

33. REGISTRATION OF PAINTERS, BUILDERS, DECORATORS IN CHRISTCHURCH



General Manager responsible:	General Manager Regulation and Democracy Services, DDI 941-8462
Officer responsible:	Legal Services Manager
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PURPOSE OF REPORT

1. To report to the Council, as requested, on the following motion moved by Councillor Keown and seconded by Councillor Corbett and adopted by the Council at its meeting on 28 July 2011:

That the Council ask staff to prepare a report on having all painters, decorators and builders working in the territory of Christchurch be registered with the Christchurch City Council before being able to do any work.

EXECUTIVE SUMMARY

Short answer

2. The only way in which the Council could require all painters, decorators and builders working in the territory of Christchurch to be registered with the Christchurch City Council before being able to do any work would be to make a bylaw. There is a very small chance that the Council could defend such a bylaw against a legal challenge.
3. In addition to the legal considerations, there would be considerable staff time and costs associated with devising and implementing a registration system, and enforcing such a system. Furthermore, such a registration system could subject the Council to subsequent civil liability claims about the quality and performance of work completed by registered persons.

Background information

Reasons for registration

4. Following the Canterbury earthquakes, there have been numerous reports about the need for builders and other tradespersons who will be required to assist with repairs and rebuilding in Christchurch. Given the need for a greater number of tradespersons in Christchurch City, is it necessary to register all painters, decorators and builders working in Christchurch City before they are able to undertake work? The reasons for potential registration are:
 - (a) There is a potential concern that employers and customers are not readily able to find a list of painters, decorators and builders in Christchurch City. Therefore a list will enable employers, customers and clients to find suitable tradespersons for their work.
 - (b) There is a potential concern that tradespersons are not carrying out work to a suitable standard. In other words, there is a possibility that incompetent service by tradespersons could result in significant harm to the consumer or a third party. Compulsory registration of tradespersons will help ensure that the work is carried out or supervised by competent people.

Current position – earthquake repairs etc

5. Repair and rebuild work in Christchurch falls into a number of categories. If a residential property owner has current home and/or contents insurance, then the property owner also has the Earthquake Commission’s cover. If a commercial property owner has insurance then repairs to a property will generally be managed by the property owner’s insurer.

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6. Once a residential property has been assessed by the Earthquake Commission ("EQC"), the following generally applies:
 - Under \$10,000+GST of repairs – EQC will pay the property owner the settlement amount and the property owner will manage the repairs. However, the property owner may refer the claim to Fletcher EQR to manage the repairs if the property owner prefers:
 - \$10,000+GST - \$100,000+GST of repairs – EQC will refer the claim to Fletcher EQR, which will act on behalf of EQC and manage the repair process. Property owners are able to opt out of using Fletcher EQR to manage the repairs:
 - Over \$100,000+GST of repairs – EQC will refer the claim to the property owner's insurer. The \$100,000 will be paid either to the property owner or the lender if the property has a mortgage or other financial security on it.
7. Fletcher EQR (i.e. the Fletcher Construction Company) has been appointed by EQC to run EQC's Canterbury Earthquake Project Management Office. To summarise, Fletcher EQR is managing the repair to residential properties with damage between \$10,000+GST and \$100,000+GST (or those with damage under \$10,000+GST that have opted in to the Fletcher EQR process). Helpful information about the Fletcher EQR Programme is set out in **Attachment 1** in "Your Guide to the Repair Process with Fletcher EQR".
8. Fletcher EQR project manages the repair work but does not carry out the work itself. The physical work is being carried out by accredited contractors, who are in turn responsible for sub-contracting other contractors as needed. Builders who are members of the Registered Master Builders Federation or the Certified Builders Association of New Zealand¹ automatically qualify for accreditation although they are still required to complete the necessary applications. Fletchers EQR have also been accrediting Licensed Building Practitioners.
9. Fletchers EQR have confirmed to staff that approximately 850 tradespersons have been accredited. Of this number, approximately 550-600 builders have been accredited. The remaining number of persons who have been accredited are painters, plasterers, house repilers, persons qualified in asbestos removal and other specialist trades. Fletchers EQR have also stated that no person, whether an accredited contractor or a subcontractor, may work on a site unless they have completed an induction programme. The induction programme is largely focussed on health and safety issues but it also addresses quality issues.

