

# **BUILDING PERFORMANCE**

## Issues Discussion Document Review of the Building Consent System

**BUILDING SYSTEM REFORM**

JULY 2022



MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT  
HĪKINA WHAKATUTUKI

Te Kāwanatanga o Aotearoa  
New Zealand Government



**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
HĪKINA WHAKATUTUKI

## **Ministry of Business, Innovation and Employment (MBIE) Hīkina Whakatutuki – Lifting to make successful**

MBIE develops and delivers policy, services, advice and regulation to support economic growth and the prosperity and wellbeing of New Zealanders.

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# How to have your say

## Submissions process

MBIE seeks written submissions on this discussion paper by 1 September 2022.

Your submission may respond to any or all of the elements of this issues discussion document. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please use the submission template provided at [MBIEs Have Your Say page](#).

This will help us to collate submissions and ensure that your views are fully considered. Please also include your name and (if applicable) the name of your organisation in your submission.

Please include your contact details in the cover letter or e-mail accompanying your submission.

You can have your say through the following methods:

- Completing a survey online via [MBIEs Have Your Say page](#)
- Filling out the feedback template attached and sending your submission to the e-mail or mailing details below.
- By sending your submission as a Microsoft Word document to [building@mbie.govt.nz](mailto:building@mbie.govt.nz)
- By mailing your submission to:

Consultation: Review of the Building Consent system  
Building System Performance  
Building, Resources and Markets  
Ministry of Business, Innovation and Employment  
PO Box 1473  
  
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New Zealand

Please direct any questions that you have in relation to the submissions process to [building@mbie.govt.nz](mailto:building@mbie.govt.nz).

## Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to Ministers on the review of the building consent system. We may contact submitters directly if we require clarification of any matters in submissions.

## Release of information

MBIE intends to upload PDF copies of submissions received to MBIE's website at [www.mbie.govt.nz](http://www.mbie.govt.nz). MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

If your submission contains any information that is confidential or you otherwise wish us not to publish, please:

- indicate this on the front of the submission, with any confidential information clearly marked within the text
- provide a separate version excluding the relevant information for publication on our website.

Submissions remain subject to requests under the *Official Information Act 1982*. Please set out clearly in the cover letter or e-mail accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the *Official Information Act 1982*.

### **Private information**

*The Privacy Act 2020* establishes certain principles with respect to the collection, use and disclosure of information about individuals by various agencies, including MBIE. Any personal information you supply to MBIE in the course of making a submission will only be used for the purpose of assisting in the development of policy advice in relation to this review. Please clearly indicate in the cover letter or e-mail accompanying your submission if you do not wish your name, or any other personal information, to be included in any summary of submissions that MBIE may publish.



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## Minister's Foreword



### Minister for Building and Construction, Hon Dr Megan Woods

The Government knows how important safe, healthy and affordable housing is for the wellbeing of New Zealanders. We also understand the importance of a productive building and construction sector that will help us to achieve our wellbeing and economic goals.

Our building consent system is key to meeting these goals, which is why the Government committed to its review back in 2020.

The building and construction sector is going through a period of strong growth, which is putting pressure on the building consent system. The latest figures from Statistics NZ show that non-residential building consented in the year to March 2022 will add \$8.5 billion directly to our economy, while a record 50,858 new homes were consented over the same timeframe. And for the first time the number of consents issued for multi-unit homes, like townhouses, has exceeded the number of consents for traditional stand-alone houses.

The scale and pace at which New Zealanders want to build means that now is a good time to take a fresh look at what we want the building consent system to look like and how we want it to perform.

We all want a building consent system that is efficient, has clear requirements and produces consistent decisions. I want a system that will continue to meet expectations and high levels of demand for building and construction.

I also want an agile system that will respond to changes in the way New Zealanders build while also avoiding defects that can be stressful and costly to address. Everyone needs to play their part in delivering good quality buildings.

This discussion document sets out a range of desirable outcomes from the system and identifies the key issues currently standing in the way of achieving those outcomes. Your feedback will help shape the Government's view on the changes we need to make to ensure the building consent system delivers for all New Zealanders.

For those interested in risk and liability, I encourage you to read the companion policy position statement on *Risk, liability and insurance in the building sector*. This statement sets out a recent history of, and the Government's position on, the risk, liability and insurance settings for the sector.

To achieve the goals that I have set out and to make the building consent system as efficient as possible, we need your input and feedback.

I encourage you to participate in this consultation process to ensure we get this reform process right.

# SECTION ONE OF THREE:

Introduction and strategic  
context





## Introduction

The Government has commenced a substantive review of the building consent system. A better building consent system is a key priority of the Government and is necessary to support transformation of our housing market to unlock productivity growth and make houses more affordable.

The aim of the review of the building consent system is to modernise the system to provide assurance to building owners and users that building work will be done right the first time, thereby ensuring that buildings are well-made, healthy, durable and safe.

### We are seeking your feedback

This issues discussion document seeks feedback on the role of government in the building consent system, the desirable outcomes from the system, and an initial assessment of the key issues that are barriers to achieving those outcomes.

The document seeks to build a shared understanding of system-wide issues as a basis for considering future system change. The initial assessment draws on general industry feedback, international comparisons and previous reviews dating back to the establishment of the *Building Act 1991*.

The document includes questions for feedback. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

### Next steps

Your feedback on this document will be collated and analysed alongside other responses. Following consideration of the submissions, MBIE will develop potential options for improvements to the building consent system.

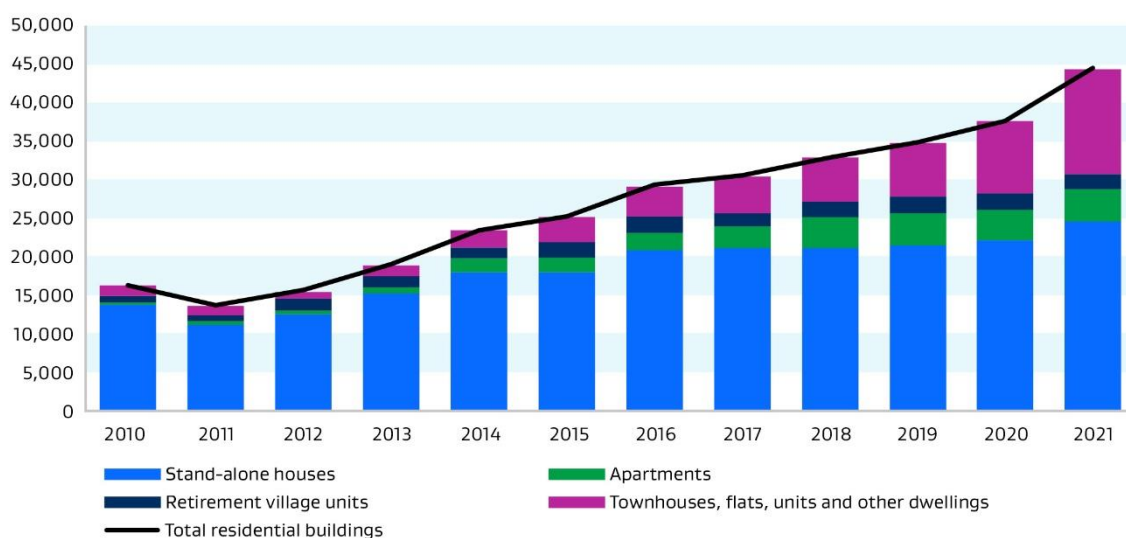
MBIE will seek feedback on these potential options for change through a further round of public consultation.

## Why now?

### The building consent system is under pressure to meet increasing demand

The building and construction sector is undergoing a period of strong growth. While the building consent system is processing a record volume of consents, it is under significant strain. There is also increasing demand to build at scale and at pace. Complaints from the sector about delays in the processing of building consents and wait times for inspections have been increasing. The demand for faster consenting creates a tension with the need for robust assurance systems to prevent building defects.

**FIGURE 1: Annual new residential dwellings consented (Year ended June 2010-2021)<sup>1</sup>**



<sup>1</sup> Statistics New Zealand. *Building Consents*.

### The way in which we design and build is changing ...

The building and construction sector has evolved since the building consent system was established in 1991. Back then, new homes were mainly detached, single-storey, timber-framed dwellings. Product choice was limited and there was a closer relationship between the building owner, designer and builder.

Today, the design, procurement and building process is more complex. There is increasing specialisation, both in design and in the building trades. Many building owners do not have a direct relationship with the designer or builders on-site. In addition, numerous products, materials, technologies and processes are being developed and used in buildings.

### ... as are expectations of the building system

Other challenges and opportunities facing the government and the sector will place greater expectations and demands on the building consent system. This includes the need to reduce

emissions, adapt to the impacts of climate change, use resources more sustainably and ensure buildings are resilient to natural hazards.

The building and construction sector is adopting new innovations and technologies that are changing how we build, what we build and how buildings perform. Greater adoption of technology by building consent authorities will be needed to support this transformation. This will lead to quicker and smarter processing, while creating a rich set of information that can be used by all parties to analyse productivity, and the quality and performance of buildings.

## **Wider government reform aimed at transforming the housing market**

The review of the building consent system sits within a wider Government reform programme aimed at transforming our housing market to unlock productivity growth, stimulate urban development where it is needed, and make houses more affordable. These reforms will have a direct impact on work needing a building consent, for example by removing overly restrictive planning rules that can make it more difficult to build homes.

A modernised building consent system will support these wider reforms by helping to speed up the scale and pace of building and construction while also ensuring that work is done right the first time. In turn, wider housing market and urban development reform will necessarily impact on the building consent system. This review of the building consent system therefore provides an opportunity to think about ways of coordinating overlaps and connections between different reform programmes such as resource management reform, climate change adaptation and local government reform.

Other work progressing in the building sector is the Commerce Commission market study into residential building supplies. This is investigating whether competition for residential building supplies in New Zealand is working well and, if not, what can be done to improve it. While the market study has a separate focus, the building consent system review will be mindful of the outcomes of the study and any recommendations for change to the building consent system.

## **The role of local government is changing**

The roles and functions of local government are in the process of changing. Work underway to reform three waters services and the resource management system are foremost among a suite of reform programmes that will reshape our system of local government.

Alongside these reforms, an independent review *Future for Local Government* is considering how the system of local democracy and governance needs to evolve over the next 30 years, to improve the wellbeing of New Zealand communities and the environment, and actively embody Te Tiriti o Waitangi.

## **The review of the building consent system will build on previous reforms**

A key theme behind the *Building Act 2004* was to “design and build it right first time”. Reforms, including the establishment of the licensed building practitioners scheme and

accreditation of building consent authorities, focussed on improving building controls and providing greater levels of assurance to the owners and users of buildings.

Past reforms have provided a strong base to deliver bigger and better system improvements. There is also a readiness across the sector to do more to lift the performance of the whole building system to deliver better outcomes for building owners.

## How the building consent system currently works

### The building consent process provides assurance

A building consent is generally required before carrying out building work.<sup>1</sup> The building consent process helps to ensure that the risks to people and property associated with non-compliance with the Building Code are managed. The building consent process can be divided into four distinct stages:

- i. the owner (or their agent) plans the building work and lodges an application for a building consent
- ii. the building consent authority processes the application and grants consent if satisfied that the proposed work will meet the minimum requirements of the Building Code
- iii. the building consent authority carries out inspections during construction, to check work is being carried out in accordance with the consent
- iv. the building consent authority issues a code compliance certificate if satisfied that the completed work complies with the building consent.

Building consent authorities must maintain accreditation and be registered. All territorial authorities must perform the functions of a building consent authority for their district. Other entities may be registered by MBIE to perform the functions of a building consent authority and are commonly referred to as private building consent authorities. Consentium (a division of Kāinga Ora) is currently the only registered private building consent authority. A few other privately-run firms contract their services to other building consent authorities.

Some design and building work that is critical to make a home structurally sound and weathertight can only be carried out or supervised by a licensed building practitioner.

### Some building work is exempt from requiring a building consent

The *Building Act 2004* contains a list of building work that does not require a building consent. The list of exempt building work includes conditions to manage risk, and exempt building work must still comply with the Building Code. Some exempt work requires that an authorised professional carry out, supervise, design, or review the design of the proposed work. Territorial and regional authorities also have some discretion to exempt other building work.

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<sup>1</sup> Building work is defined to include the construction, alteration, demolition or removal of a building.



