



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HIKINA WHAKATUTUKI



Regulatory impact statement

Building investigation powers for the building regulator

Agency disclosure statement

This regulatory impact statement has been prepared by the Ministry of Business, Innovation and Employment. It analyses options to ensure information can be gathered to learn lessons from building failures, including when there are challenges securing the cooperation of involved parties

Building failure investigations are heterogeneous and rare, so it is difficult to quantify the expected benefits and costs of regulation supporting them. As such, options have been evaluated by multi-criteria analysis, and examples of impacts provided where possible. The primary negative impact of the preferred option – powers of compulsion – is against rights and freedoms; different conclusions may be reached depending on how these are weighted. Nonetheless, MBIE is confident that the proposed powers are justifiable and will be of public benefit.

The 2016 Kaikoura earthquakes have further highlighted the need for regulation to investigate building failures. As such, MBIE has progressed this work at pace; there has not been time to consult with those such as building owners and occupiers who will be particularly affected.

Overall, MBIE is satisfied that the conclusions in this regulatory impact statement provide a reasonable indication of the potential direction and significance of effects of the options analysed.

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Contents

Agency disclosure statement	2
List of Acronyms.....	4
Executive summary	5
1 Status quo and problem definition	6
2 Objectives	9
3 Options and impact analysis.....	10
4 Consultation.....	17
5 Conclusions and recommendations	18
6 Implementation plan	19
7 Monitoring, evaluation and review	20

List of Acronyms

BCA	building consent authority
MBIE	Ministry of Business, Innovation and Employment
TA	territorial authority

Executive summary

1. Investigating building failures supports the learning of lessons to avoid future failures. There is insufficient regulation to support such investigation. As such, previous investigations by MBIE have relied on the cooperation of involved parties. This has reduced and put at risk the benefits of these investigations.
2. To address this issue, powers are proposed for MBIE to collect evidence and manage sites of building failures. It is appropriate that these powers are vested in MBIE as the national building regulator and regulatory steward. These proposed powers are for the primary purpose of learning from the building failure and informing decisions about building regulations and other matters to help prevent future failures.
3. The powers are designed not to interfere with search and rescue operations.
4. As regulatory bodies responsible for handling complaints and discipline also play a role in the building regulatory system, relevant information related to the building failure will be able to be shared with them. This information would be able to be shared only when information indicates that a particular person significantly contributed to a building failure.
5. It is proposed that powers can be used to investigate buildings that have, on reasonable grounds, failed in a way that did, or could have, caused significant injury or death. Based on previous experience, this scope does not impact on rights and freedoms or introduce complexity beyond what is necessary, while recognising that there is equivalent public interest in investigating failures that do not end up causing injury for reasons unrelated to the performance of the building.
6. By ensuring that investigations are comprehensive even when there are challenges securing the cooperation of involved parties, the proposed powers will contribute to better regulatory outcomes – in particular, the potential avoidance of serious injuries and deaths.
7. These powers impact the rights of involved parties and may result in costs to them. As building failure investigations are heterogeneous and rare, it is difficult to quantify expected benefits and costs. However, it is expected that these powers will be of net benefit. Appropriate impact on rights and freedoms has been considered in the design of the proposed powers.

1 Status quo and problem definition

Context

8. MBIE (as the over-arching building regulator) has investigated five major building failures^{1,2}. These were the Southland Stadium, Forsyth Barr Building, Pyne Gould Corporation Building, Hotel Grand Chancellor and CTV building. MBIE is currently undertaking an investigation into the performance of Statistics House in Wellington following the 2016 Kaikoura earthquake.
9. A building has failed when it has not performed as reasonably expected given the building regulations and building standards of the time. Most failures are not investigated. Those investigated by MBIE did or could have caused significant injury or death; they were investigated where MBIE identified investigation as consistent with its role as the regulator and the public interest.
10. Investigating failures can support the learning of lessons to avoid future failures, through changing regulation and support of regulatory outcomes. For example, changes may be made to the Building Code or methods of complying with it, or guidance or warnings may be issued.
11. At present, there is insufficient regulation that supports the investigation of building failures in order to learn lessons. All previous investigations have proceeded on an ad-hoc basis and relied on the cooperation of involved parties.
12. In April 2013, as part of the Government's response to the Final Report of the Canterbury Earthquakes Royal Commission, Cabinet agreed that regulation is required to address post-disaster building management, including investigation of building failure [EGI Min (13) 6/11 refers].
13. The 2016 Kaikoura earthquakes have further highlighted the need for clear powers to investigate building failures in order to learn lessons. As such, MBIE has progressed this work at pace.

