

Building (Earthquake-prone Buildings) Amendment Bill
Local Government and Environment Committee
17 April 2013



1. Introduction

- 1.1 The New Zealand Human Rights Commission (**Commission**) welcomes the opportunity to make a submission on the Building (Earthquake-prone Buildings) Amendment Bill (**Bill**).
- 1.2 The Commission has significant concerns about the provision in the Bill that enables buildings to be exempted from current building requirements to upgrade disability access and fire access when undergoing earthquake strengthening.
- 1.3 Proposed new section 133AX authorises a territorial authority to grant a building consent for the alteration of a building even if, after that alteration, the building will not comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to means of escape from fire and access and facilities for persons with disabilities. However, the alteration must be for the purpose of ensuring that the building is no longer earthquake prone, and the territorial authority must be satisfied *inter alia* that ensuring that the building is no longer earthquake prone outweighs any detriment likely to arise as a result of any non-compliance with the building code.
- 1.4 The rationale for the introduction of section 133AX is that the cost of implementing the upgrade provisions can operate as an impediment to owners strengthening their buildings, particularly for old or historic buildings. The Canterbury Earthquakes Royal Commission considered that this approach achieved an “acceptable balance between cost and strengthening work, and the desirability of the latter actually being carried out.”¹ However, there is little evidence in the Departmental Regulatory Impact Statement or any other background documents of an appropriate cost benefit analysis having been undertaken.
- 1.5 The Commission acknowledges the need to ensure that New Zealanders are not at undue risk of harm from earthquake prone buildings. However, it does not believe that the correct balance is achieved by section 133AX.
- 1.6 The Commission considers that section 133AX is in breach of New Zealand’s international and domestic human rights obligations, and represents a significant retrogressive step.

2. Access to the built environment

- 2.1 New Zealand ratified the United Nations Convention on the Rights of Persons with Disabilities (**CRPD**) on 26 September 2008. By ratifying the CRPD the Government has agreed to adopt all appropriate legislative, administrative and other measures for

¹ Ministry of Business, Innovation & Employment, *Improving the system for managing earthquake-prone buildings*, at 93. <http://www.dbh.govt.nz/earthquake-prone-buildings-cabinet-paper>

the implementation of the rights recognised in the Convention, and to refrain from engaging in any act or practice that is inconsistent with the present Convention.²

2.2 Article 9 requires State Parties to take appropriate measures to ensure that disabled people have access, on an equal basis with others, to the physical environment including facilities and services open or provided to the public. This is part of enabling disabled people to live independently and participate fully in all aspects of life.³

2.3 The principles of Article 9 are generally protected by New Zealand's domestic laws. In summary, the Human Rights Act 1993 (**HRA**) requires a service provider or building owner to accommodate a person with a disability to the extent that it is reasonable to do so. In deciding the extent of the accommodation, the requirements of the Building Act 2004 must be taken into account.

The Human Rights Act

2.4 The Human Rights Act 1993 (**HRA**) makes it unlawful to deny a person access to a place or vehicle because the person has a disability. The Court of Appeal has ruled that providers of services to the public have to provide their services differently to disabled people if that is necessary to enable them to access the service. The court described this as a positive obligation to accommodate the needs of disabled people.⁴ The obligation to accommodate is subject to a reasonableness requirement.

2.5 The HRA states that building owners or service providers do not have to provide special services or facilities to ensure access for disabled people if such a requirement is unreasonable.⁵

The Building Act

2.6 The Building Act 2004 is a regulatory framework, a licensing regime and a set of standards for building in New Zealand. Its purpose includes setting standards to ensure that buildings contribute appropriately to the health, independence and wellbeing of the people who use them.

2.7 The principles of the Building Act include the need to provide "reasonable and adequate provision" for disabled people to "enter and carry out normal activities and processes" within the building⁶. This principle must be taken into account when performing functions or duties imposed under the Act.

2.8 Section 118 of the Building Act requires that all new public buildings must make reasonable and adequate provision to enable disabled people to visit or work in that building, and to carry out normal activities and processes, within these buildings.

2.9 Section 112 of the Building Act relates to alterations to existing buildings. It requires that a building consent only be granted where a territorial authority is satisfied that the

² Article 4 CRPD.

³ The UN Committee on the Rights of Persons with Disabilities has recently released a draft General Comment on the content of Article 9 of the CRPD. In particular it elaborates on State's obligations and duties in relation to this right. The draft General Comment is available at: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>

⁴ Smith v Air New Zealand [2011] NZCA 20; [2011] 2 NZLR 171.

⁵ Section 43(4) Human Rights Act 1993.

⁶ Buildings to which section 118 of the Building Act 2004 apply.

building will comply as nearly as is reasonably practicable with the building code provisions for means of escape from fire and access and facilities for disabled people.

3. Importance of accessibility to all New Zealanders

3.1 Accessibility affects everyone at some point in time. This is clearly recognised in the international human rights legal framework which establishes access as a right for all people.⁷ Furthermore, access to the physical environment is a precondition for freedom of movement, as guaranteed under article 13 of the Universal Declaration of Human Rights and article 12 of the International Covenant on Civil and Political Rights.

3.2 As the Canterbury Earthquake Recovery Authority noted in 2012:

“A more accessible and safer built environment will benefit everyone. It will become more accessible to not just disabled people, but also older people, those with young children, and people with temporary mobility issues. A more accessible city will also offer accessible tourism opportunities.”⁸

3.3 With an aging population, failing to upgrade disability access represents a missed opportunity to future proof our buildings.

4. Conclusion

4.1 It is important to ensure that undue barriers are not placed in the way of improving the safety of New Zealand’s built environment. However, 133AX does little to achieve this. Rather, it is at odds with New Zealand’s human rights obligations and reinforces the perception that the rights of disabled people are of low priority to the Government.

4.2 The Commission believes that the status quo provides adequate discretion to allow territorial authorities to exempt alterations from building code requirements where they would be overly burdensome in all the circumstances. Such an approach is consistent with the CRPD.

4.3 **On this basis the Commission recommends** deleting section 133AX from the Bill.

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⁷ For example, the International Covenant on Civil and Political Rights, Article 25 (c) and the International Convention on the Elimination of All Forms of Racial Discrimination, Article 5 (f).

⁸ Christchurch Earthquake Recovery Authority, *Christchurch Central Recovery plan: An Accessible City* (2012), at 5. <https://ccdu.govt.nz/sites/ccdu.govt.nz/files/an-accessible-city-20121115.pdf>