



COVERSHEET

Minister	Hon Dr Megan Woods	Portfolio	Building and Construction
Title of Cabinet paper	Update on the response to the Loafers Lodge fire and new and enhanced offences in the Building Warrant of Fitness regime	Date to be published	By 18 September 2023

List of documents that have been proactively released		
Date	Title	Author
August 2023	Update on the response to the Loafers Lodge fire and new and enhanced offences in the Building Warrant of Fitness regime	Office of the Minister for Building and Construction
7 August 2023	Response to the Loafers Lodge fire and new and enhanced offences in the Building Warrant of fitness regime: Update CAB-23-MIN-0350 Minute	Cabinet Office

Information redacted

YES

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Some information has been withheld for the reason of maintenance of the law.

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Office of the Minister for Building and Construction

Cabinet

Update on the response to the Loafers Lodge fire and new and enhanced offences in the Building Warrant of Fitness regime

Proposal

- 1 This paper:
 - 1.1 provides an update on work in response to the Loafers Lodge fire; and
 - 1.2 seeks agreement to introduce a new standard offence for independent qualified persons and increase the penalties of existing Building Warrant of Fitness infringement offences for building owners.

Executive Summary

- 2 On 16 May 2023, a fire broke out at Loafers Lodge in Newtown, Wellington resulting in five deaths and injuring 20 of its occupants. My response to this tragedy has been to commission work to be undertaken in two main tranches:
 - 2.1 The first tranche is 'no regrets' work that is sensible to undertake immediately. This includes work in the independent qualified persons regime, a request to councils for information on boarding houses in their areas, and a joint boarding house operation being conducted by the Ministry of Business, Innovation and Employment (MBIE) and councils.
 - 2.2 The second tranche will consider potential changes to building and tenancy law. This work needs to strike an appropriate balance – we do not want boarding houses shut down. I anticipate work in this second tranche to become clearer following the release of New Zealand Police and Fire and Emergency New Zealand investigation reports, expected later this year.
- 3 The Loafers Lodge fire highlighted concerns relating to some building owners' and independent qualified persons' lack of compliance with the building warrant of fitness regime. Maintenance of the law
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Maintenance of the law
I consider it timely to address these concerns as part of the tranche one work.
- 4 I propose that the infringement offence fees for building owners for not supplying a building warrant of fitness and failing to display a building warrant of fitness as required be increased from \$250 to \$1,000. This provides a

greater deterrent for failure to comply with these statutory duties and is a tool territorial authorities can use easily at low cost.

- 5 Currently, territorial authorities have few tools to regulate misconduct from independent qualified persons. They can either remove them from their register or attempt to charge them under section 369 of the Building Act for providing a false or misleading document, which can be costly and difficult to prove.
- 6 The existing obligation for independent qualified persons to only issue a 12A form if a system has met all the requirements in the compliance schedule is not clear. 12A forms are issued by independent qualified persons and certify that the systems within a building have met their inspection, maintenance, and reporting procedures requirements.
- 7 I propose that this obligation be clarified in the Building Act 2004 so that it is clear to independent qualified persons that a 12A form can only be issued for systems that have met their inspection, maintenance, and reporting procedures requirements.
- 8 To ensure this obligation is met, I propose introducing a standard offence for independent qualified persons. It will become an offence to negligently issue 12A forms for a specified system where the inspection, maintenance, and reporting procedures, as stated in the compliance schedule, have not been fully complied with in the last 12 months for that system. The penalty for this would be a fine not exceeding \$50,000 for an individual and \$150,000 for a body corporate.
- 9 Stakeholder groups have indicated that there are other issues with the system, not just the lack of offences and penalties. There is a risk that these offences will not be sufficient to manage the non-compliance by independent qualified persons in the system. To mitigate this, my officials at MBIE are working with councils to provide a consistent national approach to regulating independent qualified persons.

Background

- 10 On 16 May 2023, a fire broke out at Loafers Lodge in Newtown, Wellington, resulting in five deaths and injuring 20 of its occupants. Investigations into the fire by New Zealand Police and Fire and Emergency New Zealand are ongoing.
- 11 I provided an oral update at the Cabinet Social Welfare Committee on 28 June 2023 to set out my proposed response to the Loafers Lodge tragedy [SWC-23-MIN-0076 refers]. I undertook to provide a more formal paper setting out the direction of this work in due course.