# Scope of the review

## The building consent system is one part of a wider building control system

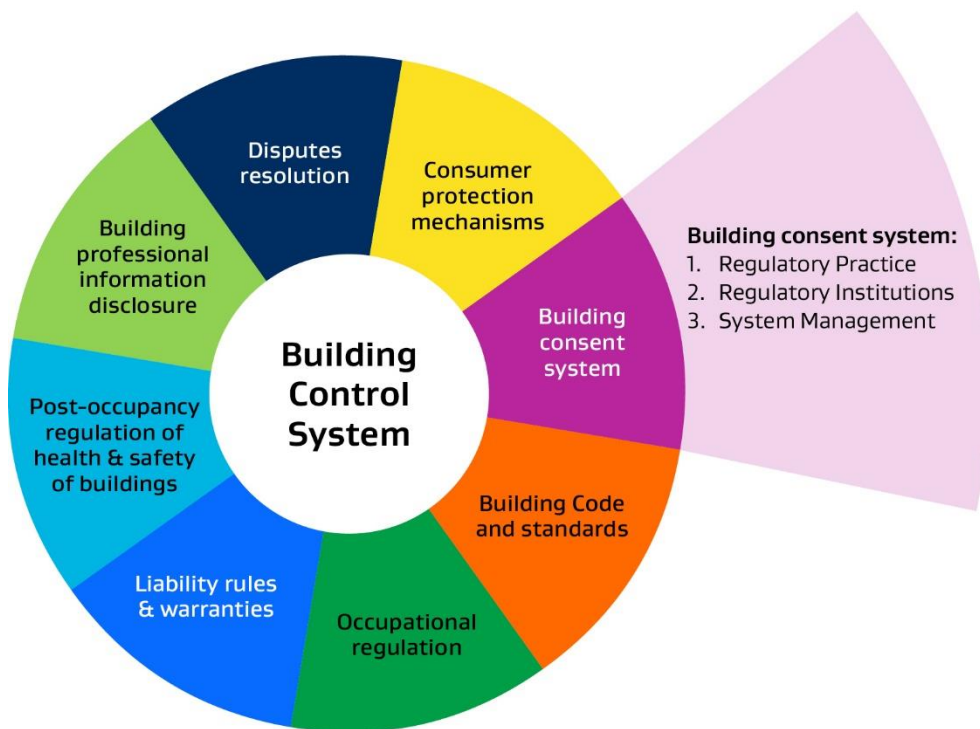
The building control system is the regulatory regime for building in New Zealand. The purpose of the building control system is to provide assurance to building owners and users that buildings are well-made, safe, durable and healthy.

The building control system encompasses a number of critical elements that, together, aim to ensure building work is done right the first time (see figure 2). This includes quality building standards that are effectively monitored and enforced, a skilled and competent building workforce, and informed and empowered consumers, as well as the building consent regime.

These elements work together and can support each other in achieving a specific regulatory outcome. For example, the liability rules, disputes resolution, building professional information disclosure and warranties all work together to improve consumer protection outcomes.

The review of the building consent system sits alongside, and supports, other key building system reforms, including a review of occupational regulation of building and construction professions and a review of consumer protection settings.

**FIGURE 2: The building consent system is one part of a wider building control system**



## We are examining the institutions, practice, and system management elements of the building consent system

The building consent system starts from the point at which buildings are designed through to the granting of a code compliance certificate after the work has been completed. The review will examine all elements of the building consent regulatory regime—regulatory institutions, regulatory practice, and system management (see Table 1).<sup>2</sup> Importantly, all of these elements must be present and working well in order for the consenting system to be successful.

The review will focus on how compliance with the Building Code is verified, but will not consider changes to the Building Code itself.

**Table 1: Scope of the review of the building consent system**

What is in scope	What this includes	Some examples
<b>Institutions</b> <i>How the regulatory regime is structured</i>	<ul style="list-style-type: none"> <li>• Roles, responsibilities and accountabilities</li> <li>• Regulator form and function</li> <li>• Governance and decision making</li> <li>• Funding for regulators</li> <li>• Mechanisms for reviewing regulatory decisions</li> </ul>	<ul style="list-style-type: none"> <li>• Role of building consent authorities, trade practitioners, designers and other parties</li> <li>• Decision-making processes including how code compliance is verified</li> <li>• Level of discretion for regulators</li> <li>• Centralised vs. devolved structure for building consent authorities</li> <li>• How MBIE and building consent authorities are funded</li> </ul>
<b>Practice</b> <i>How regulation is implemented</i>	<ul style="list-style-type: none"> <li>• Approaches to the regulation of risk in the system</li> <li>• Capability and capacity</li> <li>• Information flows and management</li> <li>• Compliance and enforcement</li> <li>• Leadership and culture</li> <li>• Te Tiriti o Waitangi and Māori-Crown relationship</li> <li>• Communication and engagement</li> </ul>	<ul style="list-style-type: none"> <li>• What the consent process looks like</li> <li>• Extent that consenting is risk-based, or based on the compliance of parties</li> <li>• Capability and capacity of building consent authorities; skills, knowledge, systems and processes</li> <li>• Extent that Māori perspectives are provided for</li> <li>• How regulators interact with sector participants</li> </ul>
<b>System Management</b> <i>How the regulatory system is managed</i>	<ul style="list-style-type: none"> <li>• Keeping regulation up to date</li> <li>• Regulatory stewardship</li> <li>• Performance monitoring and oversight</li> </ul>	<ul style="list-style-type: none"> <li>• Extent to which the <i>Building Act 2004</i> and regulations are agile and responsive</li> <li>• MBIE’s data collection</li> <li>• MBIE tools to intervene when things go wrong</li> <li>• Performance information and feedback loops</li> </ul>

<sup>2</sup> This approach is based on the Productivity Commission’s framework for reviewing regulatory systems from the final report on its inquiry into Regulatory institutions and practices.

## **Building consent system review—risk, liability and insurance in the building sector**

Issues associated with the current risk and liability settings within the wider building control system have been raised by some stakeholders as an important part of the building consent system review. This is in the context of calls for the building control system to:

- be clearer about the roles and responsibilities of system participants - how risk is allocated
- have stronger accountability and assurance by those who design, build and regulate buildings - how risk is managed, and by whom.

A clear message from stakeholders is that where assurance and accountability is weak, then trust and confidence in the consenting system is seriously diminished. These issues form part of this review of the building consent system.

The liability rule for allocating liability for damages in civil matters in the building and construction industry (joint and several liability) is out of scope for this review.

Alongside this issues discussion document, the Government has released a policy position statement on risk, liability and insurance in the building sector. This statement sets out the Government's position and underlying rationale for retaining the joint and several liability rule in allocating liability for damages in civil matters. It shows a weak case for establishing a publicly provided insurance scheme for building defects, after considering the costs, risks and potential benefits.

MBIE is taking a whole-of-system approach to issues related to risk and liability in the building sector. A whole-of-system approach takes into account the many elements of the building control system, with the aim of getting building work right first time (see figure 2 above). The performance of building consent system is a key component of this approach.

Good risk management in the building system focuses on ensuring all of the inputs into the building process are high quality, rather than focusing on liability and culpability when things go wrong.

The focus of this review is on the roles and responsibilities of industry participants, the incidence of risk and how this risk is managed. This should mean fewer building defects. The liability rule is only relevant in cases where building defects are found and there are damages incurred. If the incidence of defects decreases through better risk management, the liability rule becomes less of an issue.

### Consideration of building warranty insurance

MBIE is also carrying out an evaluation of the consumer protection measures in the *Building Act 2004*. This evaluation will determine how effective these measures are, if they are still fit for purpose and whether any changes would improve outcomes for consumers.

Depending on the findings of this evaluation, there may be a case for establishing a publicly provided insurance scheme for building defects. The case for this will be considered alongside this review.



# The role of government in providing assurance that buildings are safe, healthy and durable

We seek your feedback on what role you think the government should have in providing assurance that buildings are healthy, durable and safe.

There is a well-established rationale in New Zealand and overseas for building consent systems<sup>3</sup> to provide assurance that buildings are healthy, durable and safe. Government intervention is typically directed at addressing the following problems that can occur in the building market:

- **Information gaps:** many building owners and other users of buildings have insufficient knowledge or skill to assess the quality of building design or building work, or properly identify and manage risk.
- **Risk of harm:** poor design or building work can result in building failure, causing significant harm to the health and safety of building users, and those in the vicinity of buildings. Many building users have no influence over the quality of design or construction.
- **Cost of defects:** building defects can be very expensive to repair once work is completed. Buildings have a long life and defects may show up long after construction. It can be difficult for an owner to determine who is at fault and obtain redress.

The role of government in the building process varies around the world:

- Some countries delegate specific roles to private third parties, such as the review of plans, conducting risk assessments of projects or carrying out inspections during construction.
- Australia allows private building surveyors to directly oversee building design and inspection.
- Nearly all countries surveyed by the World Bank Doing Business report allow private third-party inspections. However, the task of issuing the final permit (the equivalent of the code compliance certificate) remains largely the responsibility of local authorities.

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<sup>3</sup> Also referred to as permit systems.

### Questions on the role of government

1. What do you think the primary focus of the building consent system should be?
2. What role should government have in providing assurance that buildings are healthy, safe and durable?
3. Are there any building consent functions that could be delegated to or provided by another party? If so, please explain your response.

# SECTION TWO OF THREE:

Desirable outcomes



# Desirable outcomes at a glance

## What and why

MBIE has identified four critical outcomes that the building consent system should primarily seek to achieve. Collectively, these outcomes will work together to provide building owners and users with assurance that building work will be 'done right the first time', thereby ensuring that buildings are well-made, healthy, durable and safe.

We welcome your feedback on these outcomes. In particular, are these the right outcomes? What other outcomes are important? We are also interested in your views on the extent to which these outcomes are currently being met.

## Desirable outcomes

### Outcome 1: Efficiency

The building consent system is efficient in providing assurance to building owners and users. It is risk-based, has proportionate compliance costs, and allows for innovation.

### Outcome 2: Roles and responsibilities

Roles and responsibilities are clear and based on participants' respective ability to identify and manage risks. All participants across the system have a good understanding of their own responsibilities and the extent they can rely on others for assurance.

### Outcome 3: Continuous improvement

The system is responsive, flexible and agile, and seeks to continually improve through performance and system monitoring, good information flows and feedback loops.

### Outcome 4: Regulatory requirements and decisions

Regulatory requirements are clear and decisions are robust, predictable, transparent and broadly understood.



## Outcome 1: Efficiency

The building consent system is efficient in providing assurance to building owners and users. It is risk-based, has proportionate compliance costs, and allows for innovation.

### Why this is important

An efficient building consent system ensures that building work complies with the Building Code and *Building Act 2004* in a cost-effective and timely manner. Regulatory effort and compliance costs for applicants are proportionate to the risks and complexity of building work, and fairly allocated to those who benefit. An efficient system also incentivises and removes barriers to innovation while managing the risks of innovative designs and methods. This reduces costs and increases performance across the system – increasing efficiency over time.

### How is the system performing?

The evaluation of the building consent system found general agreement among building consent authorities and sector participants that the system is ensuring that building work complies with the Building Code. New Zealand consistently performs well when compared with overseas regimes. For several years in a row, New Zealand has ranked number one in the world for ease of doing business (World Bank, Doing Business Report 2020) and, while there are variations, New Zealand tends to perform well when ranked against other economies on the ease of dealing with construction permits. However, most stakeholders consider the system is under pressure, no longer fit-for-purpose for modern ways of procuring, designing and constructing buildings, and not sufficiently enabling of innovation.

Most building consent authorities have implemented fully electronic consenting systems, allowing consents to be lodged online and processed electronically. This has enabled consents to be processed more efficiently. Some building consent authorities have provided the option of remote inspections. This has helped building consent authorities to manage workloads and may have the potential to reduce inspection timeframes.

A MBIE survey covering the period March-September 2021 found it took on average across all building consent authorities 14 working days to process building consents.<sup>4</sup> However, performance varies significantly across building consent authorities. While the majority of building consent authorities are managing to meet statutory requirements for processing consents most of the time, some are struggling. MBIE estimates around one-quarter are substantially falling far short of compliance with the requirement to process consents within 20 working days.

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<sup>4</sup>The actual time it takes to process a consent will largely depend on the quality of the application, and complexity of the proposed building work. The total elapsed time from the receipt of application to issuing a consent may be longer than reported processing times, as the processing time excludes time the application may be put on hold while the building consent authority waits for further information from the applicant.

## Outcome 2: Roles and responsibilities

Roles and responsibilities are clear and based on participants' respective ability to identify and manage risks. All participants across the system have a good understanding of their own responsibilities and the extent they can rely on others for assurance.

### Why this is important

Clear roles and responsibilities help participants to 'design and build right the first time'. It ensures all know what is expected of them and what they can expect from others. It also ensures all participants understand what risks they are responsible for managing and are held to account for their role.

When roles and responsibilities are not clear, it can lead to misplaced reliance on others to manage risk, provide assurance, and identify and address defects in the design or building work. It makes it difficult to hold people to account for poor performance, which weakens the incentives to get it right the first time. Together, these can lead to an increased risk of building defects and disputes.

### How is the system performing?

Previous reviews of the system found that roles and responsibilities were not sufficiently clear, and that some participants did not understand the extent to which they can rely on others for assurance. However, some stakeholders suggest many participants understand their responsibilities, and that perceptions of risk and poor incentives affect how participants carry out their role.

