



MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT  
HĪKINA WHAKATUTUKI

6

Discussion paper –  
Building system legislative reform

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# Offences, penalties and public notification

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## Summary of Part 6: Offences, penalties and public notification

Financial penalties should deter poor or illegal behaviour; MBIE needs enough time to investigate possible offences; and public notifications need to be fit for future use.

One of the building regulatory system's main goals is to make sure that New Zealand's building sector builds safe and durable buildings. Participants in the building process have to comply with the laws and regulations that make up the building regulatory system. Participants who don't comply face penalties – the goal of these penalties is to deter poor or illegal behaviour.

The proposed changes set out in this section focus on four main problems:

- ✘ Financial penalties may not be fit for purpose.
- ✘ Maximum financial penalties for organisations are the same as those for individuals. A fine that is likely to deter an individual may be seen as a minor cost by an organisation. Other New Zealand legislation, like the *Health and Safety at Work Act 2015*, sets higher penalties for organisations.
- ✘ The *Building Act 2004* only allows six months to lay a charge for an offence under the Act. This is not enough time as offences and investigations are often complex.
- ✘ Due to changes of preference in how people access information, requiring public notifications in daily newspapers may not be fit for purpose in the future.

### MBIE wants stakeholders' feedback on four proposals

1	Increase the maximum financial penalties.
2	Set the maximum penalty levels differently for individuals and organisations.
3	Extend the time relevant enforcement agencies have to lay a charge under the <i>Building Act</i> , from six months to 12 months (section 378 of the <i>Building Act</i> ).
4	Modify the definition of 'publicly notify' in section 7 of the Act.

### These changes will help deliver the programme's outcomes

The programme's three outcomes are safe and durable buildings, an efficient regulatory system and a high-performing building sector.

The proposals set out in this section would help deliver these outcomes by:

- ensuring the penalty regime for offences in the *Building Act* provides sufficient incentive to comply with legislative requirements
- ensuring that public notification provisions are fit for purpose.

## Offences, penalties and public notification

Penalties should deter poor or illegal behaviour by individuals and organisations; public notifications also need to be fit for purpose

A key purpose of the building regulatory system is ensuring that people can use buildings safely and without endangering their lives. Appropriate checks and balances are needed to ensure that buildings meet this objective. Penalties for non-compliance are one of these checks and balances. If regulations are not followed, building failure can have serious consequences, possibly putting people's lives at risk.

### Financial penalties – and other aspects of the penalties regime may not be fit for purpose

Offences and penalties are intended to achieve compliance with legislation and deter individuals or groups from behaving poorly or illegally.

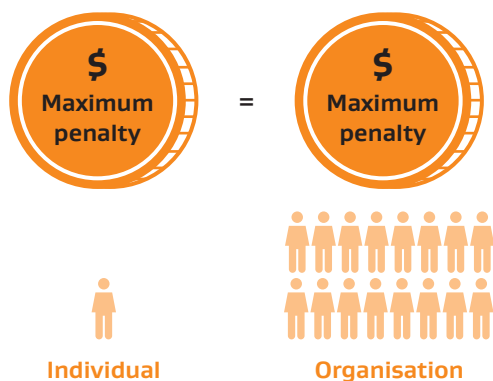
#### Current maximum penalties may no longer be fit for purpose

Many of the current maximum financial penalties set out in the *Building Act* have not been adjusted since 2004. This means that many penalties may not be fit for purpose in the future. They are also out of line with other legislation that affects the building industry and is aimed at protecting people's lives and wellbeing (such as the *Health and Safety at Work Act 2015*).

#### Maximum penalties don't distinguish between individuals and organisations

The maximum penalty amounts in the *Building Act* don't distinguish between an individual and an organisation. Other Acts that govern building practitioners do set different maximum penalties for individuals and organisations – the *Plumbers, Gasfitters and Drainlayers Act 2006* and the *Health and Safety at Work Act* both use this approach. The financial consequence for some organisations may be an insufficient deterrent compared to the effects on an individual. An increase in organisational penalties would send a stronger signal of the consequences of non-compliance, and provide a greater deterrent.

