

Submission:

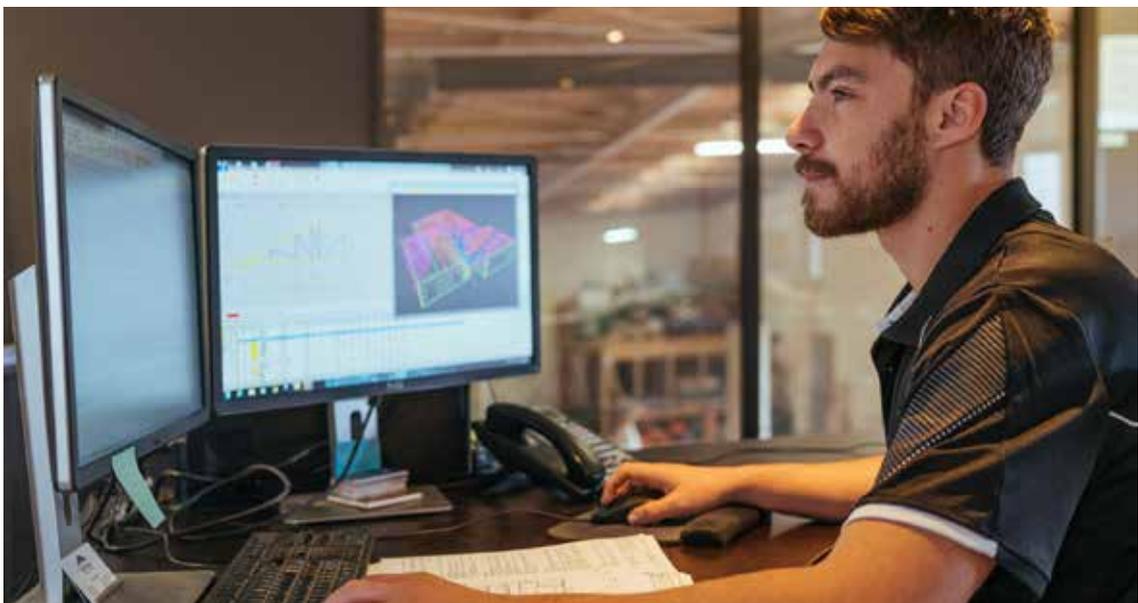
Building System Legislative Reform

JUNE 2019



1. INTRODUCTION

- 1.1 Thank you for the opportunity to submit on the proposed reforms to building system legislative framework.
- 1.2 The Building and Construction Industry Training Organisation (BCITO) is recognised under the *Industry Training and Apprenticeships Act 1992* as the Industry Training Organisation (ITO) for sectors in the building and construction industry.¹ We establish nationally-registered standards, develop qualifications and associated resources, organise training and assessment, mentor and support trainees, apprentices and their employers, and provide leadership on skills issues to the building and construction industry. Our scope covers all levels of education, from entry-level training (including school-based programmes) to apprenticeships, and on to post-experience and specialist qualifications.²
- 1.3 As the body with statutory responsibility for education and training standards in the building and construction industry, our interest in the proposed reforms relates primarily to their implications for skills development and requirements. In this submission, we have therefore focused on two aspects of the proposal: Occupational Regulation and the Building Levy.
- 1.4 Of these two aspects, Occupational Regulation is relevant to our statutory role as the standards-setting body for skills in our industry. This role requires us to understand and assess what constitutes a competent practitioner in relevant fields. Our interest in the Building Levy stems from our position as part of what could be called the 'strategic infrastructure' for the building and construction industry. This position means that we have an interest in how the Building Levy is, or could be, used to support the operation and development of the industry.



- 1 The main occupations and sectors outside our remit are scaffolding, electricians, plumbing, gasfitting & drainlaying, and roofing.
- 2 The current Reform of Vocational Education proposals have raised the possibility of our (and other ITOs') transformation into Industry Skills Bodies. Although these proposals as they stand would remove our ability to directly arrange training, we would retain our standards-setting functions and have strengthened strategic authority over the building and construction industry's skills system.