There is also some anecdotal evidence that system participants do not always manage their risks in the building process well, and some may lack knowledge of the options available for managing their risks. For example, recent research commissioned by MBIE found that homeowners place disproportionate trust in builders and have a limited understanding of the consumer protection measures provided in the *Building Act 2004*.

These issues are leading to an over-reliance on building consent authorities to identify errors or omissions in the design or building work, and provide assurance to building owners and users that the buildings are well-made, healthy, durable and safe.

## Outcome 3: Continuous improvement

The system is responsive, flexible and agile, and seeks to continually improve through performance and system monitoring, good information flows and feedback loops.

### Why this is important

A continuously improving building consent system is well-placed to adapt to an ever-changing environment. Good information flows and feedback loops are essential to support active monitoring of the system and, in turn, identify opportunities for continuous improvement. A good regulatory system is agile and able to respond quickly to new information, new technologies or changes in the market. Strong performance and system monitoring support this agility and responsiveness, while also reducing the risk of system failure over time.

### How is the system performing?

Gaps in nationally consistent performance indicators make it difficult to assess whether the system is performing well against its objective – that is, whether the system is providing assurance that building work will be ‘done right the first time’. These gaps also make it difficult to assess how efficient and consistent the system is.

At the national level, the regulatory system has been slow to respond to shocks or disruptions, such as the systemic weathertightness building failures of the late 1990s and early 2000s.

There have been a number of substantive reviews going back to 1990, including in response to weathertightness issues, with substantial reforms to building regulation in 1991 and 2004. Other amendments have been incorporated into legislation over time. These changes include the licensing of building practitioners, the accreditation of building consent authorities, CodeMark, MultiProof and, most recently, the modular component manufacturing scheme due to commence in 2022. While these initiatives have been positive, they have been implemented in response to specific reviews, rather than a process of continuous improvement. Stakeholders continue to indicate that the system is not sufficiently responsive, flexible and agile to meet the changes and increasing challenges within the building sector.

## Outcome 4: Regulatory requirements and decisions

Regulatory requirements are clear and decisions are robust, predictable, transparent and broadly understood.

### Why this outcome is important

Clear regulatory requirements help all parties understand what is required of them to fulfil their regulatory obligations and their part in providing assurance that building work will be done right the first time. This helps ensure buildings are well-made, healthy, durable and safe. Clear requirements also makes it clear what assurance is actually being provided by building consent authorities and what is not.

Robust, predictable and transparent decisions that are broadly understood:

- support higher rates of compliance with the Building Code
- enable owners, developers and builders to invest with confidence
- build trust and confidence in the performance of building consent authorities
- provide owners, other building users and those affected by buildings with the confidence that the system is working to ensure buildings are healthy, durable and safe.

### How is the system performing?

Users of the building consent system commonly claim that the regulatory requirements are not sufficiently clear. MBIE has heard from building owners, designers and builders that they often do not understand what they need to provide to support their building consent application. Requirements for what must be provided can vary significantly between building consent authorities, as does the format in which the information must be provided. Homeowners are often unaware of how the processing of their application is progressing, including the reasons for any delays. This can undermine confidence in their local building consent authority, as well as the building consent system more broadly.

Designers, developers and builders also frequently raise what they perceive to be inconsistencies between and within building consent authorities. They have difficulty understanding, for example, why a set of plans in one district may elicit more requests for further information than the same set of plans lodged in a neighbouring district. They comment on the high level of variability between how individual officers process applications and undertake inspections. This can result in unpredictable and inconsistent decisions and outcomes.



#### Questions about desirable outcomes

4. Do you agree these four critical outcomes are necessary to ensure the system provides high levels of assurance to the public that buildings are healthy, safe and durable?
5. Are there any other outcomes that are critical to ensure buildings are healthy, safe and durable?
6. How well is the system currently performing against the four identified outcomes?  
Please explain your views.

# SECTION THREE OF THREE:

Issues with the current system



# Issues at a glance

## What and why

MBIE has identified five issues that are constraining the ability of the system to achieve the desirable outcomes expected of this system. In turn, this compromises the ability of the building consent system to provide assurance that building work will be done right the first time, thereby ensuring that buildings are well-made, healthy, durable and safe.

Many of these issues are complex and long-standing. While these issues are presented separately, they are intrinsically related and collectively affect the performance of the overall system. These issues also necessarily consider features identified in the desirable outcome discussion (see section 2 above).

We welcome your feedback on these issues and other any other issues. In particular, what is the underlying cause of these issues, what are their impacts, how could a better consent system address these, and what would that system look like?

## Issues

### Issue 1: Roles, responsibilities and accountability

Roles and responsibilities across the system are not always well understood, accepted, applied or consistently enforced. There is sometimes an over-reliance on building consent authorities to provide assurance of compliance with the Building Code.

### Issue 2: Capability and capacity

Building consent authorities face capacity and capability constraints in dealing with an increased volume and complexity of building work. Sector workforce capacity and capability constraints can also undermine the performance of the system.

### Issue 3: System agility

All consents go through the same basic process, which is not always responsive to the level of risk, complexity of the building work, or type of project. The current system does not always deal well with new or innovative practices or products or the design-and-build approach. Nor is it sufficiently responsive to the building needs and aspirations of Māori.

### Issue 4: Performance monitoring and system oversight

The performance of the system is insufficiently monitored, and information flows are poor. MBIE is not yet the strong central regulator that was contemplated in the original system design.

### Issue 5: Fragmented implementation

The processing of building consent applications is devolved to territorial authorities, which has led to variability and unpredictability in the consent process and its outcomes. This fragmentation adds to the overall costs of the system due to duplication and variable processes, tools and functions being implemented across building consent authorities, and difficulties maintaining a professional workforce.

## Issue 1: Roles, responsibilities and accountability

Roles and responsibilities across the system are not always well understood, accepted, applied or consistently enforced. There is sometimes an over-reliance on building consent authorities to provide assurance of compliance with the Building Code.

A consistent theme coming through previous reviews is that many people across the system do not understand their roles and responsibilities. For example, consultation on a 2010 review of the *Building Act 2004* found that designers, builders, consumers and building consent authorities were not always clear on who is accountable for meeting Building Code requirements. This included the extent to which they could rely on others. It found that:

- many designers believed they should be able to rely on builders to construct their designs to meet Building Code requirements without the designer needing to specify all of the necessary detail
- many builders do not believe they need to know relevant Building Code clauses
- both designers and builders believed they could rely on building consent authorities to identify and correct inadequacies in their work.

An amendment to the *Building Act 2004* in 2012 sought to clarify roles and responsibilities, through the addition of an outline of responsibilities (s14A-G). However, MBIE continues to hear from stakeholders that many building owners and practitioners have a poor understanding of their responsibilities.

Others argue that responsibilities are sufficiently clear, but that perceptions of risk are driving how people carry out their role. Stakeholder groups across the sector commonly raised concerns from their members about being held responsible for the errors and omissions of other parties in the building process. Some practitioners may be deliberately taking a narrow view of their role to try to limit what they can be held accountable or liable for later if things go wrong. For example, MBIE has heard that some designers consider their responsibilities for the building work ends once the building consent has been granted, while builders feel they currently shoulder too much responsibility for things outside of their control.

Compliance with the Building Code appears to be seen as an individual, rather than shared responsibility. However, these attitudes and behaviours increase the risk of things going wrong, place greater pressure on building consent authorities to identify issues, and increase the risk of defects requiring rework.

The incentives on practitioners to get it right the first time may also be insufficient. A consistent theme coming from previous reviews is that the drive to build at pace and within budget creates an incentive for some practitioners to do the minimum they need to get the project 'over the line'. At the same time, there are very few tools to hold practitioners to account for their performance, with the building owner bearing the costs associated with any delays in obtaining a consent or failed inspections.

Stakeholders across the sector suggest there needs to be a stronger focus on quality assurance at all stages of the building process. They point out that building consent authorities are the only party required to have documented quality assurance systems and have their systems and processes subject to independent review. Building consent authorities feel that the building consent authority accreditation scheme places too much emphasis on the role of building consent authorities. On the other hand, some practitioners point out the consent system does not recognise or reward those designers or builders that have good systems and processes in place for assurance, with all consents subject to the same basic process.

Some stakeholders have questioned whether roles and responsibilities are fairly allocated. For example, groups representing homeowners consider too much responsibility is placed on homeowners under the current system.

The *Building Act 1991* established the building owner as the person with primary responsibility for complying with the Building Code. The underlying presumption was that the building owner would make their own arrangements for quality assurance of the work carried out by the practitioners they contract with. This role was carried through into the *Building Act 2004*, with the addition in 2013 of consumer protection measures in relation to residential building work.

The reality is that the ability of building owners to identify and manage risks can vary significantly. Recent research commissioned by MBIE found that homeowners place disproportionate trust in builders and have a limited understanding of the consumer protection measures provided in the *Building Act 2004*.

Many homeowners also have a limited understanding of the actual role of the building consent authorities and the basis on which they are required to make their decisions. There is a common perception that a code compliance certificate is evidence that the building work is free of defects. Few homeowners appear to understand that building consent authorities are only required to check that the building work complies with the building consent, or that building consent authorities only need to be satisfied on 'reasonable grounds' that it does so. This may lead to a poor appreciation or understanding of the actual risks they face, and not taking appropriate action to protect themselves.

Collectively, these issues lead to an over-reliance on building consent authorities to identify errors and omissions by those responsible for the work. Building consent authorities are expected to provide building owners and users with a level of assurance that goes beyond their responsibilities in the *Building Act 2004*.

Combined with the requirements of accreditation regulations, perceptions about wider sector capability, and their duty of care and obligations to their local communities, building consent authorities can respond to these expectations with a cautious approach to carrying out their functions, with homeowners ultimately bearing the costs.



Practitioners continue to raise issues relating to:

- excessive requests for documentation
- delays in the processing of consents and requests for further information
- the number of inspections during construction, and wait times
- a perceived reluctance by building consent authorities to approve new or novel building designs, products or processes.

#### Questions about roles, responsibilities and accountability

**7.** How well understood are roles and responsibilities across the sector? Please explain your views.

**8.** Does the consenting system allocate responsibility appropriately, to those best able to identify and manage the associated risks? Please explain your views.

**9.** Does the building consent system provide sufficient incentives for each party to meet their responsibilities and 'get it right the first time'? Please explain your views.

**10.** Should other parts of the sector (outside of building consent authorities) have a greater role in providing assurance that buildings are safe, durable and healthy? If yes, what would the risks and mitigations be?

**11.** Are some parts of the sector more prepared than others to take on more of the responsibility for providing assurance?

## Issue 2: Capacity and capability

Building consent authorities face capacity and capability constraints in dealing with an increased volume and complexity of building work. Sector workforce capacity and capability constraints can also undermine the performance of the system.

### **Building consent authorities face capacity and capability constraints**

Record demand for building consents has placed building consent authorities under pressure to process applications and make quality decisions in a timely and efficient manner. At the same time, the increased complexity of building work, including a shift towards higher-density housing, means the expertise and time required to assess consent applications is greater.

Most building consent authorities are reporting challenges in attracting and retaining suitably qualified and competent staff. Building consent authorities are required to ensure that all employees and contractors performing technical roles have an appropriate New Zealand qualification. Skill shortages across the building sector means that building consent authorities are having to compete with the private sector to fill these roles but are often constrained in what they can offer.

While many building consent authorities are seeking to work together and share resources, capacity constraints limit opportunities for other building consent authorities to take on additional work. Differences in priorities, risk profiles and tolerance for risk between territorial authorities, and issues around how to apportion any liability, makes it challenging for building consent authorities to collaborate across territorial authority boundaries.

Many building consent authorities are contracting work out to private organisations. However, MBIE has heard from building consent authorities that this creates further challenges in ensuring that those contracted are complying with the policies and procedures of the building consent authority. This can also result in different experiences and outcomes for those interacting with building consent authorities. In some instances, those private organisations do not have capacity to assist building consent authorities.

Despite these challenges, most building consent authorities are continuing to meet statutory timeframes most of the time. However, a number are struggling. Complaints from developers and builders about the wait times for inspections have also been increasing. The most recent building consent authority accreditation report noted that many building consent authorities are struggling with the processing of applications that include specified systems.<sup>5</sup> MBIE has also observed that some building consents requiring review by a structural engineer are being delayed because of scarcity of engineering resource and increased reluctance of engineers to carry out this work due to concerns about the risk of liability.

<sup>5</sup> MBIE (2021). Biennial BCA Accreditation Report Round Seven. December 2021.

Capacity and capability constraints may also be affecting the quality of decisions. While MBIE does not currently have information on the outcomes, building consent authority accreditation assessments by International Accreditation New Zealand found that staff turnover and a focus on trying to process, inspect and certify building work as quickly as possible, meant that some building consent authorities did not always follow documented policies and processes. This, in turn, could lead to a risk of poor-quality decisions, and an increased risk of defects requiring rework at a later date.

