

17 June 2019

Building Policy
Ministry of Business, Innovation and Employment
Wellington

By email: building@mbie.govt.nz

Re: Building System Legislative Reform Programme, Paper 4: Risk and Liability

The New Zealand Law Society welcomes the opportunity to comment on MBIE's *Discussion Paper – Building system legislative reform, Paper 4: Risk and Liability, April 2019* (discussion paper).

The discussion paper seeks feedback on two proposals:

1. Require guarantee and insurance products for residential new builds and significant alterations and allow homeowners to actively opt out.
2. Leave the liability settings for building consent authorities (BCAs) unchanged.

The Law Society has no comment to make on proposal 1, and its response to proposal 2 is set out below.

Questions for stakeholders – Proposal 2: No change to BCA liability settings

Q4.12 If the government makes all the other changes in this discussion paper, do you agree that the liability settings for BCAs will not need to be changed?

Q4.13 If the government decides to limit BCA liability, do you support the proposal to place a cap on BCA liability?

MBIE is seeking feedback on whether changes are needed to address concerns that BCAs may face a disproportionate share of damages when other parties are absent. It has considered the option of a 20% cap on BCA liability, but has concluded that:¹

“It may be unnecessary to cap BCAs’ liability because the other proposals in the reform package will make people more accountable for their work and products, thereby reducing BCAs’ potential liability. MBIE has received feedback that the other changes matter more for how BCAs approach consenting.”

The Law Society agrees that the current liability settings should be retained and that no cap for BCA liability should be introduced, for the reasons set out in the discussion paper.

The discussion paper has identified some significant disadvantages that would result from a 20% cap on BCA liability. These include creating a barrier to homeowners taking claims related to BCA negligence (as the costs may outweigh the potential amount that could be paid).² In other words,

¹ *Building System Legislative Reform: Risk and Liability – summary document, April 2019*, at p4.

² *Discussion Paper – Building System Legislative Reform: Paper 4, Risk and Liability, April 2019*, at p32.

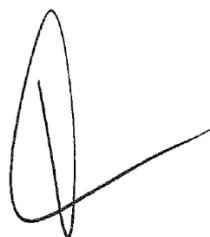
because of the costs and complexity of litigation, a cap on liability for local authorities could disincentivise actions for damages.

The question of the appropriate liability model in New Zealand was given comprehensive consideration in the Law Commission's review in 2013, and the Law Society's view at that time was that "the current system of joint and several liability in New Zealand is preferable to liability models adopted in other jurisdictions" and should be retained.³ The Law Society's view remains unchanged. The Law Commission's principal recommendation in its 2014 report was that joint and several liability should be retained,⁴ and that recommendation was accepted by the government in 2014.⁵ Joint and several liability promotes a full recovery in favour of the plaintiff for wrongs committed by joint or concurrent tortfeasors in relation to the same damage.

In summary, the joint and several liability model works. It is underpinned by sound and well-tested principles relating to duty of care, causation and remoteness. In the case of local authorities, the Law Society does not consider there is any compelling justification for departing from the current joint and several liability model.

These comments have been prepared by the Law Society's Civil Litigation and Tribunals Committee. If further discussion would assist, please contact committee convenor Andrew Beck via Law Reform Adviser Emily Sutton (emily.sutton@lawsociety.org.nz / 04 463 2978).

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.

Andrew Logan
Vice President

³ Review of joint and several liability, NZLS submission 21.2.2013, at p8 (available on request).

⁴ *Liability of Multiple Defendants*, Law Commission R132 (24 June 2014).

⁵ *Government Response to Law Commission Report, Liability of Multiple Defendants*, 2014, available at https://www.lawcom.govt.nz/sites/default/files/governmentResponseAttachments/govt_response_to_nzlc_r132.pdf.