2. OCCUPATIONAL REGULATION

2.1 Our coverage does not currently include the Engineering or Plumbing Gasfitting, and Drainlaying sectors; these are the responsibility of the ITOs *Competenz* and *The Skills Organisation*, respectively. We have therefore confined our commentary to the proposals around extending the Licensed Building Practitioner Scheme. This includes two key elements: broadening what counts as restricted building work (RBW) and enhancing competency requirements associated with gaining and maintaining LBP registration. Below we consider each of these in turn.

PROPOSAL ONE: BROADENING THE DEFINITION OF RESTRICTED BUILDING WORK

2.2 We do not have a problem with the principles behind this proposal. We agree that all building work should be undertaken by people with the requisite skills and capabilities, and that regulation should be relative to and reflect the nature of risk – both in terms of likelihood and severity of outcome.

2.3 However, we do not believe that in this case there is a need for the definition of RBW to be expanded in the proposed manner. We accept that some stakeholders in the industry have told the Ministry that they see a need for greater regulation and that they do not believe risk management practices around commercial developments are of greater quality than in private residential building. However, we also believe there is a need for stronger evidence of *actual* and *material* – not simply theoretical – risk relating to current building practices before we can support this proposal. While we appreciate that MBIE is taking a precautionary approach, we believe that this proposal requires more robust evidence that the exclusion of the relevant types of building from the RBW definition is clearly and commonly leading to defects in construction.

2.4 The hardest evidence presented of the need to extend RBW is the comparable level of building inspection failure in residential and commercial work (MBIE, 2019a, p.11). This is presented as an argument that firm-level quality controls do not differ significantly between sectors, and so regulation should likewise be the same. However, as far as we are aware the cited research does not relate to the specific aspects covered by the RBW definition; the core rationale for linking it to such work appears to be a BRANZ opinion survey which referred to a view that weathertightness was a common reason for multi-unit housing failing building inspections.

2.5 Moreover, it is worth noting that the comparison is between a sub-sector where RBW definitions currently apply and where they do not. If failure rates for commercial work were higher than for residential work, then it could be argued that there was a need for greater quality control in the commercial sector. However, this data actually shows that without the external regulation of RBW, commercial builds fail at the same rate as the sub-sector where such restrictions do apply. This leads toward a conclusion that the absence of regulation is not a primary source of inspection failure, and that extending RBW definitions and associated compliance requirements would not actually increase building quality.

2.6 As expanding the RBW definition would likely have significant flow-on impacts for the industry, we do not currently believe that the available evidence justifies such an expansion. We would be open to changing our position on this issue if presented with

compelling evidence, such as official data showing systemic issues in the quality of RBW in the relevant areas (e.g. data on 'leaky building' cases since the inception of the new Building Code in 2004). However, we are not convinced that such evidence currently exists, and believe it likely that the proposal would create new compliance requirements without genuinely affecting levels of risk. Given this, rather than changing professional and practice regulation we believe that changes to process and product regulation (e.g. the Building Code, standards of materials etc.) are likely to be more significant influences on the risk associated with commercial construction.

PROPOSAL TWO: INCREASING COMPETENCE REQUIREMENTS

- 2.7 We broadly support the proposal to increase competence requirements for the LBP scheme. However, we have a mixed view of the different elements within this proposal. We support the proposals to develop new competency standards for the LBP scheme, simplify licensing classes (in principle), and review the 'site' licence. In our view, regular review and revision of such standards is an important part of ensuring that regulatory regimes appropriately reflect the nature of safe practice without being too onerous on the individuals concerned. We also strongly support reducing the frequency of registration renewal from the current annual requirement to reduce compliance burden.
- 2.8 We note that the description of this revision and review process refers to developing new arrangements through consultation with industry. The term 'consultation' can refer to a wide range of approaches, from simply asking for feedback to direct engagement. We firmly believe that MBIE's approach to this must involve the industry as active partners in this redevelopment process. A 'co-design' approach would seem to be particularly well-suited to this, and we anticipate being involved by MBIE as a key partner in this process given our statutory standards-setting role for the industry.