There are a number of actions we can take now on a 'no regrets' basis

- 12 To support consideration of how we might improve fire safety standards more broadly, it is important to gather information about boarding house stock across New Zealand.
- 13 The Chief Executive of MBIE wrote to councils on 9 June 2023 requesting they “provide information on the stock of boarding houses (or similar types of accommodation)” in their area based on a desktop review to MBIE by 7 July 2023. Councils were asked to take a broad approach in determining what a boarding house is, and to focus on boarding house buildings that are more than three-storeys in height. I wrote to Mayors to request their support to prioritise this information being provided to MBIE.
- 14 The format and level of information included in responses varied, but MBIE has been able to draw useful insights from the data.
- 15 An initial analysis of the data has identified approximately 70 buildings in 13 areas that are similar to Loafers Lodge and may have a similar level of fire safety risk because they:
 - 15.1 are mid- or high-rise (3-storeys or greater in height)
 - 15.2 provide boarding house-type accommodation (eg shared facilities, longer-term tenancies)
 - 15.3 do not have an automatic sprinkler system installed.
- 16 Approximately two-thirds of these buildings are located in just three council areas: Auckland Council, Queenstown Lakes District Council and Wellington City Council.
- 17 MBIE’s Building System Assurance team, Tenancy Compliance and Investigations Team and local councils are developing a plan for joint boarding house audits, using boarding house data provided from the survey. This will enable officials to see the quality of boarding houses on the ground, and enable us to continue to build a picture of boarding houses in New Zealand.
- 18 The joint operation is planned to start in August and take approximately two months to substantially complete.
- 19 The joint operation, coupled with the expected release of investigation reports from the New Zealand Police and Fire and Emergency New Zealand later this year, will allow us to take a more informed approach to decisions on any changes to building or tenancy laws.

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- 21 Currently, legislation provides no framework for the consistent regulation of independent qualified persons. The Building Act 2004 (the Building Act) defines an independent qualified person as someone who a territorial authority considers to be qualified to:
- 21.1 carry out or supervise all or some of the inspection, maintenance, and reporting procedures required for a specified system stated in a compliance schedule; and
 - 21.2 certify that those procedures have been fully complied with.
- 22 To record who is certified as an independent qualified person, territorial authorities have created independent qualified person registers. In some regions, territorial authorities have grouped together to form a register. There are ten registers across the country. Each register varies in the competency requirements for registration, registration fees, and the disciplinary and complaints process. An independent qualified person needs to be registered in the region they operate in i.e. an independent qualified person registered only in Wellington cannot work as an independent qualified person in Auckland.
- 23 Building owners can be affected by misconduct by independent qualified persons as they are relying on them to correctly issue a 12A form as part of the building warrant of fitness process. If they do not do so, and a territorial authority finds a 12A form was issued incorrectly, the building owner may be liable under the Building Act for incorrectly supplying a building warrant of fitness.
- 24 I see improvements to the independent qualified person regime as something that we can get onto immediately in order to better highlight safety issues earlier.
- 25 I have commissioned MBIE officials to strengthen regulation of independent qualified persons under existing settings. This will see MBIE work with councils to agree a nationally consistent approach to the operation of the independent qualified person regime, including:
- 25.1 Regular audits of building warrants of fitness and independent qualified persons' work.
 - 25.2 Issue guidance (or create rules) for independent qualified persons on supervision best practice.
 - 25.3 Strengthen the ability of councils to remove independent qualified persons from the register.
 - 25.4 A conflict of interest declaration or fit and proper person test.
 - 25.5 A nationally consistent licensing scheme with a national register and consistent competency requirements.

- 26 This work has already begun, with initial conversations with councils complete. I expect officials to make progress on more formal conversations, with an aim to seek agreement from councils to a nationally consistent approach over the coming months.
- 27 Work to strengthen regulation of independent qualified persons also includes consideration of enhanced offences and penalties for buildings owners and independent qualified persons in relation to building warrants of fitness.
- 28 Changes to, or the addition of, offences and penalties requires legislative change. This paper outlines my policy proposals for a new standard offence for independent qualified persons and increases to the penalties of existing building warrant of fitness infringement offences.