Occupational regulation

10. The Licensed Building Practitioners ("LBPs") scheme is run by the Department of Building and Housing (DBH). Licensing began on 1 November 2007, and the scheme is competency based. The LBP scheme aims to improve building quality and increase consumer protection by:-
 - Setting national standards of competence for people carrying out certain design and building work:
 - Helping consumers choose competent building practitioners:
 - Ensuring design and building practitioners are accountable for their work.
11. The DBH website advises that

"Competent builders and tradespeople with a good track record can have their skills and knowledge formally recognised, whether they are trade-qualified or not. ...All LBPs are listed on a public online register, along with details of their licence classes. LBPs are accountable for their work via a complaints procedure. Anyone can complain to the Building Practitioners Board about licensed practitioners if their work is substandard."

¹ *The Registered Master Builders Federation and the Certified Builders Association of New Zealand are independent private organisations. Membership is voluntary but in order to become a member of the Registered Master Builders Federation or the Certified Builders Association of New Zealand, a person must be trade qualified and meet a number of criteria as specified by each body.*

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12. Licensing is currently available in 9 classes as follows:

General licensing classes

- Design
- Site

Trade licensing classes

- Carpentry
- Bricklaying and Blocklaying
- External Plastering
- Foundations
- Roofing

Specialist licensing classes

- Concrete structure
- Steel structure

13. It should be noted that licensing of building practitioners is not compulsory but from March 2012, work defined as restricted building work will only be able to be carried out or supervised by LBPs. This is set out in the Building Act 2004 as well as an upcoming Order in Council which will be made under the Building Act. Restricted building work covers work on home and small-medium sized apartment buildings. It also applies to active fire safety systems in small-medium apartment buildings. A list of Frequently Asked Questions about the LBP scheme is contained in **Attachment 2**.
14. The Building Act 2004 establishes the Building Practitioners Board and the Board's functions include receiving, investigating, and hearing complaints about, and inquiring into the conduct of, and disciplining, LPBs.
15. There is currently no requirement under the Building Act 2004 or any other Act that painters and decorators be registered in New Zealand. However, Master Painters New Zealand is a body consisting of 14 associations in New Zealand. Membership is voluntary but Master Painters advises that they only accept new members after a thorough assessment of their skills as a painter and integrity as a contractor. There is provision for work to be guaranteed provided certain requirements are met.

Canterbury Employment and Skills Board

16. The Canterbury Employment and Skills Board (CESB) has also been established. The CESB in conjunction with the Canterbury Economic Recovery Agency and the Canterbury Development Corporation will develop a 10 year strategic labour market and skills plan. Staff note that part of the CESB role is to update, analyse and inform local government and the business community on the regional workforce. Further information will be available in due course. See www.cesb.org.nz. However, it is not envisaged that the CESB will undertake a registration system of such tradespersons as painters, decorators or builders.

Summary of current arrangements

17. The DBH administers an occupational licensing system for builders in New Zealand through the LBP regime. Registration is not compulsory but from March 2012 only certain work will be able to be carried out by LBPs. The LBP regime contains a disciplinary process. There are also two industry bodies in place which are the Registered Master Builders Federation and the Certified Builders Association of New Zealand. There is currently no such regime in place for painters and decorators, although there is an industry body called the Master Painters New Zealand.
18. In terms of EQC work, repair to residential properties with damage between \$10,000+GST and \$100,000+GST (or those with damage under \$10,000+GST that have opted in to the Fletcher EQR process) is being managed by Fletcher EQR. Fletcher EQR require all main contractors to be accredited through their own accreditation process.

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FINANCIAL IMPLICATIONS

19. At this stage it is unclear the extent of the financial implications for the Council if it were to introduce a registration system for painters, decorators and builders in Christchurch City. However, there would be considerable staff time and costs associated with devising and implementing a registration system, and enforcing such a system. Furthermore, there is a real concern that the Council could be involved in subsequent civil claims about the quality and performance of work by registered tradespersons. In other words, by creating such a registration system, the Council could potentially be a defendant in any litigation brought by consumers in relation to the work completed by the tradespersons.
20. There is also a concern that the creation of a registration system may lead to delays in work being undertaken in Christchurch while such a registration system is put into place.