¹ Some investigations were undertaken by the Department of Building and Housing, prior to its integration into MBIE.

² Natural hazards may be investigated in relation to their impact on building failure, such as considering how ground characteristics contributed to the performance of a building's foundation. However, investigation of natural hazards in and of themselves is not considered in this paper.

Existing investigation powers of building regulators

14. In the absence of supporting regulation, MBIE has no clear powers to investigate building failure. There are no clear powers for Government to investigate building failure for the purpose of learning lessons³.
15. MBIE has no powers to restrict access and secure sites (territorial authorities (TAs) may do so in certain cases, in particular where a building is unsafe).
16. TAs can investigate to determine whether buildings are dangerous, insanitary, or earthquake-prone.
17. Building consent authorities (BCAs) ensure compliance with building regulations through functions such as issuing building consents and inspecting consented work. MBIE may investigate a BCA if it considers the BCA has failed to execute its functions, or been negligent in doing so. MBIE can obtain information only in specific situations relating to TAs, BCAs, or regional authorities, and for the purposes of enforcement action under the Building Act 2004.

Issues with relying on cooperation

18. Reliance on cooperation of involved parties has reduced and put at risk the benefits of investigations into building failure:
 - a. In some investigations, information on a building's design has not been provided when requested. The resulting need to infer aspects of the design has contributed to delays in findings and reduced the confidence with which findings can be made. Even when the physical cause of failure can be identified without access to design information, that information contributes to understanding how regulation of the time impacted the assumptions, interpretations and decision-making of those involved.
 - b. Delays in findings due to the need to secure cooperation or infer information not provided can diminish the benefits of an investigation. Illustratively, the investigation into the failure of Statistics House in the Kaikoura earthquake has been able to proceed at pace due to the cooperation of owners. Preliminary findings from the investigation have contributed to management of the Wellington building stock. The timeliness is particularly valuable given the current period of heightened seismic risk.
 - c. In one investigation, evidence of construction defects that were found to be a critical contributor to the building failure was partially removed in the time it took for MBIE to arrange access to the site.
 - d. MBIE's investigation into the collapse of the CTV building was significantly constrained by a lack of evidence gathered in the days after the collapse. As it was necessary and appropriate to rapidly relocate debris in the rescue effort, subsequent photos and observations were significantly less useful. In the subsequent Royal Commission of Inquiry, two engineers came to light who had gathered detailed photographic evidence under their own initiative while participating in search and rescue efforts around Christchurch. This evidence led to insights and robustness of findings that were absent in the MBIE report.

³ While, for example, the Police may investigate a building failure, this is for enforcement rather than learning lessons.

- e. While MBIE has been allowed by owners to access sites it has previously investigated, had they chosen not to do so there would have been significant challenges in proceeding.

2 Objectives

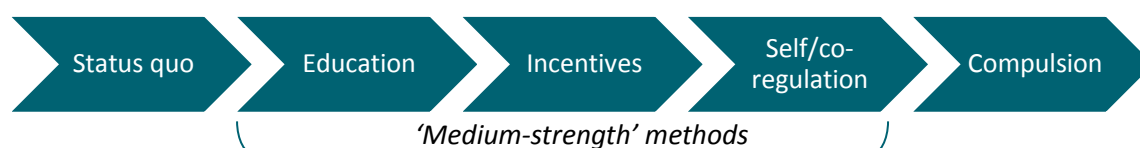
19. The primary policy objectives are:
 - a. to ensure information can be gathered for the use of regulators such as MBIE to learn lessons from building failures
 - b. including when there are challenges in securing the cooperation of involved parties.
20. Secondary objectives include:
 - to support effectiveness and efficiency*
 - c. transparency
 - d. no unnecessary complexity
 - to ensure negative impacts are appropriately considered*
 - e. no unnecessary or disproportionate impacts on rights and freedoms
 - f. no interference with search and rescue efforts.
21. Options have been evaluated against these criteria.