Analysis

The building warrant of fitness regime

- 29 The purpose of the building warrant of fitness regime is to ensure that the specified systems stated in the compliance schedule are performing, and will continue to perform, to the standards for those systems set out in the relevant building consent.
- 30 All buildings, other than single residential buildings (unless they are serviced by a cable car), require a compliance schedule and annual warrant of fitness if they contain any of the specified systems listed in Schedule One of the *Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005*. These include systems such as automatic sprinkler systems, fire alarms and lifts.
- 31 Compliance schedules are issued by territorial authorities in their capacity as a building consent authority. The compliance schedule lists the building's specified systems and the inspection, maintenance and reporting procedures needed to keep them in good working order.
- 32 Specified systems are typically mechanical or electrical in nature and require regular maintenance to ensure their ongoing operation. Failure to carry out such maintenance presents a risk that the system could fail, increasing the risk to the health and safety of occupants.
- 33 A building warrant of fitness must be supplied to the territorial authority annually by the building owner. This is to confirm that the inspection, maintenance and reporting procedures of the specified systems listed on a building's compliance schedule have been fully complied with during the previous 12 months.
- 34 An independent qualified person certifies that a specified system has complied with the inspection, maintenance, and reporting procedures stated in the compliance schedule during the previous 12 months. Independent qualified persons issue a 12A form for specified systems that have met those

requirements. A building warrant of fitness must be submitted with a 12A form for every system on the compliance schedule.

- 35 Territorial authorities review the building warrant of fitness and 12A forms to ensure they are correct and that the independent qualified person who issued the 12A form is registered. Territorial authorities may also undertake proactive inspections and audits to ensure the provided information is correct, although there is variation in how often these are undertaken.

Increasing the penalties for existing infringement offences

- 36 How the building warrant of fitness regime is enforced and promoted is critical to ensuring that the regime is working as expected. There are a range of options available to territorial authorities to address non-compliance within the building warrant of fitness regime, including:

36.1 education;

36.2 warnings;

36.3 infringement offences for minor non-compliance;

36.4 notices to fix;

36.5 deeming a building to be dangerous and restricting entry; and

36.6 prosecuting a person for committing an offence under section 108 of the Building Act.

- 37 Each of these options for dealing with non-compliance is considered by the territorial authority, who will take into account how each option is proportionate to the level of non-compliance.

- 38 The Building Act contains four offences in section 108 relating to the responsibilities of the building owner in the building warrant of fitness regime:

38.1 failing to supply a building warrant of fitness in accordance with the Act;

38.2 failing to display a building warrant of fitness;

38.3 displaying a false or misleading building warrant of fitness; and

38.4 displaying a building warrant of fitness otherwise than in accordance with the Act.

- 39 In 2021, the penalty for these offences was increased significantly to \$50,000 for an individual and \$150,000 for a body corporate. I consider these amounts to be appropriate and that they do not need to be increased.

- 40 There are also four infringement offences in the *Building (Infringement Offences, Fees and Forms) Regulations 2007* which are identical to the offences in section 108 of the Building Act. The penalty for these offences

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ranges from \$250 to \$1,000. The fee for failing to provide a building warrant of fitness or failing to display a building warrant of fitness is only \$250.

- 41 I consider that this does not reflect the severity of the infringement offence and propose that they be increased to \$1,000. A table of these proposed increases can be found at **Appendix A**.
- 42 Increasing the fee for not supplying a building warrant of fitness to \$1,000 will give territorial authorities a stronger tool against non-compliance for these offences.
- 43 Not supplying a building warrant of fitness or failing to display one can indicate issues with specified systems in the building. Maintenance of the law

The existing obligation for independent qualified persons is unclear and should be clarified in the Building Act

- 44 Local government and building compliance industry stakeholders have raised concerns around instances where an independent qualified person has issued a 12A form for specified systems that have not met the requirements of the compliance schedule.
- 45 Under section 108(3)(c) of the Building Act, a building warrant of fitness supplied to the territorial authority must have attached to it 12A forms issued by an independent qualified person that certify that the inspection, maintenance and reporting procedures stated in the building's compliance schedule have been fully complied with during the previous 12 months. Section 369 of the Building Act provides that it is an offence to provide a false or misleading document.
- 46 The Building Act therefore implies that independent qualified persons should not issue a 12A form where a specified system has not met the requirements in the compliance schedule in the last 12 months. However, the Building Act does not specifically state this.
- 47 This obligation should be clarified in the Building Act so that it is clear that independent qualified persons may only issue a 12A form where the procedures in the building's compliance schedule relating to the specified systems have been fully complied with during the previous 12 months.
- 48 I propose that the Building Act be amended to clarify that independent qualified persons have an obligation to only issue a 12A form for a specified system if the inspection, maintenance, and reporting procedures stated in the compliance schedule have been fully complied with during the previous 12 months.