Do the Recommendations of this Report Align with 2009-19 LTCCP budgets?

21. There is no financial provision in the 2009-19 LTCCP budgets for the creation and enforcement of a registration system for painters, decorators and builders.

LEGAL CONSIDERATIONS

22. The only way in which the Council could require all painters, decorators and builders working in Christchurch City to be registered with the Council before being able to do any work would be to make a bylaw setting out the registration system.
23. The Local Government Act 2002 sets out a procedure for making bylaws under that Act. An important part of the bylaw-making procedure is the section 155 analysis which the Council must complete. Section 155 requires the Council to determine that any proposed bylaw:
 - (a) is the most appropriate way of addressing the perceived problem:
 - (b) is in an appropriate form:
 - (c) is not inconsistent with the New Zealand Bill of Rights Act 1990.
24. In this case, whilst some potential concerns have been identified about builders, painters, and decorators undertaking work in Christchurch City, the Legal Services Unit advice is that these concerns do not meet the required standard of being a "problem" or even a "perceived problem". If the Council is unable to identify a perceived problem then a bylaw is not appropriate.
25. In addition to the statutory requirements, the law generally requires that any bylaw must be intra vires (in other words within the statutory powers that authorise the bylaw), certain, not repugnant to the general laws of New Zealand, and reasonable.
26. Section 145 of the Local Government Act 2002 provides that a territorial authority may make bylaws for its district for 1 or more of the following purposes:
 - (a) protecting the public from nuisance:
 - (b) protecting, promoting, and maintaining public health and safety:
 - (c) minimising the potential for offensive behaviour in public places.
27. In addition, section 151(3) of the Local Government Act 2002 provides that a bylaw may provide for the following:
 - (a) the licensing of persons or property:
 - (b) the payment of reasonable licence fees:
 - (c) recovery of costs incurred by the local authority in relation to an activity licensed under a bylaw.

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28. In terms of section 145(a), the Local Government Act 2002 does not define the term "nuisance". "Nuisance" as used in law is not capable of exact definition, but there are a number of common factors that may be used to define a "nuisance". These are-
- in general it will be a "thing", e.g. an obnoxious odour, water escaping from one property onto another etc (rather than a person or persons);
 - it arises from a long continuing condition;
 - it is caused by an unlawful act; and
 - it causes damage or interferes with a person's use or enjoyment of land, or some right over, or in connection with it.
29. Here, concerns about builders, painters, and decorators do not, in the view of the Legal Services Unit, amount to a "nuisance" in terms of section 145(a).
30. With respect to section 145(b), there may be public health and safety concerns about the work of builders and so, in conjunction with section 151(3), a bylaw requiring the registration of builders might, literally, be authorised by the Local Government Act 2002.
31. However, this interpretation needs to be approached with some caution. This is because of a New Zealand Court of Appeal case *Hanna v Auckland City Corporation* [1945] NZLR 622. In that case, a Bylaw provided that no person was able to erect any new building or structure except under the supervision of and in accordance with plans prepared by a registered architect and /or a registered civil or structural engineer who was in the opinion of the City Engineer properly qualified to prepare the plans and supervise the execution of the building. An architect who was not registered challenged the bylaw and the Court of Appeal held that the bylaw was ultra vires (i.e. outside of its authorising power). Chief Justice Myers, after discussing the particular bylaw making provision, noted as follows:
- "If a Council could so discriminate as between architects, it could presumably discriminate also as between builders by enacting a by-law that no builder other than a member of a builders' association or institute, if there be one, should be permitted to build or repair any building, or any specified class of building, within the borough. Interference of this kind by by-law cannot be permitted unless the power to interfere is clearly conferred. No doubt, as their Lordships say in Toronto City Corporation v Virgo the regulation and governance of a trade may involve the imposition of restrictions on its exercise, but there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it. In the present case I can find no power conferred on the Council even of regulation or governance of the profession of an architect."*
32. Even if a bylaw requiring the registration of builders is authorised under section 145(b), it is difficult to see how this would extend to the work of painters and decorators. There do not appear to be any immediate public health and safety concerns with painters and decorators undertaking their trades. It is the view of the Legal Services Unit that a bylaw requiring the registration of painters and decorators in Christchurch City would not be authorised by section 145(b).
33. With respect to the requirement that a bylaw must not be repugnant to the general laws of New Zealand, there is a real issue that a bylaw which purports to require all builders to be registered with the Council before they undertake any work in the city, would be so repugnant. What this requirement is designed to prevent is delegated legislation such as bylaws or regulations that contradict statutes or the common law when it is not authorised to do so. Here where the Government has already put in place an occupational licensing system for building practitioners, there is a strong argument that an additional Council registration system requiring the registration of all builders in Christchurch would be an attempt to contradict the LBP regime.