The licensing-training relationship

- 2.9 We stress that the revised competency standards and the LBP scheme need to be aligned with relevant qualifications and programmes. We note that the proposal documentation specifically refers to misalignment between licensing classes and training programmes as a problem in the current system. We agree that this exists and note that it is the result of the regulatory regime not relating to the content of specific qualifications, but rather a subset of work: the activities involved in Residential Building Work.
- 2.10 We understand that during the implementation of the scheme, it was envisaged that practitioners would ultimately be required to have relevant qualifications. The current arrangements under which a trade qualification is *not* required was intended as an interim arrangement allowing a 'window' during which skilled and experienced tradespeople could be licensed. We firmly believe that it is time for this window to be closed. The current situation has created concern in our sectors relating to the point that those formally trained in and undertaking work are not permitted to formally sign that work off – notably, this is at odds with the principle that risk is best managed at the point where it exists. The recent introduction of micro-credentials allows for this situation to be addressed through the establishment of a credential specifically linked to undertaking RBW.

Introduction of a 'Supervisor' class

- 2.11 As noted above, we support in principle the notion that revising the LBP scheme should be done to make it simple for the users (both practitioners and those employing or hiring LBPs). However, simplifying licence classes must not sacrifice the integrity of practice and/or the requirements of specialist trades. In particular, we do not support the introduction of a separate 'supervisor' class of LBP. This would unnecessarily complicate the current system, and creating different seniority classes of LBP may also create problems around lines of authority.
- 2.12 The implication of the proposal appears to be that there would be 'practising' LBPs who would be focused on *doing* work, and 'supervisor' LBPs who would be focused on *supervising* work. This could create a situation where both a practising and supervising LBP have responsibility for the same job; the supervisor for the work as a whole, and the practitioner for the specific piece of work on which they have worked. This, in turn, creates issues for who has ultimate responsibility for the quality of the work; the practitioner who was working on aspect 'A', or the supervisor who was overseeing aspects 'A' through 'M'. This could be exacerbated if views vary between the two as to whether a given piece of work is considered of sufficient quality or not.
- 2.13 We do accept that 'supervision' is a specific and distinct area of competency. However, we believe that this is best recognised through the qualifications and training system³ and the employment practices of individual firms. We note that a firm is unlikely to place people in supervisory roles unless it is confident that they have the capabilities to do so effectively. While theoretically, a newly-registered LBP might be able to engage in supervision immediately, they are in practice likely to do so only when they are genuinely capable of doing so. Conversely, implementing a supervisor class reduces the flexibility of the scheme; Licensed Building Practitioners who are capable of supervising practice will be prevented from doing so until they obtain an additional licence. The proposal documentation identifies the impact of this on current building activity as a risk (MBIE, 2019a, p.23). We emphasise a potentially significant effect of this is that if a supervisor tier was to be introduced, then we believe it would need to be implemented over a significant enough timeframe to allow the industry to adjust (certainly beyond the timeline outlined in the proposal document).
- 2.14 We also note that the proposal documentation refers to the tiered LBP structure as a method of developing a career pathway for building practitioners. However, we do not see this as the role of a regulatory regime. Practice regulation is primarily intended to safeguard the public interest and prevent harm. Career paths are more appropriately tied to qualifications which formally articulate – and provide an assessment structure for – the capabilities associated with a particular role. Regulatory regimes should instead *reflect* the existence (or creation) of particular roles and career paths, ensuring that people cannot practice in a given role without certain characteristics, due to the implications for risk and public safety of said roles.

