note that the same inherent incentive does not exist when it delivers, or partners with developers to deliver, market or affordable housing or mixed tenure buildings. To realise the benefits of Kāinga Ora establishing a BCA function and mitigate potential liabilities, Kāinga Ora has previously proposed only consenting buildings that it plans to retain (i.e. state houses where it is the long-term owner) and are reasonably simple typologies. Kāinga Ora has proposed this approach initially on the basis that it would use standard tested designs and be able

to resolve any issues through its maintenance programme. It can also manage its supply chain and procurement practices to manage risk. There are some practical challenges to this approach, including that a single consent is commonly sought for mixed tenure buildings.

- 32 Kāinga Ora will have the same risk and liability concerns as any BCA. Where the quality of BCA decision making lapses, civil liabilities can be considerable, and where the BCA is the last party standing, they can be responsible for paying others' share of the costs. Although the Crown is not directly liable for the debt of Kāinga Ora, if liabilities did occur, it could affect the ability of Kāinga Ora to carry out its other core functions and the Crown would likely be expected to 'bail it out'.

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#### **Monitoring efficiencies in Crown-built housing processes**

- 34 In light of the existing and pending mechanisms intended to drive efficiency, effectiveness and consistency in the building system, we do not propose any additional changes to the system at this point. Our view is that the existing and pending mechanisms are directly applicable to Crown-built housing projects and that there are no immediate further short-term measures to increase efficiency, effectiveness and consistency.
- 35 While there are a number of measures in place or being introduced to drive efficiency and consistency in the building regulatory system, however, there is currently no mechanism by which to assess the impact and effectiveness of these measures, or the way that BCAs are currently performing their regulatory role.
- 36 With this in mind, we propose that officials from MBIE, in consultation with HUD, report back to the Minister of Building and Construction by the end of June on options for monitoring and assessing in detail the effectiveness, efficiency and consistency of building regulatory processes as they apply to Crown-built housing. Options should include officials maintaining real-time oversight over end-to-end building regulatory processes to which Crown development proposals are subjected.
- 37 The aim of the oversight would be to identify obvious areas of inefficiency, ineffectiveness or inconsistency (if any) which further reform proposals could seek to address.
- 38 It is likely that, while the oversight would be to address processes relating to Crown-built housing, that any identified improvements would be able to be applied equally across the rest of the private housing development market.



## Development contributions

- 39 Local councils charge developers development contributions to ensure that those who create the need for new infrastructure meet the capital costs associated with that infrastructure. If developers and buyers of the newly developed properties do not face the cost of additional network infrastructure, they will find locating away from the existing network artificially cheap. This can bias development towards greenfield areas and away from land already serviced by network infrastructure. It can also impose the cost burden on existing ratepayers or other developers from whom the council will seek to recoup costs.
- 40 It is important that development contributions are paid upfront to cover capital costs that are substantial and risky investments. The longer the gap between investment and cost recovery, the more likely there will be a higher charge on the existing community through rates (or increased debt). Delays in recovering costs of infrastructure can place pressure on strained council finances.
- 41 For some territorial authorities (councils), particularly high-growth councils, development contributions are a significant component of funding for growth-related infrastructure. On average, nationally, development contributions make up 4 percent of councils' operating income, but this ranges up to 13.6 percent for some councils.
- 42 The Crown is not bound by the development contribution provisions of the Local Government Act 2002 (LGA02), even though the Crown benefits directly from infrastructure delivered to properties such as hospitals and schools. Councils and other stakeholders have argued for some time now that this adds to the infrastructure funding and rates affordability challenges faced by many councils and that there is no obvious justification for maintaining a blanket Crown exemption. In its November 2019 local government funding and financing inquiry report, the Productivity Commission recommended:
- “R7.14: The Government should pay development contributions on all projects it undertakes in line with the development-contributions policies of the local authorities in which the projects are located”.*
- 43 This exemption from paying development contributions is not transferred to Crown entities, so Kāinga Ora is liable to pay development contributions on its housing developments, and other urban development projects.
- 44 Officials were asked to consider whether it would be possible to provide for deferral of development contributions for Crown house builds. Their advice is that, given the impact of COVID 19 on local government's financial position, this would be inappropriate.