Some stakeholders have questioned whether all building consent authorities have the necessary expertise to assess more complex work. As a result, some building consent officers may seek further information or documentation to satisfy themselves that the proposed work will comply with the Building Code. These stakeholders see this issue as a contributing factor to delays in processing applications and a barrier to the uptake of more innovative designs or building methods.

On the other hand, some building consent authorities consider the system does not sufficiently enable them to place reasonable reliance on assurance provided by other parties. A recent judgement in the High Court of New Zealand in relation to the Bella Vista development has raised questions about the ability of territorial authorities to hold people to account for providing false or misleading information in a producer statement.<sup>6</sup>

Capacity and capability constraints may also be a contributing factor in inconsistent decisions between and within building consent authorities. Building consent authorities have reported challenges in finding the time to provide training and support to new staff. Informal feedback from some sector stakeholders noted that less experienced staff may take a more cautious approach to processing applications and inspecting work, while they build their knowledge and skills. This means they may ask for more information or evidence than a more experienced building consent officer.

## **The building sector workforce is also facing capacity and capability constraints**

The building sector is facing significant workforce challenges to keep pace with record building demand and expectations to deliver to deadline and within budget. According to Statistics New Zealand's Business Operations Survey 2021, around 90 per cent of construction businesses reported that they experienced moderate to severe difficulty when recruiting tradespersons.

These challenges are exacerbating long-standing concerns about skill deficits and the quality of supervision and performance across the system and may increase the risk of defects. Respondents to a 2021 evaluation of the building consent system commented that inexperienced architects, engineers, builders and project managers were undertaking work above their skill level and experience.

Building consent authorities frequently raise concerns about the poor quality of consent applications and building work. A recent review of the building consent process for houses

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<sup>6</sup> Producer statements are a common form of assurance used across the building sector. They may be issued by people responsible for the work, as well as those providing an independent review. While they have no legal status under the Building Act 2004, they are commonly relied on by building consent authorities as a method of establishing compliance.

commissioned by Kāinga Ora found that the applications were unreasonably large and included information that was not applicable or necessary.<sup>7</sup> Many building consent authorities feel that poor building work is often the result of supervisors being spread too thinly across building sites and not providing appropriate levels of oversight for their workers. Building consent authorities suggest that problems with poor quality consent applications and poor-quality building work stem, at least in part, from an insufficient understanding of the Building Code. There appears to be broad agreement across the sector that there needs to be more industry training focused on the Building Code and engaging with the regulatory system.

Collectively, these sector workforce issues are putting more pressure on building consent authorities and may be contributing to a more cautious approach. Building consent authorities frequently complain they are having to spend more time reviewing applications and are often sending out requests for information to resolve fundamental concerns with documentation.

Conversely, some designers and builders complain that a small number of poor performers is resulting in building consent authorities taking an overly cautious approach to all consent applications. A common complaint is that building consent authorities are reviewing work that has already been signed off by specialists, causing unnecessary delays.

#### Questions about capacity and capability

**12.** How significant are building consent authority capacity and capability constraints on the performance of the system? What are the most significant impacts of building consent authority capability and capacity constraints on the performance of the building consent system? Please explain your views.

**13.** How significant are sector workforce capacity and capability constraints on the performance of the system? What are the most significant impacts of sector workforce capability and capacity constraints on the performance of the building consent system? Please explain your views.

**14.** How could the impacts of capacity and capability constraints be mitigated?

**15.** Are there any barriers to a more efficient use of technical expertise across the system? If so, what?

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<sup>7</sup> Independent Expert Panel commissioned by MBIE (2021). Monitoring the efficiency of building consent processes for new Kāinga Ora public housing. Unpublished report.

## Issue 3: System agility

All consents go through the same basic process, which is not always responsive to the level of risk, complexity of the building work, or type of project. The current system does not always deal well with new or innovative practices or products or the design-and-build approach. Nor is it sufficiently responsive to the building needs and aspirations of Māori.

### The system can be one-size-fits-all ...

The building consent system was intended to be administered efficiently for different building types and varying levels of complexity in the design and building work. It is flexible and allows building consent authorities to exercise discretion in granting a building consent.

The *Building Act 2004* and related reforms strengthened the level of independent scrutiny of plans and building work through the building consent and inspection process. Reforms such as CodeMark, MultiProof and the modular component manufacture scheme have enabled the consent system to be more efficient.

While the system was intended to be agile, some stakeholders claim that the system effectively operates as a one-size-fits-all system and that the level of consenting effort is not always proportionate to risk. These stakeholders point out, for example, that an application to install a wood burner goes through essentially the same process as an application for a multi-storey apartment complex. They feel disproportionate levels of scrutiny are being applied to some consents, adding unnecessary delays and costs.

Building consent authorities must also process most applications for consent within 20 working days, irrespective of the complexity of the work. This can be insufficient for complex building work, such as a new hospital, and appears generous for a simpler consent application. Some stakeholders have suggested the statutory timeframes may also be creating some perverse incentives on building consent authorities to manage that hard deadline, such as issuing requests for further information to 'buy more time'.

### ... and the process can be too rigid

It is common for plans and specifications to change after the building consent has been granted. This may be in response to a request from the owner, suggestions from the builder, new information about the ground conditions, or the unavailability of a specified product.

Industry participants frequently complain that the process for dealing with variations to building consent applications is too rigid and slow. Substantial variations can affect compliance with the Building Code and therefore require a formal amendment to the building consent.<sup>8</sup> This can cause delays on site, but is also an important mechanism for ensuring the building work complies with the Building Code.

<sup>8</sup> Approval processes for minor variations, which do not need to go through the full consent process, were introduced in 2009 to improve the way the consent process responds to minor changes on site. In addition, MBIE recently updated its guidance on product substitution and variations to reflect the recent product shortage.



Applications for amendments to building consents are made and processed in the same way as applications for new building consents. This process adds to the existing pressures on building consent authorities, who are struggling to keep pace with the record volume of new consents. Builders complain of having to put work on hold while amendments are processed. Some building consent authorities have reported instances of builders making unapproved product substitutions, which can significantly affect the performance of a building and result in significant rework costs to the building owner.

Further detailed design that could affect the performance of the building may take place after a building consent is issued. This is more common for builds involving specified systems or constructed under a design-and-build contract, where the main contractor takes on the responsibility for both design and construction and documentation is produced and developed throughout the project. While the design-and-build approach allows for innovation and flexibility, and avoids the need to amend design documentation as decisions are made during the project, it does not align well with the current consent process, which assumes the detailed design has been completed before the application for consent has been submitted.

MBIE has heard from sector groups that the way building consent authorities deal with work under 'design-and-build' contracts varies between building consent authorities. In some cases, some building consent authorities require some aspects of detailed designs, such as cladding and fire safety systems, to be submitted with the consent, well before the design specialists have been appointed. This increases the likelihood that the consent will need to be formally amended at later stages of the project which, in turn, could hold up work while the amendment is assessed.

In other cases, MBIE has heard that building consent authorities accepting applications including performance specifications without the plans showing how that specification will be achieved. Detailed construction documentation may be prepared by others, who may lack the skills or experience to understand the implications for the building's performance. This in turn, increases the risk of serious defects that could affect the performance of the building, requiring rework to make the building healthy and safe.

The option to stage consents – for example by consenting work on the foundations first, and then the superstructure later – is intended to accommodate work that is meant to be carried out in stages. However, we are hearing from some developers and builders that they are choosing not to stage consents because it may not be practical to do so or because lenders prefer to see full approvals provided upfront.

## **The system does not always deal well with new or innovative designs and methods**

The Building Code is performance-based. It states how a building must perform in its intended use rather than describing how the building must be designed and constructed. This is intended to allow for innovative building solutions to be developed and used, provided they meet the performance requirements of the Building Code.

To facilitate compliance with the Building Code, *the Building Act 2004* allows for the publication of documents that specify design and construction methods that are ‘deemed to comply’. These publications include Acceptable Solutions and Verification Methods. Building consent authorities must accept these as establishing compliance with the Building Code.

While these ‘deemed to comply’ methods are known to work, stakeholders tell us the system is not sufficiently enabling of other design and construction methods that could deliver similar or better building outcomes for the owners and users of buildings. They feel the system over-incentivises the use of the “tried and true” designs and methods, which are used as there are fewer compliance costs and more certainty on the consenting outcomes. In contrast, some stakeholders tell us that innovative designs and methods can be subject to an unreasonable level of scrutiny in some cases, and result in significant additional costs to the building owner to gather sufficient evidence to satisfy the building consent authority.

While acceptable solutions and verification methods may be seen as providing pathways that disincentivise innovation (and create an overreliance on checklists) they can also be ideal measures that manufacturers of innovative products can use to prove their products and methods are equivalent without having to go back to first principles.

## **Providing for a Māori perspective on building and construction**

An important aspect to system agility is the capacity and flexibility of the building consent system to acknowledge and respond to the needs and aspirations of Māori. For Māori, the building consent process can be inflexible and difficult to navigate. There can be issues with using Māori traditional methods of construction, or building materials that support sustainable design, and compliance with the Building Code. There can also be issues in the current building consent process and building on Māori owned land.<sup>9</sup>

The building consent system review will investigate the issues facing Māori, understand where the system does not work for Māori building, and identify opportunities for the building consent system to be responsive to meet needs of Māori. The building consent system should not be a barrier to Māori determining and fulfilling their own social, cultural and economic aspirations, particularly in relation to the construction of papakāinga, buildings for communal use and buildings that are purpose-built to the natural environment.

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<sup>9</sup> See, for example, Ministry of Business Innovation and Employment, “Maori engagement and partnerships”, 2022 (MBIE: Wellington)

### Questions about system agility

**16.** Do you agree that the consent system is not sufficiently agile for the way in which we design, procure and build today and in the future? If you agree, how does rigidity in the building consent system impact consenting outcomes and productivity in the building sector?

**17.** What changes would you suggest to the building consent system to make it more agile?

**18.** Does the current building consent process constrain or limit the use of traditional Māori methods of construction?

**19.** Does the current building consent process add constraints to the development of Māori-owned land that other landowners don't face?

**20.** What Māori perspective or set of values do building consent authorities need to take into account when considering and processing consent applications for iwi/hapū/Māori-led building and construction projects?

## Issue 4: Performance monitoring and system oversight

The performance of the system is insufficiently monitored, and information flows are poor. MBIE is not yet the strong central regulator that was contemplated in the original system design.

### It is difficult to assess whether the system is delivering on its intended outcomes

Some aspects of building consent authorities' operations have been monitored since 2006 through routine accreditation and auditing processes. However, empirical evidence on how well the broader system is performing is currently gathered on an ad hoc basis. Evidence from the evaluation of the building consent system showed MBIE is relying on some anecdotal evidence of issues. This, in turn, makes it difficult to know whether the objectives of the building consent system are being achieved.

### Evidence gaps make it difficult to identify and address specific issues

Building consent authorities hold data about buildings and building consents. However, the data is not collected in a consistent format due to the different way activities are recorded and different systems used by building consent authorities to collect and store information.

Inconsistencies in what information is recorded and how it is stored make it challenging for MBIE to collect, collate and analyse in a systemic way. As a result, it is difficult for MBIE to evaluate local or regional variations in system performance and identify common problems that could potentially be addressed through regulatory changes or sector guidance.

### Stewardship of the building consent system could be strengthened

MBIE is both the central regulator and system steward within the wider building regulatory system. System-wide oversight is particularly important in a performance-based regulatory system as, unlike in a prescriptive system, there is greater latitude for judgement about whether a particular product or design will achieve Building Code compliance. The 2003 *Inquiry into the Weathertightness of Buildings in New Zealand* found there was inadequate monitoring of the building control system.<sup>10</sup>

MBIE has since increased its regulatory oversight of the building system within its statutory functions, while the stewardship aspect of its role requires MBIE to look beyond its direct statutory responsibilities to the capability and resilience of the regulatory system over time. Existing *Building Act 2004* provisions enable MBIE to publish guidance, disseminate other information and provide educational programmes.<sup>11</sup>

<sup>10</sup> [https://www.parliament.nz/en/pb/sc/reports/document/47DBSCH\\_SCR2389\\_1/inquiry-into-the-weathertightness-of-buildings-in-new-zealand](https://www.parliament.nz/en/pb/sc/reports/document/47DBSCH_SCR2389_1/inquiry-into-the-weathertightness-of-buildings-in-new-zealand)

<sup>11</sup> Building Act 2004, sections 11(e) and 11(l)

However, stakeholders have indicated that they would like MBIE to take a greater leadership role, provide more information and education on how the building consent system should operate. They would also like MBIE to work with the sector to address systemic problems, so that similar issues are not being resolved many times over by individual building consent authorities, which further contributes to inefficiencies.