³ For example, the previously mentioned establishment of micro-credentials opens up the potential for formal training in supervision.

Code of Ethics and 'Fit and Proper' Person Test

- 2.15 While technical competence must always be at the heart of a regulatory regime, we agree with MBIE that adding behavioural standards would enhance the status of LBP registration, provide an additional tool for the Building Practitioners Board, and remedy an inconsistency with other regulated occupations in the industry. We, therefore, support the introduction of a Code of Ethics and 'fit and proper person' test for LBP registration. We assume that the detail of the Code would be subject to further industry consultation, but believe that the general elements proposed by MBIE constitute a reasonable and relevant definition of ethical practice for LBPs.
- 2.16 Regarding the fit and proper person requirement for LBP registration, we support this on the proviso that the elements of such a test relate directly to the role of the LBP as a building practitioner. We are conscious that the building and construction industry attracts people from a wide variety of backgrounds, and that the integrity and reputation of our trades in general and LBP status in particular need to be balanced against not unduly barring potential applicants.
- 2.17 In this light, we see the elements set out in the proposal documentation as largely appropriate components of a fit and proper person test. These can be associated with three different aspects of practice: the first two elements relate to obeying legal obligations, the third and fourth relate to honest and trustworthy behaviour, and the final two relate to the applicant's position within the building industry. These are all reasonable dimensions of being a fit and proper practitioner, and the specific elements are sufficiently specific to practice in the building and construction industry.
- 2.18 We do see the first element – having been convicted of significant offences that are not building-related – as potentially problematic. However, we are pleased to see that MBIE proposes clarifying that such an offence would only ban a person from gaining registration if it "reflects adversely on the person's fitness to carry out or supervise building work" (MBIE, 2019a, p.20). Alongside the comment that the Board would be expected to follow principles of natural justice and allow for extenuating circumstances, age of offending etc., we see this element as thus being unlikely to create unreasonable barriers to entry. It would, however, be helpful for official guidance to be prepared relating to this element, particularly in terms of determining when something does and does not 'reflect adversely'. This would not only assist the Board in its judgement but would also support potential applicants in deciding whether or not to apply.



3. BUILDING LEVY

- 3.1 As noted earlier, we have an interest in the operation of the building levy because of our position as part of the industry's 'strategic infrastructure'. In our view, the rationale for the levy is that it can be used to support an effective and high-quality building and construction industry. Under the *Building Act 2004*, it currently does this by supporting MBIE to operate an effective regulatory regime.
- 3.2 Three proposals are being put forward for the future of the levy: a 25% reduction in the rate, standardising the levy threshold and extending the scope of what the levy can be spent on. Of these three elements, we fully support the proposal to standardise thresholds across different Building Consent Authorities (BCAs). This standardisation would make the levy process more consistent, there is no clear rationale for different BCAs to maintain different rates, and as the proposal notes (MBIE, 2019b, p.12) most authorities currently use the proposed threshold.
- 3.3 We see proposal one (reducing the levy) and proposal three (expanding permitted uses of the levy) as linked. We recognise that the levy has been generating a significant surplus over time above good practice guidelines. In our view, however, this is due not so much to the levy rate being set unjustifiably high, but rather the point that – as the proposal documentation points out – the purposes for which levy funds can be spent are relatively tightly prescribed.
- 3.4 As the proposal notes, a core reason for the current rate of 'over-recovery' is that we are undergoing a long boom in the building and construction industry that is both more significant and more sustained than historical precedent. This has had the effect of generating a surplus much larger than foreseen when the rate was last set, and we appreciate that as a Memorandum Account there is an expectation that the levy fund should essentially trend towards net zero over time (as income balances expenditure). However, while it is fair to note that current activity is forecast to remain high for the near future, we are concerned that effectively setting the rate based on what are recognised boom conditions seems likely to create problems when conditions are not as strong, and levy income falls proportionately.
- 3.5 Moreover, we note that one rationale for reducing the levy rate is that this would reduce costs to clients. However, given the level of both the levy and the proposed reduction, at an individual level, this is unlikely to have a material effect on the cost of builds to customers. In the examples presented in the proposal documentation the effect of this levy represents less than 0.1% of the total cost of the example builds; for the example private new build the saving amounts to \$158.10. We do not believe that this represents a meaningful reduction in cost for clients, nor that current levy rates constitute an overly-onerous burden on customers.