Territorial authorities have few tools to manage independent qualified persons issuing 12A forms incorrectly

- 49 There are no specific offences for independent qualified persons issuing 12A forms for specified systems that have not met the requirements in a buildings compliance schedule. Therefore, territorial authorities have difficulty disciplining this misconduct when they discover it.
- 50 Independent qualified persons need to be trusted to have undertaken work to assess whether the compliance schedule procedures have been complied with so that territorial authorities and building owners can have confidence that the 12A forms they receive are accurate and that the specified systems are operating, and will continue to operate, as expected.
- 51 When a 12A form does not correctly represent the status of the specified systems in a building, there may be an increased risk to the life and safety of occupants. An incorrectly issued 12A form may lead to issues with specified systems (such as automatic sprinkler systems and fire alarms) not being detected due to system testing, inspections and maintenance being missed.
- 52 Stakeholders have indicated that there are currently instances where independent qualified persons are issuing 12A forms when they should not be. The cases outlined by territorial authorities suggest that this is most often due to negligence from independent qualified persons rather than them knowingly issuing 12A forms when they should not.
- 53 The Building Act only provides territorial authorities with two tools to discipline this misconduct:
- 53.1 removing the independent qualified person from the register; and
- 53.2 prosecuting the independent qualified person under section 369 of the Building Act for knowingly submitting a false or misleading document.
- 54 I am not aware of any instances of section 369 being used against an independent qualified person. Stakeholders have said it can be difficult to remove someone from the register where a disciplinary process is not in place.
- 55 To ensure that independent qualified persons can be held to account for not fulfilling their obligations under the building warrant of fitness regime, I propose that it be an offence under the Building Act for an independent qualified person to negligently issue a 12A form for a specified system where the inspection, maintenance, and reporting procedures stated in the compliance schedule have not been fully complied with during the previous 12 months.
- 56 I propose that the maximum penalty for this offence should be \$50,000 for an individual and \$150,000 for a body corporate to reflect the seriousness of this offence. This penalty is the same as the other offences in s108 of the Building Act as I consider the seriousness of the offence to be equivalent to those existing offences.

- 57 I consider these penalties are appropriate to the level of offence committed. An independent qualified person not taking care and issuing a 12A form when they should not undermines the entire Building Warrant of Fitness regime and means that issues with specified systems may not be identified or resolved. This could impact the health and safety of occupants in an emergency, such as a fire.
- 58 These offences would provide territorial authorities with tools to discipline and deter this misconduct and help ensure that independent qualified persons are fulfilling their obligations under the building warrant of fitness regime.

There is a risk that these offences will not prevent misconduct from continuing

- 59 Stakeholders have said that they were supportive of introducing new offences, but they also raised other issues with the building warrant of fitness regime and the role of independent qualified persons. These include:
- 59.1 the lack of a complaints and disciplinary process in some parts of the country;
 - 59.2 the inconsistent competency requirements for independent qualified person registration;
 - 59.3 the lack of a national register, which allows 'incompetent' independent qualified persons to practice in other parts of the country; and
 - 59.4 the building owner being in a position where they have committed an offence under the Act because an independent qualified person hasn't done their job adequately, resulting in no building warrant of fitness being issued.
- 60 There is a risk that this new offence will not be sufficient to manage the non-compliance by independent qualified persons in the building warrant of fitness regime and would not address all of the issues raised by stakeholders.
- 61 To mitigate this risk, I have instructed my officials to look into developing a national register for independent qualified persons as well as developing guidance for territorial authorities on managing independent qualified persons, as outlined in paragraphs 25-26.

Cost-of-living Implications

- 62 There are no impacts to the cost of living from these policy proposals.

Financial Implications

- 63 The offences and infringement offences are based on existing obligations in legislation. There may be additional costs for those who commit infringement offences, but these costs can be avoided. The addition of a new offence can have financial implications on the criminal justice system.

Legislative Implications

- 64 These proposals will require amendments to the *Building Act 2004* and *Building (Infringement Offences, Fees, and Forms) Regulations 2007*. These amendments will be made through the next available legislative vehicle.

Impact Analysis

Regulatory Impact Statement

- 65 The Treasury's Regulatory Impact Analysis team has determined that this proposal is exempt from the requirement to provide a Regulatory Impact Statement on the grounds that it has no or **only** minor impacts on businesses, individuals, and not-for-profit entities.

Climate Implications of Policy Assessment

- 66 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that CIPA requirements do not apply to this proposal as it not expected to result in any significant, direct emissions impacts.