<b>Questions about performance monitoring and system oversight</b>
<b>21.</b> What can be done to improve monitoring of the building consent system?
<b>22.</b> What information or data relating to the consenting system performance would you find useful?
<b>23.</b> Are you aware of any barriers to collecting and sharing information across the sector?
<b>24.</b> Are you aware of additional data and information sources that we could be using to inform our understanding of the system performance?
<b>25.</b> Is there anything else MBIE could do to better meet its system oversight and stewardship responsibilities?

## Issue 5: Fragmented implementation

The processing of building consent applications is devolved to territorial authorities, which has led to variability and unpredictability in the consent process and its outcomes. This fragmentation adds to the overall costs of the system due to duplication and variable processes, tools and functions being implemented across building consent authorities, and difficulties maintaining a professional workforce.

New Zealand's 67 building consent authorities process anywhere from ten to tens-of-thousands of consent applications per year, alongside related functions such as inspections and issuing code compliance certificates.<sup>12</sup> Each building consent authority develops its own systems and processes and builds up the expertise required to deliver consenting services specific to their geographic areas, from small rural settings to large cities.

Stakeholders have reported inconsistencies between and within building consent authorities, and that duplication of effort across the system is creating inefficiencies across the sector. These issues are increasing building costs and undermining the purpose of having a single national Building Code. Concerns have also been raised that where projects require both building and resource consents, applicants face two processes that may both address similar matters, leading to duplication and additional costs.

### Implementation can be inconsistent, leading to variable outcomes

Differing requirements across building consent authorities for consent applications, variable approval timeframes, and different approaches to requests for information and inspections create uncertainty and increase costs for users of the building consent system that operate across the country.

The 2021 evaluation of the building consent system identified that sector professionals who interact with multiple building consent authorities experience frustration that there is no standard process or system for submitting applications. Stakeholders have told us that it is difficult to keep track of the different requirements for each building consent authority, and that there are multiple electronic systems in use, which means different systems to learn and navigate.

Stakeholders have also highlighted other issues with the devolved approach to building consents. For example, there are inconsistencies between building consent authorities when assessing similar consent applications, and even individual officers may treat applications differently than other officers within their building consent authority. In addition, building consent authorities are reported to be interpreting aspects of the Building Code and other *Building Act 2004* requirements differently.

<sup>12</sup> Territorial authorities generally perform the functions of a building consent authority. Private entities are also able to apply to become a building consent authority. There are currently 66 territorial authority building consent authorities (excluding Chatham Islands) and one private building consent authority, Consentium, which provides services to Kāinga Ora.



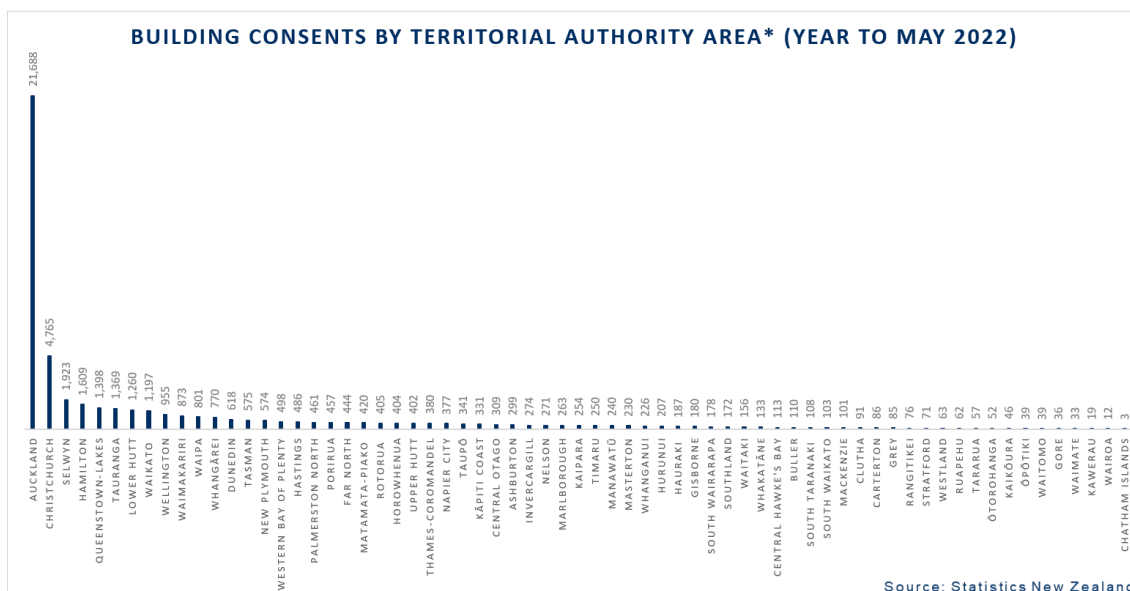
Different outcomes in relation to Building Code compliance seem to, in part, come from the subjective nature of the ‘reasonable grounds’ test<sup>13</sup> for granting a consent. This leads to different levels of rigour being applied to applications and inspections. This may, in part, relate to a building consent authority’s appetite for risk or individual consent officers’ competency and experience.

## Systems and processes are duplicated across New Zealand

The volume of building consents processed within each territorial authority area varies substantially. For example, in 17 territorial authority areas less than 100 consents were processed in the year ending May 2022, while more than 21,000 were processed in the Auckland region (Figure 3). The devolved structure requires each building consent authority to develop their own systems and processes, provide guidance to potential applicants in their territorial area, interpret the requirements of the *Building Act 2004* and Building Code, recruit, train, and develop staff, and so on. This comes at a cost to each building consent authority, which are passed on to applicants as much as possible.

The devolved structure also limits the opportunities for efficiency gains, particularly for smaller building consent authorities, as they could not feasibly pass on the costs of efficiency initiatives to applicants and would likely not achieve gains substantial enough to offset the costs.

**Figure 3: Building consents by territorial authority area in the year to May 2022 (refer to Annex One to see data in table format)**



\*Note that data includes consents issued by both local building consent authorities and Consentium within each territorial authority area

Among the larger building consent authorities, initiatives that might improve local efficiency are often found to be duplicated around the country. For example, many building consent authorities procure and maintain their own information technology systems to manage consent applications and processing. However, the overall cost to the system, and applicants in turn, may be substantially higher than a common approach to information technology.

<sup>13</sup> Building Act 2004, s49(1).

## **Changes have attempted to reduce fragmentation and variation, but issues remain**

There have been some changes to address concerns about system fragmentation. In 2006, the building consent authority accreditation scheme was introduced, requiring building consent authorities to have documented policies, procedures, and systems in place, and to ensure they are consistently and effectively implemented.

The purpose of the accreditation scheme was to ensure good building outcomes. However, a 2020 evaluation<sup>14</sup> found that the scheme was not always delivering predictable and consistent outcomes.

There have also been some attempts in recent years to share information and promote the use of shared technologies to harmonise business processes among building consent authorities to create efficiency gains. For example, voluntary groups of councils, called 'clusters', aim to provide consistency in building control functions, processes, and documentation across areas (for example, consistency across a particular region). While participating building consent authorities find clusters valuable, especially smaller authorities, their capacity to participate in cluster group activities may be constrained by demand in their areas.

Building consent authorities may not pursue rationalisation or efficiency initiatives because they are constrained by the influence of local government, which is accountable to ratepayers, or face unique challenges, including funding constraints and other local priority issues.

Territorial authorities can transfer their functions, powers, or duties in relation to consenting and inspections. This has enabled rationalisation of consenting in relation to dams, whereby some building consent authorities are responsible for dam consent applications in other geographical areas. Despite the potential efficiencies of having a single authority responsible for larger areas, to date, only one territorial authority has used these provisions in their entirety (Chatham Islands).

Since 2006, a range of other system changes have been introduced, for example the introduction of MultiProof, CodeMark, and the new modular component manufacturing scheme that will commence in 2022. However, stakeholders have told us these initiatives do not address system-wide issues resulting from a fragmented system.

## **Building Act 2004 and Resource Management Act 1991 requirements can overlap**

Many building projects are subject to consents under both the *Building Act 2004* and the *Resource Management Act 1991*. The processing of resource and building consents are currently managed at the local and regional authority level. The resource consent process assesses the environmental impacts of projects in accordance with district and regional plan provisions. While the building consent process considers the performance of the building itself, and ensures building work complies with the building code.

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<sup>14</sup> <https://www.building.govt.nz/building-officials/bca-accreditation/bca-accreditation-scheme-evaluation/>

To determine any resource consent requirements, a project information memorandum can be sought from local councils, which will show the types of consents and other approvals or information needed to pursue a project. Despite their different purposes, similar information or reports may be required for both resource and building consent applications. For example, building on land subject to natural hazards can generate the need for similar engineering advice and technical reports. Having consecutive processes for projects where similar matters are considered under different regulatory regimes can affect the cost and timeliness of some projects.

The resource management system is currently undergoing substantial reform. The reviews of the resource management and building consent systems provides an opportunity to consider how the relationship between the two systems could be streamlined and improved.

### Questions about fragmented implementation

**26.** Building consent processing is devolved and carried out by individual territorial authorities under the current system. How does this structure affect the consenting performance and building outcomes?

**27.** What aspects of the current consenting system structure work well?

**28.** What aspects of the current consenting system structure do not work well?

**29.** How does the current devolved consenting system structure impact consent applicants and building owners?

**30.** What improvements or changes are required to the current consenting system structure to reduce fragmentation in implementation and deliver better consenting outcomes?

**31.** Is there any duplication or overlap between the building consent and resource consent processes, or any other legislation? Please explain your views, including any impacts.

**32.** How could the relationship between the building consent and resource management systems be improved?

### General questions

**33.** Do you have any other comments?

## Annex One: Building consents by territorial authority area

The table below provides the building consent data used in Figure 3 (page 41).

Number of consents by territorial authority area for the year to May 2022 (source: Statistics New Zealand)			
Territorial authority area	Number of consents	Territorial authority area	Number of consents
Auckland	21,688	Timaru	250
Christchurch	4,765	Manawatū	240
Selwyn	1,923	Masterton	230
Hamilton	1,609	Whanganui	226
Queenstown-Lakes	1,398	Hurunui	207
Tauranga	1,369	Hauraki	187
Lower Hutt	1,260	Gisborne	180
Waikato	1,197	South Wairarapa	178
Wellington	955	Southland	172
Waimakariri	873	Waitaki	156
Waipa	801	Whakatāne	133
Whangārei	770	Central Hawke's Bay	113
Dunedin	618	Buller	110
Tasman	575	South Taranaki	108
New Plymouth	574	South Waikato	103
Western Bay of Plenty	498	Mackenzie	101
Hastings	486	Clutha	91
Palmerston North	461	Carterton	86
Porirua	457	Grey	85
Far North	444	Rangitikei	76
Matamata-Piako	420	Stratford	71
Rotorua	405	Westland	63
Horowhenua	404	Ruapehu	62
Upper Hutt	402	Tararua	57
Thames-Coromandel	380	Ōtorohanga	52
Napier city	377	Kaikōura	46
Taupō	341	Ōpōtiki	39
Kāpiti Coast	331	Waitomo	39
Central Otago	309	Gore	36
Ashburton	299	Waimate	33
Invercargill	274	Kawerau	19
Nelson	271	Wairoa	12
Marlborough	263	Chatham Islands	3
Kaipara	254		

## Annex Two: Summary of questions

<b>SECTION ONE OF THREE: Introduction and strategic context</b>	
<b>Role of Government</b>	
1.	What do you think the primary focus of the building consent system should be?
2.	What role should government have in providing assurance that buildings are healthy, safe and durable?
3.	Are there any building consent functions that could be delegated to or provided by another party? If so, please explain your response.
<b>SECTION TWO OF THREE: Desirable outcomes</b>	
4.	Do you agree these four critical outcomes are necessary to ensure the system provides high levels of assurance to the public that buildings are healthy, safe and durable?
5.	Are there any other outcomes that are critical to ensure buildings are healthy, safe and durable?
6.	How well is the system currently performing against the four identified outcomes? Please explain your views.
<b>SECTION THREE OF THREE: Issues with the current system</b>	
<b>Issue 1: Roles, responsibilities and accountability</b>	
7.	How well understood are roles and responsibilities across the sector? Please explain your views.
8.	Does the consenting system allocate responsibility appropriately, to those best able to identify and manage the associated risks? Please explain your views.
9.	Does the building consent system provide sufficient incentives for each party to meet their responsibilities and 'get it right the first time'? Please explain your views.
10.	Should other parts of the sector (outside of building consent authorities) have a greater role in providing assurance that buildings are safe, durable and healthy? If yes, what would the risks and mitigations be?
11.	Are some parts of the sector more prepared than others to take on more of the responsibility for providing assurance?
<b>Issue 2: Capacity and capability</b>	
12.	How significant are building consent authority capacity and capability constraints on the performance of the system? What are the most significant impacts of building consent authority capability and capacity constraints on the performance of the building consent system? Please explain your views.