#### The financial consequence for some organisations may be an insufficient deterrent compared to the effects on an individual



### **Time to lay charges is not sufficient**

The chief executive of MBIE, territorial authorities, regional authorities and other authorised people can file a charging document for an offence against the *Building Act*. They currently have six months to lay a charge from the date that an offence becomes known, or from when an authority could not justify having missed an offence. Due to the possibly complex factors of an offence under the *Building Act* and the number of people involved, six months is not a sufficient period to gather information and progress an investigation

### **Rules on public notification need to be updated**

A number of sections of the *Building Act* require public notification of various matters that relate to the exercise of certain powers by the chief executive of MBIE or the Building Practitioners Board (BPB). For example, the chief executive is required to publicly notify a proposal to issue, amend or revoke an acceptable solution or verification method. Where the BPB disciplines a person, in addition to notification in the BPB Register, the BPB may also publicly notify the action in any other way it thinks fit.

'Publicly notify' is defined in section 7 of the *Building Act* and includes a requirement to publish a notice in one or more daily newspapers in Auckland, Hamilton, Wellington, Christchurch and Dunedin, in addition to publishing in the *New Zealand Gazette* and on the internet.

Changes in technology and how the public accesses information means that requiring public notification in daily newspapers may not be fit for purpose in the future.

## MBIE proposes three changes to offences and penalties in the *Building Act*

- 1** Increase the maximum financial penalties for all persons.
- 2** Set the maximum penalty levels differently for individuals and organisations.
- 3** Extend the time relevant enforcement agencies have to lay a charge under the *Building Act*, from six months to 12 months (section 378 of the *Building Act*).

## MBIE proposes one change to the notification requirements in the *Building Act*

- 4** Modify the definition of 'publicly notify' in section 7 of the *Building Act*.

The objectives of these changes are to:

- ensure that the financial penalties in the *Building Act* provide sufficient incentives to comply with legislative requirements and
- public notification requirements are fit for purpose.

## 1. Increase the maximum financial penalties

### Proposal

Increase the maximum financial penalties for all persons under the *Building Act*.

MBIE proposes to set higher penalties so that the consequences of offences align with other legislation and are adequate for the future.

The proposed framework sets maximum penalties for both individuals and organisations in proportion to the consequence of that offence (see table 6.1). There are four levels of offence:

- Very high: Offences that cause serious risk to people or death.
- High: Offences relating to dishonesty or fraud in relation to risk and performance assessment. For example, permitting a person to use a building when you know it is unsafe or unsanitary.
- Medium: Offences relating to notification and information issues.
- Low: Offences relating to record keeping.

### Questions for stakeholders

**6.1** Are the current maximum penalty amounts in the *Building Act* appropriate?

**6.2** Do you agree with the proposed increases to maximum penalties?

## 2. Set the maximums differently for individuals and organisations

### Proposal

Set the maximum penalties differently for individuals and organisations.

MBIE also proposes a maximum penalty for individuals and a different maximum penalty for any other person (including all legal persons other than individuals such as the Crown, corporations sole, and bodies of persons whether incorporated or unincorporated). This proposal is aimed at differentiating between penalties to ensure that sufficient incentives are available to ensure compliance.

Table 6.1 outlines the proposed framework of offences alongside a comparison of current penalty maximums for both individuals and organisations in the *Building Act* and the *Health and Safety at Work Act*. It also outlines the new proposed penalty maximums for both individuals and organisations.



A number of reform proposals outlined in this document propose new offences and penalties. These are presented in their respective sections.


Questions for stakeholders 	
<b>6.3</b>	Do you agree with introducing higher penalties for organisations?
<b>6.4</b>	What impacts on the building industry could arise from this proposal if it is implemented?