Population Implications

- 67 These proposals do not have any implications on specific populations as it looks at the entirety of the Building Warrant of Fitness regime which includes all commercial buildings and large residential buildings that contain specified systems.

Human Rights.

- 68 The proposals in this paper uphold and protect the right to a safe and healthy home and the right to adequate housing in the Universal Declaration of Human Rights 1948 and the International Covenant on Economic, Social, and Cultural Rights 1966 (ICESR).

Use of External Resources

- 69 No external resources were used in the development of these policy proposals.

Consultation

- 70 The following agencies were consulted on this paper: Accident Compensation Corporation; Department of Internal Affairs; Department of Prime Minister and Cabinet; Te Tūāpapa Kura Kāinga – the Ministry of Housing and Urban Development; Infrastructure Commission; Kāinga Ora; Ministry of Foreign Affairs and Trade; Ministry of Education; Ministry of Justice; Te Puni Kokori; WorkSafe New Zealand; The Treasury; Ministry of Health.

- 71 The following groups were consulted on the policy proposals in this paper: Waikato Building Consent Group; Southern Building Controls Group; Association Building Compliance; and Building Networks.
- 72 Overall, these groups were supportive of the proposal to introduce offences and penalties for independent qualified persons' misconduct. However, they also noted that independent qualified persons need consistent regulation across the country and that the current system is not working as it should. Further work is underway to address these issues.

Communications

- 73 I intend to announce these proposals through a press release.

Proactive Release

- 74 I intend to proactively release this paper as per Cabinet Circular [CO(18)4 refers]. However, some of the contents of this paper are part of an ongoing police investigation and these parts will be withheld. If the paper were requested under the Official Information Act 1982, those parts would be withheld under section 6(c).

Recommendations

The Minister for Building and Construction recommends that Cabinet:

- 1 **Note** that investigations into the Loafers Lodge fire are ongoing;
- 2 **Note** a range of actions are underway on a 'no regrets' basis to respond to the Loafers Lodge fire, including:
 - 2.1 Gathering information on boarding houses in New Zealand, to build a more complete picture of this type of housing;
 - 2.2 The launch of a joint MBIE and council boarding house operation, using boarding house data supplied by councils; and
 - 2.3 Changes to strengthen the regulation of independent qualified persons, which will see MBIE work with councils to agree a nationally consistent approach to the operation of the regime.
- 3 **Note** that these initial actions will help inform any further changes required to building and tenancy laws, as will the investigation reports currently being prepared by the New Zealand Police and Fire and Emergency New Zealand.
- 4 **Note** that the Ministry of Business, Innovation and Employment is investigating potential legislative changes to the building warrant of fitness regime and obligations of independent qualified persons;
- 5 **Agree** to increase the fine for buildings owners for failing to supply territorial authority with a building warrant of fitness from \$250 to \$1,000;

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- 6 **Agree** to increase the fine for building owners for failing to display a building warrant of fitness required to be displayed from \$250 to \$1,000;
- 7 **Agree** to amend the Building Act 2004 to clarify the obligations of Independent Qualified Persons in issuing 12A forms;
- 8 **Agree** to introduce a new standard offence for Independent Qualified Persons who negligently issue a 12A form for a specified system where the inspection, maintenance, and reporting procedures of the compliance schedule have not been fully complied with in the last 12 months for that system;
- 9 **Agree** that the penalty for this offence is a fine not exceeding \$50,000 for an individual and \$150,000 for a body corporate;
- 10 **Invite** the Minister of Building and Construction to issue drafting instructions to the Parliamentary Counsel Office to give effect to Cabinet decisions in this paper;
- 11 **Authorise** the Minister of Building and Construction to further clarify and develop policy matters relating to the proposals in this Cabinet paper in a manner not inconsistent with the policy recommendations contained in the paper; and
- 12 **Authorise** the Minister of Building and Construction, in consultation with the Minister of Justice, to make changes to the proposed offence.

Authorised for lodgement

Hon Dr Megan Woods

Minister for Building and Construction

Appendix A – Current and proposed infringement offence penalties for the Building Warrant of Fitness regime

Offence	Current penalty	Proposed penalty
Failing to supply territorial authority with a building warrant of fitness	\$250	\$1,000
Failing to display a building warrant of fitness required to be displayed	\$250	\$1,000
Displaying a false or misleading building warrant of fitness	\$1,000	No change
Displaying a building warrant of fitness other than in accordance with section 108	\$1,000	No change