<p><b>13.</b> How significant are sector workforce capacity and capability constraints on the performance of the system? What are the most significant impacts of sector workforce capability and capacity constraints on the performance of the building consent system? Please explain your views.</p>
<p><b>14.</b> How could the impacts of capacity and capability constraints be mitigated?</p>
<p><b>15.</b> Are there any barriers to a more efficient use of technical expertise across the system? If so, what?</p>
<p><b>Issue 3: System agility</b></p>
<p><b>16.</b> Do you agree that the consent system is not sufficiently agile for the way in which we design, procure and build today and in the future? If you agree, how does rigidity in the building consent system impact consenting outcomes and productivity in the building sector?</p>
<p><b>17.</b> What changes would you suggest to the building consent system to make it more agile?</p>
<p><b>18.</b> Does the current building consent process constrain or limit the use of traditional Māori methods of construction?</p>
<p><b>19.</b> Does the current building consent process add constraints to the development of Māori-owned land that other landowners don't face?</p>
<p><b>20.</b> What Māori perspective or set of values do building consent authorities need to take into account when considering and processing consent applications for iwi/hapū/Māori-led building and construction projects?</p>
<p><b>Issue 4: Performance monitoring and system oversight</b></p>
<p><b>21.</b> What can be done to improve monitoring of the building consent system?</p>
<p><b>22.</b> What information or data relating to the consenting system performance would you find useful?</p>
<p><b>23.</b> Are you aware of any barriers to collecting and sharing information across the sector?</p>
<p><b>24.</b> Are you aware of additional data and information sources that we could be using to inform our understanding of the system performance?</p>
<p><b>25.</b> Is there anything else MBIE could do to better meet its system oversight and stewardship responsibilities?</p>
<p><b>Issue 5: Fragmented implementation</b></p>
<p><b>26.</b> Building consent processing is devolved and carried out by individual territorial authorities under the current system. How does this structure affect the consenting performance and building outcomes?</p>
<p><b>27.</b> What aspects of the current consenting system structure work well?</p>
<p><b>28.</b> What aspects of the current consenting system structure do not work well?</p>



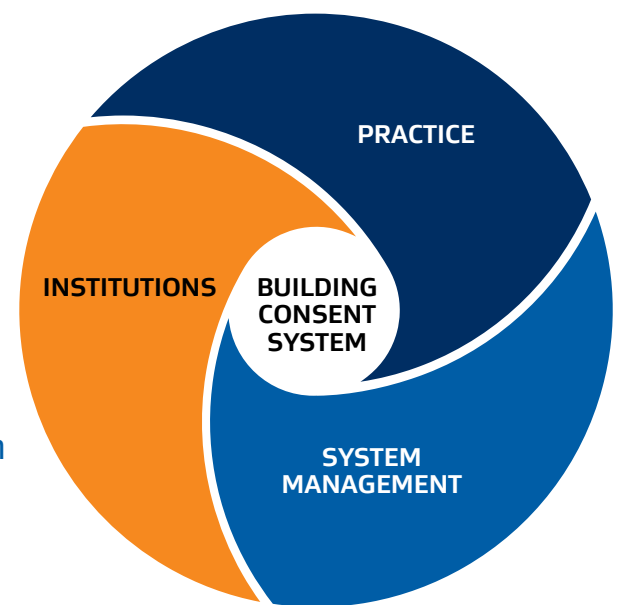
<b>29.</b> How does the current devolved consenting system structure impact consent applicants and building owners?
<b>30.</b> What improvements or changes are required to the current consenting system structure to reduce fragmentation in implementation and deliver better consenting outcomes?
<b>31.</b> Is there any duplication or overlap between the building consent and resource consent processes, or any other legislation? Please explain your views, including any impacts.
<b>32.</b> How could the relationship between the building consent and resource management systems be improved?
<b>General questions</b>
<b>33.</b> Do you have any other comments?



**Te Kāwanatanga o Aotearoa**  
New Zealand Government

**BRM 8226**

## Review of the Building Consent System



### What we're looking at

#### REGULATORY INSTITUTIONS

- › Roles, responsibilities and accountabilities
- › Regulator form and function
- › Governance and decision making

#### REGULATORY PRACTICE

- › Approaches to regulating risk
- › Capability and capacity
- › Compliance and enforcement

#### SYSTEM MANAGEMENT

- › Keeping regulation up to date
- › Stewardship
- › Monitoring and oversight

### The outcomes we think are desirable

#### EFFICIENCY

- › Risk based
- › Proportionate compliance costs
- › Enables innovation

#### ROLES AND RESPONSIBILITIES

- › Clear roles and responsibilities based on ability to manage risk
- › Participants understand their responsibilities

#### CONTINUOUS IMPROVEMENT

- › Responsive, flexible and agile system that continually improves
- › Good information flows and feedback loops

#### REQUIREMENTS AND DECISIONS

- › Regulatory requirements are clear
- › Decisions are robust, predictable, transparent and broadly understood

### The issues we have observed in the current system

#### ROLES, RESPONSIBILITIES AND ACCOUNTABILITY

- › Roles and responsibilities across the system are not well understood, applied or consistently enforced
- › Over-reliance on building consent authorities

#### CAPACITY AND CAPABILITY

- › Increased volume and complexity of building work
- › Capacity and capability constraints are undermining the performance of the system

#### SYSTEM AGILITY

- › Is not always responsive to risk and complexity
- › Does not always deal well with innovation
- › Is not responsive to Māori needs

#### PERFORMANCE MONITORING AND SYSTEM OVERSIGHT

- › Performance of the system is not well monitored
- › Information flows are poor
- › MBIE is not yet the strong regulator originally contemplated

#### FRAGMENTED IMPLEMENTATION

- › Variability and unpredictability for people navigating the consent process
- › Variable processes, tools and functions across building consent authorities
- › Linkages with other systems

#### NEXT STEPS – MBIE WILL:

- › analyse your feedback
- › develop potential options for system improvements
- › seek further feedback on these potential options for change

# **BUILDING PERFORMANCE**

## Risk, Liability and Insurance in the Building Sector

### **POLICY POSITION STATEMENT**

JULY 2022





**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
HĪKINA WHAKATUTUKI

## **Ministry of Business, Innovation and Employment (MBIE) Hīkina Whakatutuki – Lifting to make successful**

MBIE develops and delivers policy, services, advice and regulation to support economic growth and the prosperity and wellbeing of New Zealanders.

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**JULY 2022**

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## Purpose

Risk, liability and insurance settings in New Zealand's building and construction sector have been extensively examined for more than 20 years by policymakers, legal experts, sector participants and researchers. A range of perspectives exist. For the building and construction sector, the key question has been whether to retain the current joint and several liability rule or move to proportionate liability. Successive governments have sought to address the issue of how to allocate liability among multiple defendants in building negligence claims.

In 2011 the Government referred the liability question to the Law Commission for consideration. In 2014 the Law Commission presented its final report *Liability of Multiple Defendants* to the House of Representatives. The report recommended that the joint and several liability rules remain and made a number of recommendations for further work in relation to the building and construction sector.

The Government response in 2014 to the Law Commission's report accepted the Law Commission's recommendation to retain joint and several liability across the legal system. The Government directed agencies to undertake further work, including consultation and regulatory impact analysis, on the Law Commission's recommendations to cap building consent authority liability and, if proved feasible, introduce a residential building guarantee scheme.

This Policy Position Statement sets out the last 20-plus years of risk, liability and insurance work undertaken by the Ministry of Business, Innovation and Employment (MBIE) and its predecessor. It provides clarity on the Government's position on the risk, liability and insurance settings for the building and construction industry, and in doing so covers the following matters:

- An outline of the two Law Commission reviews of joint and several liability, and the rationale behind the Government's response to each of these reviews.
- A summary of consultation on, and subsequent analysis of, the Law Commission's recommendations to cap building consent authority liability and introduce a residential building guarantee scheme.
- Recent decisions on the Law Commission recommendations.
- The case for a whole-of-system approach to risk and liability in the building and construction sector.
- An overview of whole-of-system reforms to date.
- The direction of future reforms.

This Policy Position Statement has been released to support consultation on the Building Consent System Review, which is the next stage of the Government's whole-of-system approach. Submitters to the Building Consent System Review consultation may find this document provides additional background and analysis to inform their submissions.

## Introduction

Getting policy settings right on the allocation of risk in the building sector is important. The allocation of risk across the building sector, and the regulatory settings underpinning this, affects the level of productivity and innovation in the sector, supply of housing, quality of building work, consenting efficiency, sector capability and the outcomes for consumers when things go wrong.

Risk, liability and insurance in the building and construction sector came to prominence in the aftermath of the leaky homes crisis in the 1990s and early 2000s and the systemic failure of New Zealand's building regulatory system. Since then, there has been substantive and widespread reforms to the regulatory control system for building and construction. Reform in this area continues.

### Risk management in the building sector is a shared responsibility

The nature, allocation and incidence of risk and liability in the building and construction sector is a product of the institutions, laws, processes, and formalities that underpin the building regulatory framework. Participants' obligations and responsibilities are also determined by common-law responsibilities and contractual arrangements. The interaction between these different elements shapes the incentives and behaviours of industry participants and the overall performance of the sector.

An important principle and theme underpinning this Policy Position Statement is the need for the building regulatory control system to clearly define the roles, responsibilities and accountabilities of all building industry participants. Therefore, all parties should recognise that building safety, quality and compliance with the Building Code are a shared responsibility and understand how individual participants contribute to that.

### Getting building work right first time — A whole-of-system approach

The Government is taking a whole-of-system approach to risk and liability in the building and construction sector. This incorporates the many elements of the building control system and focuses on ways to strengthen the incentives, accountabilities and behaviours of industry participants to get building work right in the first place.

In this context, this Policy Position Statement provides an overview of the reforms implemented, underway and proposed that aim to ensure quality building standards are in place that are effectively monitored and enforced, an effective and efficient building consent system, a skilled and competent building workforce, and informed and empowered consumers. Together, these minimise the prospect of building defects and disputes where liability issues are most visible.

The current focus of the whole-of-system approach is:

- **A first-principles review of the building consent system.** The building consent system is the primary mechanism that governs risk allocation in the building system. The review will seek to ensure the building consent system is fit-for-purpose; including that it provides a strong assurance mechanism for building work and that the roles and responsibilities of all parties are clear.

- **A review of occupational regulation of building and construction professions.** Occupational regulation aims to protect the public from the risks of an occupation being carried out incompetently or recklessly. The review of building and construction occupational regulation will ensure building and construction professionals are skilled and competent so people can have confidence in them and their work, and poor performers are held to account.
- **A review of consumer protection in the building and construction sector.** Many building system settings have, at their heart, a public policy interest in protecting consumers. The consumer protection review will ensure consumers are able to manage their risks in the process and have mechanisms to enforce their rights.

## Policy Position: risk, liability and insurance

The Government has responded to the Law Commission’s recommendations in its review of how liability for damages in civil matters among two or more liable parties should be allocated, including for the building and construction industry. The following policy proposals are examined and form the basis of this Policy Position Statement.

- Liability rules — joint and several vs. proportional
- Capping building consent authority liability cost and/or limiting building consent authority duty of care.
- A publicly-provided building defects insurance scheme.

### Liability rules—joint and several vs. proportional

Liability arises when things go wrong. In New Zealand, as in many other common law jurisdictions, the liability rule where multiple parties have been found negligent and responsible for the same loss is joint and several liability. Essentially that means each of the guilty parties who are responsible for the same loss to a plaintiff are both ‘jointly’ liable for the loss suffered with the other defendants and ‘severally’ or individually liable for all of the loss. Therefore, under this rule, a plaintiff (in this context, the homeowner) is able to recover costs from any of the parties who played a part in causing the loss. If one liable party does not pay their share of the costs for any reason (such as insolvency or absence), the homeowner can recover that share from another liable party. This rule is primarily concerned with protecting the injured plaintiff (homeowner).

An alternative liability rule is ‘proportionate liability’. Under proportionate liability, each liable party is allocated or apportioned a share of the total cost, based on the court’s judgment of each liable party’s share of responsibility or fault. This means that judgement may not be given against a defendant for a sum greater than the amount apportioned to them. If one liable party does not pay their share of the costs for any reason, the homeowner cannot recover that share from another liable party. Liable parties are protected from paying more than their proportion, which means the homeowner must bear the cost of any missing liable party or any party that cannot pay their share.<sup>1</sup>

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<sup>1</sup> More detailed descriptions of different liability schemes can be found in Law Commission “Review of Joint and Several Liability” (NZLC IP32, 2012), *Issues Paper*. (NZ Law Commission: Wellington)

Some stakeholders in the building and construction sector support a move away from joint and several liability in New Zealand. The key reason for many is the perception that a change would result in fairer outcomes when things go wrong. They would prefer a slightly different application of the joint and several rule or a move to proportionate liability, and argue that joint and several liability:

- is flawed in principle as defendants are liable to the plaintiff for the whole loss, regardless of the role they play in causing it
- is unfair in practice because it can require solvent defendants (so called ‘deep pocket defendants’) to carry liability beyond their apportioned share when other negligent parties are absent
- may lead to risk-averse behaviour (e.g., taking excessive care), particularly by ‘deep pocket defendants’.