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Have you considered the legal implications of the issue under consideration?

34. Yes. A summary of the legal position is as follows:

- (a) While there are concerns, currently, there is no evidence of a perceived problem in terms of section 155 of the Local Government Act 2002. If the Council is unable to identify a perceived problem then it is not appropriate for the Council to make a bylaw.
- (b) Literally, under section 145(b) of the Local Government Act 2002, there is a power to make a bylaw requiring the registration of builders. However, the Council must take into account case law that applies to bylaws. Following the Hanna case, such a bylaw may well be ultra vires. There is also a strong argument that a bylaw of this kind would be repugnant to the general laws of New Zealand.
- (c) The Local Government Act 2002 does not, in the view of the Legal Services Unit, authorise a bylaw requiring the registration of painters and decorators in Christchurch City.

35. Only a Court may finally determine whether or not a bylaw is authorised. However, taking the matters in paragraph 34 into account, the Legal Services Unit advice is that if the Council proceeded to make a bylaw that required the registration of all painters, decorators and builders working in Christchurch City before they were able to undertake work, there is a significant legal risk that a Court would find the bylaw to be invalid.

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

36. Not applicable given the legal advice above.

Do the recommendations of this report support a level of service or project in the 2009-19 LTCCP?

37. See above.

ALIGNMENT WITH STRATEGIES

38. There are no applicable strategies.

Do the recommendations align with the Council's strategies?

39. See above.

CONSULTATION FULFILMENT

40. Staff in the Legal Services Unit and the Enforcement and Inspections Unit have had initial discussions about the possibility of a bylaw that would contain the proposed registration system. Other than obtaining information from Fletcher EQR about their current accreditation system, and background to the role of the CESB, staff have not had discussions with industry organisations or representatives about the proposal.

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STAFF RECOMMENDATION

It is recommended that the Council:

- (a) Receives this report; and
- (b) Determines that staff do not undertake any further analysis on having all painters, decorators and builders working in the territory of Christchurch to be registered with the Christchurch City Council before being able to do any work.

THE OPTIONS

41. There are 2 options.

Option 1

- 40. That staff undertake further analysis on having all painters, decorators and builders working in the territory of Christchurch to be registered with the Christchurch City Council before being able to do any work.

Option 2

- 41. That staff undertake no further analysis on having all painters, decorators and builders working in the territory of Christchurch to be registered with the Christchurch City Council before being able to do any work.

PREFERRED OPTION

- 42. Option 2 is the preferred option. There is already a registration system in place for LBPs under the Building Act 2004. While it is acknowledged that there is no national registration system in place for painters and decorators, it should be noted that certain earthquake repair work to residential properties that is being managed by Fletcher EQR may only be undertaken by lead contractors who are accredited with Fletcher EQR. Painters or decorators, if they are the lead contractor, must be accredited.
- 43. The Legal Services Unit advice is that if the Council proceeded to make a bylaw providing for such a registration system, there is a **significant legal risk** that a Court would find the bylaw to be invalid. Furthermore, there would be considerable costs to the Council in setting up, administering and enforcing such a registration system. The Council also faces a potential civil liability with such a registration system. There is also a concern that it may lead to delays in work being undertaken in Christchurch while the registration system is put in place. Consequently, it is recommended that staff undertake no further analysis on having all painters, decorators and builders working in the territory of Christchurch to be registered with the Christchurch City Council before being able to do any work.