



Cabinet Policy Committee

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Leaky Buildings: Establishing a Mediation Service

On 30 September 2002 Cabinet noted a submission and oral briefings on the Report of the Overview Group of the Weathertightness of Buildings to the Building Industry Authority, and the government's response to it.

Cabinet agreed that the submission be referred to POL, along with further information on developments since that paper was prepared. The attached paper incorporates the information in the Cabinet paper and the new information.

POL has power to act.

The recommendations are on pages 6-7.

Sarah Egan
for Secretary of the Cabinet

Copies to:
Cabinet Policy Committee
Chief Executive, DPMC
Mary Anne Thompson, DPMC
Secretary to the Treasury
Chief Executive, Ministry of Economic Development
State Services Commissioner
Solicitor-General
Chief Executive, Te Puni Kokiri
Minister of Internal Affairs
Secretary for Internal Affairs

Memorandum for Cabinet Policy Committee

LEAKY BUILDINGS: ESTABLISHING A MEDIATION SERVICE

Proposal

1. In this paper I seek the Committee's agreement to the establishment of a dedicated mediation service to assist home owners with leaky buildings. I also seek additional funding to enable the Department of Internal Affairs to develop the proposed mediation service over the next two weeks and to establish it over the following four weeks.

Summary

2. In this paper I propose:
 - that Government promote a limited assessment and mediation service;
 - a process for designing the detail of the service, and determining the contributions to its funding;
 - an initial additional appropriation to fund the work involved in developing the detailed design of the service over the next two weeks and in establishing the service over the following four weeks.

Background

3. The Humm report identified a significant problem with leaking buildings and roughly estimated the cost of repair at \$120 to 240 million.
4. *(This information has been withheld under section 9 of the Official Information Act 1982)*
5. Several parties have raised mediation as a possible solution to the leaking buildings problem. The Master Builders' Federation proposes a government-funded scheme using some of the mediation techniques it uses in disputes over its building guarantees. The New Zealand Subcontractors' Federation supports this proposal.
6. Mediation is one element of the "four pronged approach" proposed by Local Government New Zealand:
 - expert local authority building inspectors comprehensively inspect suspected leaking buildings
 - a mediation service assists in determining who is responsible for remedial work
 - disputes are heard by a special bench of the District Court assisted by experts in construction law
 - a "community fund" is established by Government, local authorities, builders, architects and others to provide compensation.

7. *(Information has been withheld under section 9 of the Official Information Act 1982)* These are private affairs and private disputes. The Government's role in such situations is to provide the dispute resolution process that will enable people to pursue their own legal remedies. Usually that is through the general court system. However, in this instance there are concerns about whether leaving people to pursue their own remedies through the courts is practical or appropriate, given the potentially large number of similar claims that may be involved and the difficulties for individuals in obtaining the information needed to commence a claim.
8. I believe that in some cases a carefully designed assessment and mediation service will provide solutions more quickly and cheaply than leaving parties to rely on litigation. I believe the Government should have a role in such a scheme, and this paper sets out proposals for defining and funding that role.
9. I note that similar problems were experienced in Canada in the 1990s and investigated by a formal inquiry. The provincial government involved did not set up a compensation fund, but did make available a user pays mediation service and assisted with interest free loans to low income people. A research consortium was also established to improve construction industry technology and practice. I have asked my officials to undertake further investigation into the response mechanisms utilised in Canada and in other jurisdictions, in particular evaluating the outcomes of the interventions adopted. This work will be included in the overall design of the mediation service.

An overall response to the issues raised in the Overview Group report

10. Officials will report to Cabinet Policy Committee next week with a summary of the issues raised in the Overview Group report, and of the actions the government is taking in response.
11. This paper therefore concentrates on the proposal for a mediation service, and the steps needed to develop that idea into a detailed proposal ready for implementation.

What would a mediation process look like?

12. An assessment and mediation service should provide a framework for the resolution of the private legal issues raised by the leaking building problem.

Minimum elements

13. The mediation service should have at least these elements:
- an initial screening stage to isolate cases where buildings are leaking because of the causes identified in the Hunn Report
 - an independent assessment process that identifies the problems and the work needed to fix them
 - a time bounded mediation process that focuses on the substance of problems and emphasises the advantages of settlement.

14. The initial screening and assessment should be done so far as possible by independent professionals, not by territorial authority building inspectors or other building certifiers involved with leaking buildings, or inspectors from the local authority that has previously authorised the work. The Master Builders' Federation has offered to assist with this aspect of the work.
15. Parties would need to agree to the mediation process and to be bound by any settlement that was negotiated at the mediation. If no settlement is able to be reached, the parties will still be able to return to litigating the issues. These arrangements can be established by contract between the parties and do not require legislation. The Crown's role will be to provide the service, not to compel people to use it or to enforce agreements reached.
16. Mediators should be drawn from professional bodies such as Lawyers Engaged in Alternative Dispute Resolution (LEADR) and the Arbitrators and Mediators Institute of New Zealand Inc. They should have some experience in construction disputes if possible. The Arbitrators' Institute will assist with identifying possible mediators.
17. The mediation process itself should be proactive, focus on substantive issues and stress the value of settlement.