The Law Commission note that the views of either side are often strongly entrenched, and there is no consensus on which system is fairer. Unsurprisingly, “views on which liability rule is better, fairer or more efficient tend to divide neatly according to whether a person is more likely to be a plaintiff or a defendant.”<sup>2</sup> Put another way, who should bear the risk of an uncollectable share—the plaintiff (homeowner) or defendant? This is the heart of the issue. Where all parties are present and solvent, the concerns with joint and several liability and claims of major injustice lessen, provided all parties can make the necessary financial contribution.

The Law Commission (‘the Commission’) has carefully considered what the appropriate liability rule for New Zealand should be in two separate investigations. First in 1998<sup>3</sup>, and then again in 2014<sup>4</sup>.

### Law Commission’s preferred rule — 1998

The Commission’s review of the rule of joint and several liability was carried out as part of a wider review of the rules of apportionment in civil liability. This review was important as it was probably the first consideration in recent times of the appropriateness of joint and several liability for New Zealand.

In its 1998 final report the Commission was of the firm view that no sufficiently compelling case was made for replacing the joint and several liability rule. The Commission thought it was undesirable that a plaintiff should be left to carry the burden of an insolvent defendant, where the plaintiff suffers loss at the hands of others through no fault of their own.

Considerable emphasis was put on the point that the whole basis of the law of civil liability is that quantification is determined not by the degree of the wrongdoer’s fault but by the extent of the injury to the plaintiff. The Commission’s view was that as a defendant’s liability is for the whole loss caused by the defendant’s wrongdoing, liability should be unaffected by the fact that the behaviour of some other party has caused the same loss.

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<sup>2</sup> NZLC R 132, *Liability of multiple defendants* (June, 2014), p. iv, (NZ Law Commission: Wellington)

<sup>3</sup> NZLC R 47, ‘Apportionment of civil liability’, (May, 1998) (NZ Law Commission: Wellington)

<sup>4</sup> NZLC R 132, ‘Liability of multiple defendants’, (June, 2014) (NZ Law Commission: Wellington)

The Commission's views were also strongly influenced by the reluctance of legislators and reformers overseas to move away from joint and several liability. Central to this reluctance is the view that joint and several liability is the best means of ensuring fairness to the plaintiff.

As part of its inquiry, the Commission examined a compromise scheme somewhere between joint and several liability and proportionate liability. However, this was rejected outright as it considered this would produce a fundamental change in the law that is unjustified.

### **Law Commission's preferred rule — 2014**

Given the large numbers of multiple defendant cases arising from the leaky homes crisis, and the strongly divergent views in the building sector, the Law Commission was again asked to investigate this issue in 2011, and to recommend a preferred liability rule. The Commission delivered its final report in 2014 and concluded that joint and several liability is clearly the preferable system, rather than adopting proportionate liability or a hybrid model, and that it should remain the general rule.

The principal reason for the Commission's recommendation is joint and several liability provides the best assurance that plaintiffs (homeowners) will be compensated for their loss. Therefore, provided there is a present and solvent liable defendant who has caused the loss, the plaintiff will receive full compensation irrespective of the proportion of the loss actually caused by that present and solvent liable defendant. A shift to proportionate liability simply moves the responsibility for the uncollected share from the liable parties, including building consent authorities, on to the blameless homeowner.

The Commission concluded that assertions of "unfairness" of joint and several liability to some defendants is, at best, overstated. Further, no defendant is called upon to meet all the plaintiff's damages unless they have first been found to have caused the plaintiff's loss in some material way and meet all other legal requirements to be held liable.

Fundamentally, the policy issue comes down to a choice between a blameless plaintiff taking on the risk of an absent defendant, or a wrongdoer co-defendant taking on that risk. On this issue, the Commission clearly comes down in favour of the innocent party. Unless there is some substantial reason of public policy that demands some adjustment, parties who have actually caused the harm are the parties who should bear the risk.

The Commission noted that its conclusion on this issue was boosted by the fact that some specific legislative steps have been taken over the past decade to help resolve the leaky home crisis, as well as more general changes and improvements to building legislation and regulations.

While the Commission clearly preferred joint and several liability as the general liability rule for New Zealand, including the building sector, they did identify adjustments that could be made "to improve fairness for both sides". It was recommended that the liability of building consent authorities held liable in tort negligence relating to building consents and all related work should be capped. Further, it was recommended that work be progressed by government officials in developing, if proved feasible, a comprehensive residential building guarantee scheme.

The Government response in 2014 to the Law Commission's report accepted the Law Commission's recommendation to retain joint and several liability across the legal system. The Government directed agencies to undertake further work, including consultation and regulatory

impact analysis, on the Law Commission's recommendations to cap building consent authority liability and, if proved feasible, introduce a residential building guarantee scheme. The outcome of this work is discussed later in this Policy Position Statement.

### Liability rules and economic efficiency

The Commission also reviewed the evidence as to which liability rule is more likely to produce economic efficiency. The Commission found no sound evidence that proportionate liability can better incentivise economically efficient behaviour or outcomes:

- There is anecdotal evidence that the proportionate liability process is often longer and more complex because it requires a full assessment of relative liability. Lessons learned from Australia indicate that proportionate liability can be more costly than the joint and several liability regime for both plaintiff and defendant.
- A common perception is that limiting 'collective' liability should stimulate activity, particularly in areas where multiple parties contribute to activity. However, liability will still exist, and the incentive to avoid it is strong regardless of regime.
- Risk-averse behaviour can be exacerbated, but is not caused by, the joint and several liability rule. A range of other factors combine to cause risk aversion, some of which the Government is working to address through ongoing *Building Act 2004* reforms to strengthen accountability and provide consumer tools for risk management.

### The impact of the joint and several liability rule on building consent authorities

The practical application of joint and several liability in the building sector means some parties responsible for the building work might bear more of the cost if other parties are absent. For example, if both the building consent authority and the builder are found liable but the builder is no longer in business, building consent authorities can be made to cover damages otherwise allocated to the builder. In some cases, the building consent authority may be the only solvent party in a building defect case (the so-called 'last party standing') and, under the joint and several liability rule, is liable for covering the whole loss. The question is how often does this situation arise, and how material is it?

To help answer these questions, MBIE commissioned Sapere Research Group.<sup>5</sup> Sapere examined the legal cases that went before the courts and found that building consent authority negligence costs are estimated at approximately \$1.1 billion over a 10-year period 2008-2018, at the peak of leaky homes negligence cases. This included an estimated \$332 million towards other parties' share of the costs where other defendants were absent, or 48 per cent of cases where building consent authorities were jointly and severally responsible. These costs represent a relatively small proportion of all consents issued (valued at approximately \$75 billion for the same period). The Sapere study also estimated that, for the same period, homeowners were left out of pocket by \$458 million, or 10 per cent of the value of total claims in the cases studied.

It is also important to note how many building consents actually result in disputes. For the 10-year period 2008-2018, Sapere estimated that around 2.5 per cent of residential building consents resulted in court action or another dispute resolution process. But only a small

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<sup>5</sup> Sapere Research Group (2018), "Liability outcomes in the building sector: glimpses from available data", Report for MBIE (13 November 2018).



percentage of building defect disputes make it to court (around 5 per cent of disputes). Therefore, many disputes are settled out of court to avoid the cost and time of court hearings, while others are not resolved at all, at a cost to the homeowner.

Setting aside the implications of joint and several liability when there are absent defendants, precedent suggests that a building consent authority's own liability in each negligence case is assessed by reference to the nature, and value, of its role and responsibility in that building's process relative to other defendants. Liability for building consent authorities has been determined by the courts to be in the region of 20 per cent.

Notably, the Sapere research indicates that the number of defective building cases involving building consent authorities has been declining since 2012. This suggests that the majority of leaky building cases may have worked their way through the system. Substantial reform has also been implemented in response to the leaky homes crisis. Along with the proposed changes contained in the current legislative reform programme, the potential liability risks to building consent authorities should be lower than they were five to 10 years ago.

### **Policy position**

The Government accepts the Law Commission's recommendation that joint and several liability remain the liability rule for allocating liability for damages in civil matters in the building and construction industry, and more generally across the legal system. It is not fair that a homeowner should be left to carry the burden of insolvent defendants through no fault of their own. The innocent party should be protected. Joint and several liability provides the best assurance that the homeowner will be compensated.

### **Capping building consent authority liability costs and/or limiting their duty of care**

Concerns have been expressed by some in the building sector that the current risk and liability settings (i.e., joint and several liability) mean a risk-averse approach is taken by building consent authorities in carrying out their consenting function and that this, in turn, impacts on the speed of consenting. Therefore, some building consent authorities perceive there to be a high risk of being the last party standing when there are absent defendants in building negligence court cases and are incentivised to over-invest in care in carrying out their consenting function. As a consequence, a cap on building consent authority liability costs and/or limiting their duty of care is often put forward as a policy solution in addressing these perverse incentives.

Moreover, in its 2014 report, the Law Commission acknowledged that local authorities remain attractive potential defendants because of their resources, especially if another major liability event emerges. The Commission therefore concluded that, on fairness grounds, some further protection from excessive liability is justified, and recommended a cap on building consent authority liability. Specifically, the Commission considered such a backstop cap on building consent authority liability apply to any excessive effect on local authorities arising from "a future major liability event" and where local authorities are likely to constitute the "last person standing".<sup>6</sup>

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<sup>6</sup> NZLC R 132, Liability of multiple defendants (June, 2014) (NZ Law Commission: Wellington), p. 55.

Capping building consent authority liability costs would provide certainty for building consent authorities in terms of the maximum expected liability they might face in the case of building defects. Likewise, limiting building consent authorities' duty of care will potentially provide an element of certainty as to the scope of their liability. However, there is little evidence that either of these options would result in building consent authorities acting in a less risk-averse way or changing their approach in delivering their consenting functions, and it is questionable whether this is desirable.

### **Building consent authority decision-making and risk aversion—what is the evidence?**

MBIE research and consultation with sector participants produces a mixed picture on the impact of risk and liability settings on building consent authority behaviour. While some building consent authorities perceive there to be a high risk of being the last party standing when there are absent defendants in building negligence court cases, MBIE has been unable to find concrete evidence as to ways in which building consent authorities were over-investing in care in carrying out their consenting function.

Other building consent authorities and industry stakeholders do not see liability as an issue and argue that it is not a primary driver of consenting behaviour. In any case, some considered additional scrutiny of building consent applications was a good thing rather than a problem. Some industry stakeholders acknowledged that, while compliance costs and overall regulatory burden may have increased following the leaky homes crisis, this was considered necessary (i.e., previously building consent authorities were too lax) and meritorious (i.e., it may serve to improve quality and effectively weed out those who are unable or unwilling to comply).

The impact of potential liability claims on building consent authority behaviour and decision-making is difficult to quantify and there is little evidence to suggest that the liability regime alone drives building consent authority behaviour. Other drivers of building consent authority decision-making that have previously been identified include their:

- views about their statutory responsibilities and duties around building code compliance and the behaviour and actions required to satisfy these responsibilities and duties (*Building Act 2004*)
- views about wider sector capability and capacity, including poor quality building consent applications
- views about their duty of care and obligations to their community to ensure a safe built environment and to perform their functions in a cost-effective way (*Local Government Act 2002*)
- difficulties in gaining adequate insurance cover and concerns about other sector participants seeking to manage risk through company structures.

Claims of excessive risk aversion by building consent authorities need to acknowledge that the role of building consent authorities has changed in recent years since the leaky homes crisis and the introduction of building consent authority accreditation. Accreditation requirements have necessarily increased the education and skill requirements for building consent authorities and the level of information required to carry out their function. It would be expected that these additional requirements have shaped their incentives and behaviours.

## Consenting speed and efficiency

It could be expected that if building consent authorities were over-investing in care, then this would negatively affect consenting speed and efficiency. This does not appear to be the case. Indeed, New Zealand compares well internationally. The 2020 World Bank Doing Business report ranked New Zealand 7th out of 213 jurisdictions for ease of dealing with construction permits, ahead of Australia (11th), the United Kingdom (23rd) and the United States (24th).<sup>7</sup> It is relevant to note that the civil liability regimes in each of these three jurisdictions differs from New Zealand's. Both the United States and Australian states retain a proportionate liability regime, while the United Kingdom limits liability and the duty of care for the building regulator (New Zealand's equivalent of a building consent authority). New Zealand's placement ahead of these countries in ease of dealing with construction permits would seem to contradict claims that New Zealand's liability rule/duty of care settings are having a negative impact on consenting speed.