3 Options and impact analysis

	xx	x	✓	✓✓
Key	Strongly inconsistent with objective	Inconsistent with objective	Consistent with objective	Especially consistent with objective

Degree of intervention

22. A spectrum of policy responses was considered, as per the chart below.



23. The table below summarises performance of the status quo, ‘medium-strength’ methods, and compulsion against primary policy objectives.

24. Examples of medium-strength methods include campaigns encouraging cooperation, monetary rewards for cooperation or requesting the sector develop a code of practice for compliance with investigations.

Table 1: Policy responses assessed against criteria

	Status quo	Education, incentives or self/co-regulation	Compulsion
Ensure information can be gathered for the use of regulators such as MBIE to learn lessons from building failures	✓	✓✓ see 28.	✓✓ see 28.
Overcome challenges in securing the cooperation of involved parties	xx see 25.	x see 26.	✓

25. The status quo is not consistent with the primary policy objectives, as investigations rely on the voluntary cooperation of involved parties. This can delay an investigation and impact on its comprehensiveness.

26. ‘Medium-strength’ methods may reduce some delays and increase the likelihood of cooperation, but are also inconsistent with the primary policy objectives: investigations still rely on the voluntary cooperation of involved parties. *Issues with relying on cooperation* are discussed on page 7. Even if medium-strength methods were sufficient to secure cooperation, the delay from needing to do so may compromise investigations where evidence is removed in the days after the failure, as has happened in previous investigations.

27. Powers of compulsion are consistent with primary policy objectives, as the cooperation of involved parties can be secured. As such, powers of compulsion are proposed and have been considered further in this RIS. Access to powers does not preclude MBIE from continuing to operate under principles of cooperation in the first instance.

28. Regulation supporting investigations, whether medium-strength or stronger, also provides added clarity that building failure investigations are part of the regulator’s role.

Detailed design of proposed powers

29. The proposal for powers must clarify
- the scope of the powers (*buildings in scope*)
 - which regulator holds the powers (*responsibility for investigations*)
 - what the powers are (*proposed powers*).
30. This section presents analysis of options for each of these components in turn.

Buildings in scope

31. The table below assesses options for the scope of the proposed powers against criteria deemed relevant.

Table 2: Scope of buildings that can be investigated using the proposed powers assessed against criteria

	Building must have failed and caused significant injury or death	Building must have failed in a way that could have caused significant injury or death	Building must have failed	Include some buildings that haven’t failed
Ensure information can be gathered for the use of regulators such as MBIE to learn lessons from building failures	xx see 34.	✓	✓✓ see 32.	✓✓ see 32.
No disproportionate impact on rights and freedoms	✓	✓	xx see 32.	xx see 32.
No disproportionate complexity	✓	✓	x see 32.	xx see 32.

32. In MBIE’s previous experience of investigations, buildings identified as in the public interest to investigate have been those that failed in a way could have caused *significant* injury or death. While a scope broader than this would allow more flexibility to gather information, it would be inconsistent with policy objectives by impacting on rights and freedoms beyond the extent which has been identified as necessary. It would also introduce complexity via ambiguity about the circumstances in which the regulator is likely to investigate. As such, it is proposed that buildings must have, on reasonable grounds, failed in a way that could have caused significant injury or death in order to be within scope of the proposed powers. Such failures are rare.

33. The proposed scope captures building failures that MBIE has previously investigated, which involved collapses of roofs, stairs and floors, as well as near-total collapses. It would not include buildings that may cause or pose a risk of serious injury or death without having failed (i.e. performed below expectations), such as through the presence of asbestos or identified structural vulnerabilities. The performance of a building may result in serious injury or death without falling in the proposed scope – for example, the performance of most collapsed unreinforced masonry buildings in the Christchurch earthquakes was consistent with expectations given the movement experienced.
34. Building failures that do not end up causing injury (e.g. Stadium Southland, Forsyth Barr Building and Statistics House) for reasons unrelated to the performance of the building still provide information of equivalent public interest. In these cases, no-one happened to be on or under the collapsed roof, stairs and floors respectively. Requiring significant injury or death to have actually occurred would restrict the learning of lessons from serious building failures, and hence be strongly inconsistent with primary policy objectives.