### *Impact of COVID 19 on local government's financial position*

- 45 The Local Government COVID-19 Response Unit, a joint initiative of the Department of Internal Affairs, Local Government NZ (LGNZ), Society of Local Government Managers (SOLGM) and the National Emergency Management Agency (NEMA) has produced two reports on potential financial implications of

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COVID-19 on councils. In summary, key overall findings of the most recent, 1 May 2020, report are:

- 45.1 On average, nationally, rates would need to rise by around 9.5% to make up the forecast decrease in non-rate revenue. However, most councils appear to be looking at a lower rates increase (as well as lower expenditure) for 2020/21 than what they were planning pre-COVID-19.
- 45.2 Councils' fixed costs mean small reductions in revenue can have a large practical impact. Without action to maintain revenue or reduce expenditure, eight councils could be at-risk of breaching Local Government Funding Agency (LGFA) net debt/revenue covenants. A further 13 councils could come within 20% of the covenant thresholds, giving little headroom in case of a further financial shock (e.g. due to a natural disaster). Councils will likely consider reducing operating and capital expenditure to reduce this risk. The implications of breaching LGFA covenants could include:
  - 45.2.1 higher borrowing costs and possible decreases in credit ratings for the LGFA as a whole; and
  - 45.2.2 issues for councils who are acting as guarantors for individual councils, should that council get into financial trouble.

### *Cost of deferral of Crown funded housing development contributions*

- 46 We do not support widening the exemption from liability to pay development contributions at a time when councils and many of their ratepayers are facing significant income reductions due to COVID-19. Ultimately the question comes down to whether central or local government should pay for the infrastructure, and central government is in a better position to do so. In addition, further exemptions would have a negative impact on council's ability to fund infrastructure, and ratepayers would be required to fund the shortfall, which in turn reduces the councils' ability to partner with government on large scale projects requiring broader network upgrades.
- 47 If, however, Cabinet did wish to pursue a change in policy settings to exempt Kāinga Ora from paying development contributions this would likely require amendments to the Local Government Act 2002, and further advice would be required from officials on what those amendments would be.
- 48 Additionally, with its new urban development functions, Kāinga Ora is likely to have an increasing role in directly funding or providing infrastructure and amenities that would normally be provided by councils and funded by development contributions. There may be the need for policy work in the future to ensure that Kāinga Ora is not in a position where it is liable for both direct funding/provision and development contributions.

### **Financial Implications**

- 49 There are no financial implications arising from this paper.

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### Legislative Implications

- 50 No legislative implications arise from the proposals in this paper. However, legislative change might be required at a later date depending on further advice around risk and liability issues.

### Population Implications

- 51 No population implications have been identified as a result of the proposals in this paper. Consultation with HUD and Kāinga Ora have identified some wider questions about consenting for papakāinga housing, which have been considered in the wider Building Sector Regulatory Programme. These will be addressed through other areas of advice.

### Consultation

- 52 This paper has been jointly developed by the Ministry of Business, Innovation and Employment, the Ministry of Housing and Urban Development and the Department of Internal Affairs. Treasury has been consulted on the paper and the paper has been shared with the Department of Prime Minister and Cabinet.

### Proactive Release

- 53 The Minister of Building and Construction will proactively release this Cabinet paper within 30 days.