REPOSITIONING THE BUILDING LEVY

- 3.6 Rather than addressing the levy surplus by reducing the amount of funding generated by current strong industry conditions, we believe that the focus should instead be on how to use levy funding effectively. To this end, we strongly support expanding the range of purposes and activities on which it can be spent. This begins with MBIE’s ‘System Stewardship’ role; we also agree with the proposal’s definition of this role involving work to “analyse the building environment, understand where the future might take us, and assess whether the building regulatory system is equipped to cope with the future” (MBIE, 2019b, p.10).
- 3.7 However, we believe that the range of purposes for which the levy could be used should be expanded further. Currently, the levy operates as a simple funding stream for MBIE; under s.53(1) of the *Building Act* it flows to the Ministry’s Chief Executive, and they deploy it to provide support for the Ministry’s functions under that Act. The current proposals would widen the specific functions involved from purely operational to include more strategic activity, but the levy would remain essentially a method for resourcing MBIE. We strongly believe that there is scope for these funds to be used in a more externally-facing manner; not simply supporting the *work of the Ministry*, but supporting the *development of the industry*.
- 3.8 While we support continuing to use part of this funding to support MBIE functions, this reframing would also allow the fund to contribute toward broader industry concerns or priorities – including those identified by MBIE as part of its other work. To this end, we believe that the permissible usages of the levy within the *Building Act* should be defined as a) the current purposes, b) the stewardship function proposed in the reform documents, and c) supporting strategic priorities facing the building and construction industry as a whole.
- 3.9 Repositioning the levy from an internal MBIE funding stream to have a stronger strategic industry focus would allow it to be used for more direct benefit to the industry. In the longer term, it would also allow for more flexibility in terms of using the full amount of income generated. We are not convinced that the cost of MBIE functions under the *Building Act* (even including ‘Stewardship’ functions) are closely linked to the level of actual activity in the industry, and so funding them through the levy will always run the risk of misalignment.



SUPPORTING STRATEGIC PRIORITIES

- 3.10 As an example of strategic use, we have been consistent advocates for a levy approach to supporting skill development within firms in a similar way to the United Kingdom and Australia (BCITO, 2017a, 2017b). In the vocational education sector (and, through models such as degree apprenticeships, 'higher' education as well) the workplace is increasingly seen as the best location within which to develop fully-rounded skills through situated forms of learning (see Brown et al., 1989; Göhlich & Schöpf, 2011; Kolb, 1994; Lave & Wenger, 1991; Schön, 1983). However, ensuring good quality workplace learning experiences requires investment on the part of firms, and the more sophisticated the skills and teaching, the greater the scale of investment required. For this reason, we have advocated that direct public support should be available to firms who take on apprentices and can offer a high-quality training environment. We have been actively discussing such schemes with education officials and Minister Hipkins in the context of the current Reform of Vocational Education (RoVE) proposals, and this approach has also been endorsed by the Construction Strategy Group (2017).
- 3.11 A repositioned 'strategic' building levy could be used to support such a move and would allow for such funds to effectively be reinvested in the industry, both providing an incentive for firms to train and increasing the quality of training outcomes. The building levy is particularly suited to this as it is not funded by employers per se but rather by another key beneficiary of said training: the customer, who has a clear and direct interest in a high quality trained workforce but does not currently contribute to that training. This arrangement is a better mechanism than a direct employer levy as it shares costs more broadly, allowing for a lower rate than would otherwise be the case.⁴
- 3.12 Similarly, if the Government's current RoVE proposals go through as proposed, then there will be questions over how to fund the Industry Skills Body (ISB) that governs the construction sector (as the current ITO funding system cannot support that model). Directing a portion of the levy to the ISB would be a logical way of maintaining an 'industry contribution' to the qualification and standards-setting body.⁵
- 3.13 While our focus is primarily on the potential of a reoriented levy to support training and skills development, we also see this as providing a method of addressing other strategic priorities. For example, we are strong supporters of the need to address gender and ethnic diversity in the industry and see a clear need to promote building and construction careers to ensure a sustainable workforce pipeline. Funding through the levy could be used to support specific measures in this regard, such as a building sector equivalent to the *Engineering E2E* initiative, or complementing elements of the Government's Construction Skills Action Plan such as leveraging procurement policies or the *Mana in Mahi* programme.
- 3.14 These are all examples of approaching the building levy from a 'value add' point of view; i.e. thinking about how we can ensure it serves to support the building and construction sector. Rather than looking to reduce levy surpluses by reducing levy income, MBIE should instead be looking at the quality of expenditure and exploring how it can use that income most effectively to benefit the industry as a whole.