Responsibility for investigations

35. The table below assesses options for which building regulator holds the powers of investigation against criteria deemed relevant.

Table 3: Options for responsible regulator assessed against criteria

	BCAs	MBIE	New independent entity
Ensure information can be gathered for the use of regulators such as MBIE to learn lessons from building failures	✓	✓✓ see 37.	✓
Transparency	✓	✓	✓✓ see 36.
No disproportionate complexity	✓	✓✓ see 38.	✗ see 36.

36. As BCAs and MBIE may contribute to a building failure, creating a new independent entity to investigate may reduce risks relating to conflicts of interest – consistent with the objective of transparency. However, investigations are rare enough that a dedicated entity is unlikely to be undertaking any investigations most of the time. For this reason, creating a new entity is disproportionately costly and complex.
37. As the over-arching regulator and regulatory steward for buildings, MBIE has particularly relevant expertise and connections. These strengthen its capability to learn lessons from building failures. As such, MBIE holding investigation powers is more strongly consistent with primary policy objectives, as compared to BCAs holding these powers.
38. Fragmentation of investigations across different BCAs will inhibit accumulation of experience and efficiencies of scale. As such, MBIE holding investigation powers is more strongly consistent with the objective of avoiding disproportionate complexity, as compared to BCAs holding these powers.

39. For these reasons, it is preferred that MBIE is the entity responsible for investigations. This is consistent with its monitoring functions under the Building Act 2004. This does not preclude contracting or cooperating with other entities or the establishment of Ministerial Inquiries or Royal Commissions of Inquiry (for example, if it believed that investigation independent of MBIE is necessary).

Proposed powers

40. The following proposed powers were identified as necessary to ensure information can be gathered about building failures in situations when there are challenges in securing the cooperation of involved parties:
- secure, or direct any person to secure, the site for a reasonable period (to prevent interference with or removal of evidence, which has occurred in previous investigations)
 - enter sites and carry out inspections (with notice of entry provided as soon as reasonably practicable)
 - take samples or other evidence from the investigation site, in accordance with the Search and Surveillance Act 2012 with any necessary modifications.
 - require information or documents from any person who might hold information or documents relevant to the building failures⁴
 - undertake works (to protect the safety of or assist investigators).
41. These powers would be held by the chief executive of MBIE, to be used on their initiative or at the request of the Minister responsible for the Building Act 2004. They could be used to investigate building failures that did, or could have, resulted in serious injury or death. It would be required to give notice as soon as practicable to the owner of a building under investigation.

Securing sites

42. MBIE lacks experience in site security and may not have a local presence. It is proposed that MBIE can direct others to secure a site, to support information gathering without disproportionate complexity. This is because other parties such as owners and TAs have both local presence and ongoing responsibilities for buildings in the Building Act 2004.
43. The manner in which a site is physically secured will vary by investigation. For example, signage may be sufficient where there is a low risk of interference with the investigation. TAs currently perform this function in relation to dangerous buildings under section 124 of the Building Act 2004, and in some circumstances buildings may already be secured as part of that process. Further work on how sites will be secured in practice will be undertaken.
44. Where sites have already been secured, for example under civil defence emergency management legislation or where building has been classified by a TA as dangerous under the Building Act, MBIE will work closely with the responsible entities to gain appropriate access to the site.

⁴ Where personal information may be gathered, this is consistent with exceptions in the Privacy Act for agencies to collect and disclose personal information where they believe on reasonable grounds that this is necessary to prevent or lessen a serious threat to public health or public safety.