### Recommendations

The Ministers of Housing, Local Government and Building and Construction recommend that the Committee:

- 1 note that in April 2020, Cabinet invited the Ministers responsible for Housing, Building and Construction and Local Government to report back on possible changes to the building consent model, risk and liability and payment of development charges to support Crown built housing [CAB-20-MIN-0182 refers];
- 2 note that Kāinga Ora has had a number of standardised housing solutions approved through the existing MultiProof system in the Building Act to support a streamlined consenting process for developments using these designs;
- 3 note that the Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill was introduced into the House on 8 May 2020 and that, once passed, the legislation will allow for faster, more consistent building consents for manufacturers that are able to meet quality and performance standards and have demonstrated an ability to produce buildings and components that comply with the New Zealand Building Code;
- 4 note that MBIE, the Construction Sector Accord leadership group and Local Government NZ are working together to develop a new model for building consenting;

5 note that more up-to-date evidence about the effectiveness, efficiency and consistency of building regulatory processes as they apply to Crown built housing would be beneficial in identifying issues that future reform could look to address;

6 note that the Ministry of Business, Innovation and Employment, in consultation with the Ministry of Urban Development, will report back to the Minister for Building and Construction by the end of June 2020 on a proposal for monitoring and evaluating building regulatory processes for Crown built housing, and that this could include having some real-time oversight over end-to-end building regulatory processes to which Crown development proposals are subjected

7 note that in light of the existing MultiProof option, the pending legislation, efficiencies being driven by BCAs, and the work between MBIE and the Construction Sector Accord, no immediate additional changes to the building consenting system are proposed at this stage;

8 note that the risk and liability settings in the construction sector should be considered in the context of finding ways to streamline the system wide consenting model;

9 note that in considering issues of risk and liability, it is important to consider the impact of an effective insurance market, and that such a market does not exist in New Zealand;

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11 note that Kāinga Ora is currently working through the process to become a Building Consent Authority, with a focus on public housing of limited complexity;

12 note that Kāinga Ora will need to manage risks and liabilities (like all other Building Consent Authorities) if it becomes registered as a Building Consent Authority;

13 note that if Kāinga Ora becomes a BCA, this has the potential to improve efficiency, innovation and consistency in the building consent processes for Crown built houses consented by Kāinga Ora;

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- 15 agree that Kāinga Ora should continue to meet development contributions as set by local governments.

Authorised for lodgement

Hon Jenny Salesa

Minister for Building and Construction

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## Appendix One: Update on the Building System Legislative Reform Programme

- 1 Over the last few years, Building and Construction officials have undertaken a review of the Building System regulatory framework. Last year, consultation was undertaken on a range of issues and the reported back to Cabinet. The Reform programme has now been broken into three streams of work, and this appendix provides an update on each.

### *Stream one: Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill*

- 2 On Friday 8 May we introduced the Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill to the House. This Bill provides for necessary legislative reform to provide for economies of scale and a reduced risk to New Zealand's reputation from product and building defects. Components in this Bill will help to streamline consenting processes; by:
  - 2.1 Requiring better information on products to support better and more informed decision-making, helping designers and builders to choose the right products and install them in the way intended and support faster consenting.
  - 2.2 Providing for a new manufacturer certification and registration scheme that will provide faster, more consistent building consent approaches for manufacturers that are able to meet quality and performance standards and have a demonstrated ability to produce buildings and components that comply with the New Zealand Building Code.
  - 2.3 Strengthening the CodeMark scheme to provide further confidence to BCAs and product users that new and innovative building products and methods will comply with the building code. BCAs must accept a product certificate as evidence of compliance with the Building Code.

### *Stream two: Strengthening the main occupational licencing regimes in the building sector*

- 3 MBIE officials are also looking at ways to strengthen the main occupational licencing regimes in the building sector. This will include consideration of:
  - 3.1 strengthening the existing LBP regime to ensure that builders have the right skills, knowledge, experience and behaviours to do quality building work;
  - 3.2 removing territorial exemptions in the Plumbers, Gasfitters and Drainlayers Act that create regulatory gaps; and
  - 3.3 introducing a new licensing regime and licensing classes for Engineers.

### *Stream three: Addressing risk and liability settings*

- 4 MBIE officials have been looking at how best to address risk and liability settings in the building and construction sector. Timeframes for reporting on this work were late 2020; but this paper brings the initial report backs forward.