TABLE 6.1

**Comparison of penalty maximums in current legislation and proposed penalty maximums**

LEVEL OF SERIOUSNESS <b>Very high</b>		
Types of offences:		
<ul style="list-style-type: none"> <li>■ Offences that cause serious risk/death to people</li> <li>■ Other offences that may have serious consequences.</li> </ul>		
<i>Building Act 2004</i>	<i>Health &amp; Safety at Work Act 2015</i>	
<b>s128A:</b> Failure to comply with a notice when issued where a territorial authority is satisfied that a building is dangerous, affected or insanitary.	<b>s48:</b> Failure to comply with a duty that exposes an individual to a risk of serious injury, serious illness or death.	
<b>Current penalty</b> \$200,000	<b>Proposed individual penalty</b> \$300,000	<b>Current individual penalty</b> \$150,000 (not a PCBU or an officer of a PCBU) \$300,000 (Officer of a PCBU or a PCBU)
	<b>Proposed organisational penalty</b> \$1.5 million	<b>Current organisational penalty</b> \$1.5 million

TABLE 6.1 – CONTINUED

LEVEL OF SERIOUSNESS <b>High</b>	
Types of offences: <ul style="list-style-type: none"> <li>■ Offences relating to dishonesty/fraud.</li> <li>■ Offences relating to risk/performance assessment and hazard identification.</li> <li>■ Offences relating to (failure to put in place) risk controls.</li> </ul>	
<i>Building Act 2004</i>	<i>Health &amp; Safety at Work Act 2015</i>
<b>s116B(1)(b):</b> A person uses a building, or knowingly permits another person to use a building, that has inadequate means of escape from fire.	<b>s49:</b> Offence of failing to comply with duty.
<b>Current penalty</b> \$100,000	<b>Proposed individual penalty</b> \$150,000
	<b>Proposed organisational penalty</b> \$500,000
	<b>Current individual penalty</b> \$50,000 (not a PCBU or an officer of a PCBU)  \$100,000 (Officer of a PCBU or a PCBU)
	<b>Current organisational penalty</b> \$500,000

LEVEL OF SERIOUSNESS <b>Medium</b>	
Types of offences: <ul style="list-style-type: none"> <li>■ Offences relating to administration and provision of information.</li> <li>■ Offences relating to notification.</li> </ul>	
<i>Building Act 2004</i>	<i>Health &amp; Safety at Work Act 2015</i>
<b>s108(5)(a):</b> A building owner fails to display a building warrant of fitness that is required to be displayed.	<b>s204:</b> Conducting business at a workplace required to be authorised, which is not authorised.
<b>Current penalty</b> \$20,000	<b>Proposed individual penalty</b> \$50,000
	<b>Proposed organisational penalty</b> \$150,000
	<b>Current individual penalty</b> \$50,000
	<b>Current organisational penalty</b> \$250,000

TABLE 6.1 – CONTINUED

LEVEL OF SERIOUSNESS		
Low		
Types of offences:		
<ul style="list-style-type: none"> <li>Offences relating to record-keeping.</li> </ul>		
<i>Building Act 2004</i>		<i>Health &amp; Safety at Work Act 2015</i>
<b>s114(3):</b> A person fails to give written notice to the territorial authority that the owner proposes to change the use of a building.		<b>s57:</b> Not keeping required records of notifiable events.
<b>Current penalty</b> \$5,000	<b>Proposed individual penalty</b> \$5,000	<b>Current individual penalty</b> \$5,000
	<b>Proposed organisational penalty</b> \$25,000	<b>Current organisational penalty</b> \$25,000

### 3. Extend the time period for charges to be laid

#### Proposal



Extend the time relevant enforcement agencies have to lay a charge under the *Building Act*, from six months to 12 months (section 378 of the *Building Act*).

MBIE proposes to extend the time period to lay a charge for an offence. At present, six months is not always enough time. Due to the complexity of building and the number of parties involved, investigations can be lengthy. This proposal aims to better balance the time needed to enforce compliance with ensuring timely prosecution. MBIE proposes that 12 months is an appropriate time to lay a charge and aligns with other regulatory systems that have longer timeframes (12 months or more) in which to file a charge, such as the *Electricity Act 1992* or the *Crown Minerals Act 1991*.

#### Questions for stakeholders



6.5

Do you think 12 months is an appropriate time period for relevant enforcement agencies to lay a charge?

## 4. Modify the definition of 'publicly notify' in the *Building Act*

### Proposal



Modify the definition of 'publicly notify' in section 7 of the *Building Act* to remove the requirement to publish in daily newspapers circulating in each of the cities of Auckland, Hamilton, Wellington, Christchurch, and Dunedin. Public notification will still be required in a more modern form that is future proofed and publicly accessible.