Fines

45. While it is expected the majority of involved parties will cooperate, in order to ensure compliance fines of up to \$10,000 for an individual and \$50,000 in any other case are proposed for intentionally accessing, interfering in any way with the scene of any building investigation without the permission of MBIE or reasonable excuse, wilfully obstructing an investigation, or failing to comply with requests for information.
46. These fines were developed taking into account offence provisions with respect to information disclosure and investigations in health and safety, transport, civil defence, and network utility legislation and the Building Act 2004. The offence provisions also take into account advice received from the Ministry of Justice, and the Legislative Advisory Committee's *Guidelines on process and content of legislation*.

Impact

Benefits

47. Much of building regulation relies on attempts to estimate and model how buildings will perform under different requirements. Investigating failures is particularly valuable as it allows changing regulation and supporting regulatory outcomes in response to observed evidence. Previous investigations have led to:
 - a. updating of standards referenced in regulation and issuance of guidance⁵ on ensuring staircases can tolerate inter-storey movement in earthquakes, following collapses during the 2011 Christchurch earthquakes. This guidance has incentivised remedial work on stairs, including in Wellington buildings of the type that experienced particularly strong shaking in the Kaikoura earthquake
 - b. a review to establish if there are any buildings with similar design flaws as the collapsed CTV Building, which incentivised remedial work on a number of potentially vulnerable buildings
 - c. changes to snow load requirements in methods of complying with the Building Code, incorporating findings from the collapse of the Stadium Southland roof.
48. By ensuring that investigations are comprehensive even when there are challenges securing the cooperation of involved parties, the proposed powers will contribute to better regulatory outcomes – in particular, the potential avoidance of serious injuries and deaths. Ways in which cooperation has contributed to desirable outcomes and reliance on cooperation has reduced or put at risk benefits in previous investigations are discussed under *Issues with relying on cooperation* on page 7.

⁵ See <https://www.building.govt.nz/building-code-compliance/d-access/d1-access-routes/practice-advisory-13-egress-stairs-earthquake-checks-needed-for-some/egress-stairs-earthquake-checks-needed-for-some/>.

Costs

49. The proposed powers impact the property rights of building owners and users, as their use of a building under investigation may be restricted. Previous investigations have not resulted in economic costs from lack of access, as buildings have already been rendered unusable by damage. Previous investigations have generally required only a few days of access to the site itself. While a particularly complex investigation could require restricting access for a number of months, this would be very unlikely.
50. Owners of investigated buildings may face costs from damage to the building as part of the investigation. Previous investigations have not imposed significant economic costs from damage: most impact has been on buildings or parts of buildings that are already damaged beyond value, and remaining information has been able to be gathered non-invasively. Nonetheless, investigating certain types of failure could result in consequential damage to a building.
51. Providing in advance for appropriate compensation is complicated by the unique nature of a given building failure, such as where a failed building may be damaged or unusable regardless of an investigation. As such, decisions regarding compensation will be made on a case-by-case basis. To ensure disproportionate losses to owners are appropriately recognised, decision making about compensation will apply the principles for financial support and compensation in the Civil Defence and Emergency Management Act 2002.
52. The powers may result in relatively minor compliance costs for those required to provide information.
53. MBIE will continue to incur fiscal costs of investigations within existing baselines and the building levy. The fiscal impact of the proposed powers is ambiguous: more comprehensive investigation may increase costs, but greater access to evidence will allow more efficient investigations.
54. Where a more comprehensive investigation indicates someone is at fault, they may suffer loss of reputation. It may also act as an impetus for regulatory, legal or criminal investigation. Negative impacts on those implicated are expected to be offset by the benefits to society from increased information that will lead to improved building regulation. In recognition of these impacts, potentially identifiable individuals will be given opportunity to comment before proposed findings are published.

Limits on powers

55. To avoid unnecessary or disproportionate impacts on rights and freedoms, the proposed powers will primarily be used for the purposes of learning from the building failure and improving regulation to help prevent other building failures. The powers will only be exercised for as long as the investigation requires and in a way that is reasonable in the circumstances.
56. Household units will not be able to be entered without consent of the occupier or in accordance with a warrant⁶. This is consistent with other parts of the Building Act 2004 that recognise the importance household units play in the lives of owners and occupiers.