Detailed design

18. The framework for the process will need to be prescribed in some detail and:
 - define a class of cases eligible for the mediation process.
 - (possibly) set a minimum level of damage as part of the class definition
 - prescribe a date by which applications for assessment and mediation must be made
 - set out a time limit for the mediation process
 - fix a date by which the service will end
 - have the assessment process produce a standard set of data
 - involve detailed guidelines for the mediation process, including whether or not lawyers for the parties should participate
 - produce a database recording the problems and their resolution
19. It is proposed that the Department of Internal Affairs (DIA) appoint a project manager to convene a group of experts, including the Overview Group, a financial expert and an expert in mediation/arbitration and construction law, to assist it to develop the detailed framework for the mediation service over the next two weeks. I would report back to the Cabinet Policy Committee at that point. The same group, or a smaller version of it, would then work for a further 3-4 weeks to establish the service, so that it was ready to start considering disputes by the end of November or early December. I expect the service would be based in Auckland.
20. Over the next two weeks officials will also need to gather information on a number of other issues such as an estimate of the likely volume of cases, so that we can form views on the likely size and timeframe for the provision of the service. At this stage I would expect to review the operation of the service after one year. It may be possible to wind down its operations after 18-24 months.

21. Other issues that need to be resolved in this design phase include who will undertake the assessments, how conflicts of interest are handled and the context of the mediation process itself.

Funding

22. The Department of Internal Affairs does not currently have sufficient capacity to provide the level of building policy advice and support that is needed for the establishment of the mediation service. It has no scope to reprioritise within the existing baseline. My priority for the Internal Affairs policy advice output class remains the passage in 2002/03 of the Responsible Gambling Bill. On-going problems within the gaming machine sector reinforce this priority. The Government has also committed to dealing with Fire Service funding issues as a matter of urgency.
23. I am satisfied that there is no other opportunity for reprioritisation of the Crown-funded outputs within Vote Internal Affairs (most these other outputs are third-party funded). Ministers will have further opportunity to consider this issue in the context of fees review papers for gaming regulation and identity services which are due for reporting back to EXG in November 2002.
24. It is recommended that the Committee approve an increase in appropriation in Vote: Internal Affairs – Departmental Output Class D1 – Policy Advice - Internal Affairs in 2002/03 of \$280,000 (GST exclusive) with a negative impact on the Crown's operating provisions, to provide the Department of Internal Affairs with the capacity to develop and establish a mediation service. A breakdown of these costs is attached.
25. The increase in appropriation above does not include any costs associated with administering the proposed mediation service. These will be addressed in a report on the detailed proposal and its implementation, which will be brought to Cabinet Policy Committee in two weeks time. Nor does it include other increased costs that the Department of Internal Affairs is facing as a result of the Overview Group report. These will be discussed in the more general report that will come to Cabinet Policy Committee next week.
26. I am exploring options for how the service itself is funded. Other parties such as local authorities and major players in the construction industry may offer to contribute funding or assistance in kind to an assessment and mediation service.
27. Officials have talked to Local Government New Zealand (LGNZ) and it has indicated support for working in partnership with central government on this issue and for the idea of a dispute resolution service along these lines. LGNZ is considering what contribution it may be able to make to the service. It is in the process of consulting individual territorial authorities on this issue. Other stakeholders such as the Insurance Council of New Zealand and the Master Builders' Federation are also being consulted.
28. The Building Industry Authority was established in 1991/92 with an appropriation from the Crown of 0.930 million, additional appropriations in 1992/93 and 1993/94 of \$1.425 million and \$0.890 million respectively. The Building Industry Authority has advised that it is in a position to repay \$1.1 million (which constitutes unspent Crown funding from 1991-1994 plus interest) from current reserves. These returned funds could contribute to the costs of the service proposed.

Other developments

29. Since the Group's report was published, the weathertightness issue has generated considerable public concern and speculation in the marketplace. A number of responses to the issue have been reported. These include responses from the building, banking and insurance sectors and range from the positive (increases in incomes of building inspection companies) to the negative (for example, more difficult to get home loans, adverse comments from people within or associated with the building industry).
30. It is difficult to establish the veracity of some reports, however there has been a certain impact on the insurance required for building certifiers, and hence their ability to continue to do this work. The BIA has advised that at least one established certifier has been forced to stop certifying because the certifier's insurer declined to offer continuation of insurance in a form the BIA could approve¹. The BIA advise that many certifiers in Auckland apparently believe their respective insurers will not renew on suitable terms when their respective renewal dates come round.
31. Officials are monitoring these various developments and are in contact with relevant industry groups. They will report to Ministers on any other developments if it seems that further government action may be required.

Compliance Costs

32. My proposals will not generate any compliance costs.

Human Rights Act and Bill of Rights Issues

33. My proposals do not raise any issues in terms of the Human Rights Act or the New Zealand Bill of Rights Act.

Legislative implications

34. My proposals do not have any legislative implications.

Financial implications

35. To provide the Department of Internal Affairs with the capacity to develop the detailed design of a mediation service and to establish it, the following increases in appropriation are sought.