The definition of 'publicly notify' applies to the exercise of certain powers of MBIE's chief executive and the LBP Board. Removing the requirement to publish in daily newspapers in the main cities is expected to better respond to changes in technology and how the public accesses information. The proposed change is consistent with proposals currently before Parliament to amend the *Building Act* to manage buildings following an emergency.

### Questions for stakeholders



6.6

Do you agree that public notification under the *Building Act* should no longer be required in newspapers?

6.7

Do you agree that publication on the internet and in the New Zealand Gazette is sufficient?

## How the proposed changes measure up to our five assessment criteria



### Does the proposal meet the objectives for penalties and other matters?

The overall objective is to ensure that the penalty regime for offences in the *Building Act 2004* provides sufficient incentive to comply with legislative requirements, and that public notification requirements are fit for purpose. Compared to the status quo, the proposals are expected to better meet this objective:

- Increasing maximum financial penalties for offences and differentiating fines between individuals and organisations is expected to better support compliance with the *Building Act* and deter individuals or organisations from behaving poorly or illegally.
- Extending the time relevant enforcement agencies have to place a charge under the *Building Act* from six months to 12 months is expected to better balance the time needed to gather evidence in more complex cases, and the time for action to enforce compliance.
- The proposed changes to the public notification provisions will better respond to changes in technology and how the public accesses information.



### Does the proposal support the desired behavioural shifts in the building sector?

Penalties for non-compliance with the *Building Act* are one of the checks and balances on the building regulatory system. The proposals should support desired behaviours in the building sector by helping to ensure that penalties are fit for purpose and effective.



### Would the benefits of the proposal outweigh the risks and costs?

The penalty proposals will expose building owners, practitioners, developers and others in the sector to greater maximum fines for both individuals and organisations. However, many of the maximum penalties levels have not been adjusted since 2004 and may not be fit for purpose in the future.

The benefits of the proposals are expected to outweigh the costs and risks.



### Is the proposal consistent with other elements of the building regulatory system?

The proposals are consistent with other elements of the building regulatory system as they help to support the legislative requirements in the *Building Act*.



### Is the proposal consistent with related government policy and regulations?

The penalty proposals will more closely align the *Building Act* with other legislation that affects the building industry and is aimed at protecting people's lives and wellbeing (for example, as set out in the *Health and Safety at Work Act 2015*).

## Potential impacts of the proposed changes



### Building consent authorities, territorial authorities and relevant persons

- Will have more time to investigate and lay a charge under the *Building Act*.
  - Potentially a greater number of charges will be investigated in a 12-month period.
- 



### Building owners and developers

- Individuals and organisations would face higher fines for non-compliance.
  - Higher fines will have a greater financial impact on individuals and organisations.
  - Poor behaviour is deterred and conviction rates are lower.
- 



### MBIE

- Will have further time to investigate offences of the *Building Act*. This would potentially result in more successful prosecutions.
  - Cost efficiencies associated with updated public notification processes.
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### Occupational regulation boards

- Potentially fewer investigations carried out due to the deterrent effect of higher penalties changing practitioner behaviour.
  - The range of offences investigated by occupational regulation boards may potentially be wider.
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## Recap of questions

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### Part 6 – Penalties



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|------------|---|
| <b>6.1</b> | Are the current maximum penalty amounts in the <i>Building Act</i> appropriate?                                 |
| <b>6.2</b> | Do you agree with the proposed increases to maximum penalties?  |
| <b>6.3</b> | Do you agree with introducing higher penalties for organisations?   |
| <b>6.4</b> | What impacts on the building industry could arise from this proposal if it is implemented?                      |
| <b>6.5</b> | Do you think 12 months is an appropriate time period for relevant enforcement agencies to lay a charge?         |
| <b>6.6</b> | Do you agree that public notification under the <i>Building Act</i> should no longer be required in newspapers? |
| <b>6.7</b> | Do you agree that publication on the internet and in the New Zealand Gazette is sufficient?                     |

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## List of acronyms

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**LBP** Licensed building practitioner

**MBIE** Ministry of Business, Innovation and Employment

**PCBU** Person Conducting a Business or Undertaking

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### Have your say

See **page 4** of the introduction (Part 1) for details on how to submit your feedback.



**Submissions close  
on 16 June 2019**