4 Indeed, with 95% of construction firms having 10 staff or less and 65% having no employees (being arrangements such as owner-operators) using the building levy as a collection vehicle would likely be more sustainable than one based on a direct levy of firms

5 We would also point out that even if the building levy is to remain primarily a support for the Ministry's activities, the RoVE proposals include an explicit role for ISBs as providing 'industry skills leadership'. While decisions are yet to be made regarding what this means in practice, we believe that in the construction sector this could at least partly overlap with the stewardship functions of MBIE. This raises the question of whether 'stewardship' element of the levy could be appropriately directed to support relevant ISB leadership activities.

4. CONCLUSION

- 4.1 Our submission has focused on those aspects of proposed legislative reforms that relate most closely to our role as the statutory standards-setter body for building and construction training, and our consequent position as part of the industry's 'strategic infrastructure'. These are the proposals to amend occupational regulation, and reform the building levy.
- 4.2 Regarding the first set of proposals, while we appreciate and support the Ministry's desire to ensure that regulation reflects risk, we do not believe that there is currently sufficient evidence to justify extending the definition of Restricted Building Work. We do support most proposals to enhance the competence requirements – including introducing a Code of Ethics and fit and proper person test – on the proviso that the detail of this is undertaken in partnership with the industry. We especially see potential, given the recent establishment of micro-credentials, to more closely align LBP registration with formal training, assessment, and qualifications. However, we do not support the creation of a distinct 'supervisor' licensing class; we see this as likely to increase complexity and potentially confuse lines of accountability. We also see it as inappropriate to use a regulatory framework as a tool for creating career paths within the industry. Instead, we see such pathways and perceived gaps in supervision capability as better handled through skill development, assessment, and qualifications.
- 4.3 Regarding changes to the building levy, we support setting a consistent rate and expanding the purposes for which levy funds can be used. However, we do not support a reduction in the levy rate. Instead of attempting to reduce income generated through the levy, we believe that MBIE should focus on considering how the levy fund can be best used to support the overall development of the building and construction industry. To this end, we believe that this is an opportunity to reposition the levy as serving more strategic purposes. This would involve permitting it to support current activities, the stewardship function as proposed, and also strategic priorities facing the building and construction industry as a whole. As part of this, we believe that there is scope for considering how the levy could support the funding of skill development in the industry, through measures such as direct employer support and/or (dependent on the outcomes of RoVE) funding for a construction ISB.
- 4.4 Once again, thank you for the opportunity to comment on these proposals. Please do not hesitate to contact me if you would like to discuss any elements of this submission in more detail.



Warwick Quinn Chief Executive
Building and Construction Industry Training Organisation (BCITO)

warwick.quinn@bcito.org.nz

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