⁶ It is unlikely that the failure of a standalone house would be considered in the public interest to investigate, as compared to more substantial buildings such as apartment blocks. Limits on entering household units remain applicable where the unit is part of a multi-use building.

57. Inspection of sites and the taking of samples or other evidence from them will be in accordance with the Search and Surveillance Act 2012, with any necessary modifications. This reflects consideration of rights and freedoms, and consultation with the Ministry of Justice and other agencies.
58. These limits would also apply to anyone acting on MBIE's behalf.

Key issues

Sharing of information with regulatory bodies responsible for handling complaints and discipline

59. It is proposed that MBIE may only share information related to the building failure with regulatory bodies responsible for handling complaints and discipline in the building and construction sector when it indicates that a particular person significantly contributed to a building failure. This is to avoid disproportionate impact on rights and freedoms. When such information about a person is shared, they will be notified.

Interface with search and rescue operations

60. Given the objective of non-interference with search and rescue efforts, the proposed powers will not be used in a way that interferes with search and rescue efforts. MBIE will coordinate activities with other agencies and emergency services. For example, MBIE will liaise with the relevant Incident Controllers, Civil Defence Controller or Recovery Managers when other groups are working on the same site.

Net impact

61. As building failure investigations are heterogeneous and rare, it is difficult to quantify the expected benefits and costs of regulation supporting them. Nonetheless, it is anticipated that the expected benefits in avoiding future failures will outweigh negative impacts. Factors contributing to this include:
 - a. the proposed powers can only be used to investigate serious failures
 - b. there have been clear benefits of previous investigations to the wider public, and clear ways in which the need to secure cooperation has reduced these benefits and put them at risk
 - c. buildings that have recently experienced significant failure are not usually in otherwise usable condition
 - d. imposed costs are expected to be insignificant compared to those of building failures that may be prevented.

4 Consultation

62. The following agencies have been consulted on the proposals in this paper: the Treasury, Department of Internal Affairs, Ministry of Justice, Ministry of Civil Defence and Emergency Management, Ministry for Culture and Heritage, Ministry for the Environment, Ministry of Foreign Affairs and Trade.
63. Initial discussions have been held with the Office of the Privacy Commissioner.
64. The Department of the Prime Minister and Cabinet has been informed.
65. The 2016 Kaikoura earthquakes have further highlighted the need for clear powers to investigate building failures in order to learn lessons. As such, MBIE has progressed this work at pace; there has not been time to consult with those particularly impacted by the proposed powers such as building owners and occupiers.
66. There will be further consultation on the proposals as the Bill with the proposed powers is considered.

5 Conclusions and recommendations

67. To ensure information can be gathered in order to learn lessons from building failures, including when there are challenges securing the cooperation of involved parties, while meeting policy objectives and constraints, it is recommended to:
 - a. provide legislative powers for MBIE to
 - restrict access to and secure a site (including directing others to do so)
 - enter property to carry out investigations
 - require information
 - take samples
 - undertake works
 - b. where it has reasonable cause to believe a building has failed in a way that did, or could have, resulted in serious injury or death
 - c. recognising that life-safety actions will take priority over investigations and that MBIE will coordinate activities with other agencies and emergency services.
68. It is appropriate that these powers are vested in MBIE as the national building regulator and regulatory steward.
69. The proposed powers recognise impacts on individuals, such as by providing identifiable individuals with opportunity to comment before proposed findings are published.

6 Implementation plan

70. The proposals would be given effect by
- inclusion in the an amendment bill to the Building Act 2004 which is planned for introduction in March 2017. Interactions between the proposed investigation powers and proposals for managing buildings after an emergency that will also be included in the bill have been considered in its drafting.
 - provision of information and guidance from MBIE.
71. MBIE has experience running investigations into building failures. This experience will be applied in implementation. Further detailed work is being carried out on the business processes needed to support the use of the proposed powers to ensure consistency and certainty. This work will formalise and build on technical guidance MBIE is currently developing on how to undertake building investigations.

7 Monitoring, evaluation and review

72. After each building failure investigation, MBIE will consider the extent to which use of the proposed powers supported identified policy objectives, and whether there are any learnings that should be reflected in future business processes and guidance relating to the powers.