	\$m – increase				
	2002/03	2003/04	2004/05	2005/06 & Outyears	GST
Vote Internal Affairs					
Departmental Output Class:					
D1 –Policy Advice - Internal Affairs	0.280		-	-	Exc

36. The increase in appropriation referred to above will have a negative impact on the Crown's operating provisions of \$280,000 (GST exclusive) in 2002/03.

Publicity

37. A detailed communications strategy will be developed in consultation with key Ministers.

Consultation

38. The following have been consulted on the issues raised in this paper: Treasury, Department of Prime Minister and Cabinet, Crown Law, State Services Commission.

Recommendations

39. I recommend that the Committee:

1. **note** that the report of the Overview Group on the Weathertightness of Buildings identified that the problem of weather tightness is widespread and substantial and it is still very difficult to assess the full extent and impact of the problem;
2. *(This information has been withheld under section 9 of the Official Information Act 1982)*
3. **note** that a limited assessment and mediation process may be more efficient in settling some disputes over leaking buildings than leaving the parties to rely on litigation and court related settlement negotiations.
4. **agree in principle** that the Government promote a limited assessment and mediation process which is be available to users for a modest application fee.
5. **note** that an assessment and mediation process of the kind described in recommendation 4 will be effective only if it is receives significant support from the parties involved in the leaking building problem.
6. **note** that officials have talked to LGNZ and they have indicated support for working in partnership with central government on this issue and for the idea of a dispute resolution service along these lines. LGNZ is considering what contribution it may be able to make to the service.
7. **Approve** the following changes to appropriations in 2002/03 to provide the Department of Internal Affairs with capacity to design and establish a mediation service for the resolution of disputes arising from leaky buildings, with a negative impact on the Government's operating provisions:

	\$m – increase				
	2002/03	2003/04	2004/05	2005/06 & Outyears	GST

Vote Internal Affairs					
Departmental Output Class:					
D1 –Policy Advice – Internal Affairs	0.280		-	-	Exc

8. **Agree** that the changes referred to in recommendation (6) above be included in the 2002/03 Supplementary Estimates and in the interim be met from Imprest Supply.
9. **Note** that the increase in appropriation above does not include any costs associated with administering the proposed mediation service.
10. **Direct** officials from the Department of Internal Affairs to report to the Cabinet Policy Committee on 23 October 2002 on the detailed design of the proposed mediation service, including funding mechanisms for the mediation service.

Hon George Hawkins
 MINISTER OF INTERNAL AFFAIRS

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Budget

Group of expert advisers to assist DIA to develop the details of the mediation service (2 weeks work, reporting to POL on 23 October)

Project manager and support staff	10,000
Expert arbitrator, expected to lead the service	30,000
The Overview Group reporting to the BIA (3 people)	30,000
Insurance/finance expert	10,000
Incidental expenses (travel, accommodation, legal advice, meeting costs)	30,000
TOTAL (development phase)	110,000

Project team to establish the Mediation Service (3-4 weeks work, through November)

Project manager and support staff	40,000
Expert arbitrator, expected to lead the service	20,000
The Overview Group reporting to the BIA (3 people)	60,000
Incidental expenses (travel, accommodation, legal advice, meeting costs)	50,000
TOTAL (establishment phase)	170,000

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Consultation on Cabinet and Cabinet Committee Submissions

Certification by Department

Departments consulted: The attached submission has implications for the following departments whose views have been sought and are accurately reflected in the submission:

Treasury, DPMC, SSC, Crown Law,

Departments informed: In addition, the following departments have an interest in the submission and have been informed:

Others consulted: Other interested groups have been consulted as follows:

LGNZ (on the proposal, not the paper)

Signature <i>[Signature]</i>	Name, Title, Department <i>Helen Algar, GM Policy</i>	Date <i>01/10/02.</i>
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Certification by Minister

Ministers should be prepared to update and amplify the advice below when the submission is discussed at Cabinet/Cabinet committee. The attached submission:

Consultation at Ministerial level	<input type="checkbox"/> did not need consultation with other Ministers <input type="checkbox"/> has been the subject of consultation with the Minister of Finance <i>[required for all submissions seeking new funding]</i> <input checked="" type="checkbox"/> has been the subject of consultation with the following Minister(s) <i>MINISTER OF FINANCE, MR ANDERTON</i>
Consultation with Government MPs	<input checked="" type="checkbox"/> does not need consultation with the government caucuses <input type="checkbox"/> has been or will be <i>[specify which]</i> the subject of consultation with the following government caucuses: <input type="checkbox"/> Labour caucus <input type="checkbox"/> Progressive Coalition caucus
Consultation at Parliamentary level	<input checked="" type="checkbox"/> does not need consultation at parliamentary level <input type="checkbox"/> has been or will be <i>[specify which]</i> the subject of consultation with the following other parties represented in Parliament:

Signature <i>G.W. Hawkins</i>	Portfolio <i>INTERNAL AFFAIRS</i>	Date <i>1/10/02.</i>
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