This World Bank ranking is in the context of the building consent system dealing with an unprecedented demand—a record 47,331 new homes consented in the September 2021 year, a 25 per cent rise from the previous September year (and more than previous highs going back to 1974). Town houses, flats and units boost these consenting volumes. This compares with 13,516 consents in 2011 and 29,627 consents in 2016. Residential construction is forecast to keep growing for the next few years.

Given the current record levels of building consent applications, what impact has this on processing times? An MBIE survey covering the period March-September 2021 found it took on average across all building consent authorities 14 working days to process building consents. However, there is a significant variance in performance across building consent authorities. While the majority are managing to meet statutory requirements for processing consents most of the time, some are struggling. MBIE estimates around one-quarter are falling far short of compliance with the requirement to process consents within 20 working days.<sup>8</sup>

Building consent authorities' workload and resourcing has a major impact on efficiency. In this regard, building alterations and additions can take up a significant amount of building consent authorities' time and resourcing. Alterations and additions are often unique and therefore likely to be more difficult to consent, attracting more requests for information and potential delays. MBIE's evaluation data shows that, in an effort to improve efficiency and cope with increasing demand and complexity in building consents, many councils are in practice taking a risk-based approach to consent processing.

The Government is therefore not persuaded that liability settings and excessive risk aversion is driving building consent authority consenting behaviour, decision-making and efficiency. This issue is much more complex and nuanced. There would therefore be little point, and indeed it would be very costly, to design a policy intervention targeting either building consent authority

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<sup>7</sup> <https://archive.doingbusiness.org/en/data/exploretopics/dealing-with-construction-permits#>

<sup>8</sup>The actual time it takes to process a consent will largely depend on the quality of the application, and complexity of the proposed building work. It is also important to note that the total elapsed time from the receipt of application to the issuing a consent may be longer than reported processing times, as the processing time excludes time the application may be put 'on hold' while the building consent authority waits for further information from the applicant. MBIE does not currently have reliable information on the frequency of requests for information, or the total elapsed time to process building consents.

liability costs or their duty of care when many other factors are at play in the building consent process.

### **Risk shifting, productivity and fairness**

A cap on building consent authority liability costs or limits on their duty of care can be expected to move any excessive risk aversion from building consent authorities to other parties in the building system. In particular, it would leave the blameless homeowner exposed to the risks of absent parties and uncollectable costs. Put another way, limiting building consent authority liability effectively transfers building risk from those able to manage risk and deal with loss or damage, to the homeowners who have the least ability to manage building risk and cope with losses.

There are also wider productivity impacts when transferring risk to other parties in the building system. For example, building professionals may prefer to stick to building designs, techniques and practices that they have experience in rather than adopting new innovative solutions (a long-standing problem in the New Zealand building industry). Others may choose to leave the sector altogether, as they are not willing to bear the level of risk and potential costs they face.

Out of fairness, it could be expected that other participants in the building process will equally seek a cap on their liability costs should a cap be placed on BCA's liability costs. This point was made by a number of submitters as part of the 2019 Building System Law Reform Programme consultation on this issue. In effect, capping multiple parties' liability would be a move to proportionate liability and would leave the homeowner even more exposed.

There is also a fairness issue relating to how and where any liability cost cap is actually set. While building consent authorities have tended to be responsible for around 20 per cent of the liability, there have also been cases where they have been responsible for more than 20 per cent of the liability. If the cap is set too low, then building consent authorities avoid the cost of damage and culpability for their decision-making. Conversely, if the cap were too high then there would likely be no (potential) behaviour change at all. Such implementation issues are not straightforward.

MBIE also examined and received advice on a number of options that limited building consent authorities' duty of care. That is limiting their duty of care to:

- 'gross negligence', or provide BCAs with statutory protection from the costs of liability
- 'substantial safety and sanitary issues'
- just 'first owners', and so exclude subsequent purchasers.

While these options will likely limit liability of building consent authorities, they will potentially have different impacts on risk allocation, liability and insurance in the sector; homeowners; and consenting efficiency. These impacts can be summarised as follows:

- Less protection for homeowners as risk and liability costs shifts to homeowners, particularly where other parties are absent from dispute.
- Unlikely to increase consenting speed, as building consent authorities still have statutory obligations to their community and compliance with their accreditation requirements.
- Wider productivity impacts as other parties in the building system take on more risk and liability, influencing the incentive to innovate.
- Increased legal complexity, litigation and cost.

- Greater legal uncertainty as courts work through the interpretation of scope of building consent authorities duty of care and definitional issues.
- Possible negative impacts on professional indemnity insurance market where building consent authorities are no longer required to contribute towards the costs.
- Withdrawal or increase in the cost of insurance, as insurers have reduced ability to reclaim costs.

### **Consultation with building and construction sector—mixed feedback**

In April 2019, as part of the Building System Legislative Reform Program consultation, and the release of a discussion document, MBIE sought feedback on a wide range of reform measures aimed at improving the performance of the building regulatory control system. This consultation included a proposal to cap liability costs for building consent authorities.

There was mixed feedback from the building and construction sector on the proposal to cap building consent authority liability costs. Building consent authorities and some other sector participants strongly supported a change to the liability settings as they consider it will better reflect the role of building consent authorities' in the building process and may mitigate risk-averse behaviour. Ratepayers would not be subsidising the failures of other industry entities, and it would incentivise other sector players to lift their performance. Many of the submitters who supported a change to liability settings also advocated for proportionate liability rather than a cap.

The majority of written submissions did not support a cap on building consent authority liability costs. While many building consent authorities supported a cap on liability costs, a significant number of stakeholders saw this as unfair as liability and cost would simply be shifted to other parties in the building process, including the blameless homeowner. Some considered that this undermines the more general policy goals of reform in that joint and several liability is considered a valuable protective measure for homeowners. It also creates an incentive for good risk management. Other participants in the building process also advocated for a cap on their own liability, while others supported a fundamental move to a proportionate liability rule.

More generally, there were mixed views on whether changing liability settings would impact consenting behaviour. While most of the written submissions thought improving building products and processes would have the biggest impact on consenting efficiency, many online survey respondents thought risk and liability settings would have the biggest impact. Another common viewpoint was the need to focus on high-quality standards that are well supervised and enforced to minimise the risk of poor-quality products and workmanship.

### **Potential for perverse and unintended outcomes**

The potential impacts of any limitation on building consent authority liability are extremely complex. The actual impacts depend on how parties (particularly building consent authorities) adjust their behaviour in response to any limitation of liability, which is difficult to predict with certainty. There is a risk that while a building consent authority liability/cost cap may change incentives, this might not translate into a significant change their behaviour. For example, despite any form of statutory protection from liability or liability costs, building consent authorities will still be obligated to meet their consenting accreditation requirements and uphold their wider obligations to the community.

More broadly, limiting building consent authority liability is not consistent with the policy expectation that people will be held liable for their negligent actions, and sends a mixed message about parties having to stand behind their work. It also gives rise to outcomes that would seem perverse. Building consent authorities that, by virtue of their superior standards, processes and conduct in undertaking their consenting function, may be less likely to be in a situation that exposes them to significant liability risks. On the other hand, building consent authorities that have lower standards, poor processes and poor conduct are afforded protection.

### **Policy position**

The current liability settings for building consent authorities should remain. There is a weak case for implementing a cap on building consent authority liability costs or limiting their duty of care, given the potential costs, risks, and benefits. This is unlikely to result in faster building consenting and would impact negatively on fairness and productivity in the building sector, and risk unintended outcomes.

### **Building warranty insurance**

Guarantee and insurance products provide protections to homeowners who are building or renovating their home against non-completion of building work and post-completion defects. These can be a guarantee or insurance policy. In general, a guarantee provides assurance that something will be fixed if it goes wrong, whereas insurance provides compensation for loss.

- A guarantee provides a promise to ‘make right’, that the builder will complete the home in accordance with the building contract, and the home will be free of defects. A warranty is a promise by the builder to fix any defects. It is a mechanism to ensure the guarantee promises will be kept.
- An insurance product is a policy that will compensate the policy holder for a (insured) loss, and often pays for the problem to be corrected.

The coverage levels and types of protection offered by insurance and guarantee products differ significantly. If the insurance or guarantee offers ‘first resort’ cover, the homeowner can turn to the insurance company or guarantor in the first instance of a defect and have them arrange repairs for the full period of cover. The insurer acts for the homeowner in dealing with claims. However, homeowners purchasing ‘last resort’ cover must attempt to negotiate with builders to resolve building defects, or demonstrate that the builder is no longer in existence, before the insurance company or guarantor will step in. All avenues for recovery of any loss must have been exhausted.

Guarantee and insurance products are also regulated differently with insurance products subject to much more stringent regulatory oversight and requirements.

New Zealand has a limited building guarantee market. All schemes are offered by the builder or building industry association. They have acceptance criteria relating to business history that a builder must meet. The schemes also offer differing levels of protection and focus on the performance of the builder. Notably, none of these guarantees protect against design defects that the building consent authority may identify through the consenting process.

Exact figures of new build stand-alone houses in New Zealand covered by some form of guarantee are not known. A typical guarantee in New Zealand provides cover for builder

insolvency during the build, and structural and other defects for certain periods post-construction (with limitations and exclusions). Guarantees are typically transferable to a new owner where ownership of the home changes during the cover period.

### **The absence of a building warranty insurance market in New Zealand**

A viable insurance market for building defects in New Zealand has not developed. Stamford Insurance previously had an insurance product that provided protection against both design and workmanship defects. However, its underwriter, Lloyds, left the market at the end of 2019, leaving no building warranty insurance products available in the New Zealand market.

There are a number of reasons why a building defects insurance market has not developed in New Zealand, including the:

- low levels of consumer demand for, and awareness of, guarantee and insurance products
- effectiveness of the system for regulating building sector professionals
- ability of insurers to recover losses from other negligent parties (including building consent authorities)
- small size of the New Zealand market
- challenges insurers face when pricing for a the 10-year limitation period required by the *Building Act*, the so-called 'long tail risk', which makes it difficult for insurers to be able to predict their losses and therefore price insurance products
- nature of the risks in New Zealand's building and construction sector
- lack of information on the causes of risk in New Zealand's building sector (efficient pricing requires good information on the causes of risk)
- reluctance of underwriters to set up a physical presence in New Zealand (a Reserve Bank requirement for insurers).

The absence of a building warranty insurance market in New Zealand raises the policy question as to what the government's role is in developing and supporting a warranty insurance scheme. Some building sector participants would like a publicly provided warranty insurance scheme or product.

### **Publicly provided building warranty insurance scheme**

The Government has considered the merit of a publicly provided insurance scheme for New Zealand. This was in the context of any proposal for a cap on building consent authority liability, and the subsequent impact of this on consumers, and the absence of a building warranty insurance market or offering in New Zealand.

A publicly provided building warranty insurance scheme could be a reinsurance scheme where the government insures private insurers, private insurers on-selling government insurance, or direct provision. This would be a significant intervention in the New Zealand insurance market and raise a number of risks that would need to be managed.

### **Potential for perverse and unintended outcomes**

Transferring risk to an insurer removes important incentives on other parties in the building sector to actively reduce and manage risk, leading to higher expected losses overall. This is the so-called moral hazard problem or 'peace of mind' effect of insurance where industry



participants have weak incentives to closely monitor building work and identify defects. That said, the design of an insurance product could seek to minimise moral hazard incentives through, for example, risk-based pricing, eligibility and access standards, regulation and limiting coverage.

However, controlling moral hazard risk can be problematic. The 10-year limitation period for building warranty insurance (required by the *Building Act 2004*), the policy intent to provide cover for non-chance events (e.g., negligence), and the relatively short lifespan of building companies collectively weaken the effectiveness of these controls. These are likely to be contributing factors to the lack of a building warranty insurance market in New Zealand (and would likely be an issue for any publicly provided building warranty insurance).

The existence of a 'deep pocketed' party can also exacerbate moral hazard risks and is likely to be the case if a deep pocketed public insurer replaces building consent authorities - but with the public insurer having less direct control to manage risk.

### Fiscal risk for the Government

A public insurer would generate a fiscal risk to the Government that its claims exceed its revenue for any given period. Private insurers manage this risk by building up capital (e.g., retained profits accumulated over time) or purchasing reinsurance. A public insurer would likely carry a government guarantee, either explicit or implicit, meaning the Government would need to consider how it manages the fiscal risk.

Finally, any government-provided warranty insurance product would effectively move the cost of liability from the building consent authorities to central government. While this might be a fairer option for ratepayers, central government does not have any means to manage this risk, and this could be seen as unfair for taxpayers.

### The Building Performance Guarantee Corporation

New Zealand has previously had a government provided insurance scheme for building defects. In 1977, the Building Performance Guarantee Corporation was set up with the aim of protecting homeowners from building defects from new builds. A key concern at the time was the cost of homeowners to pursue their legal rights.

The Building Performance Guarantee Corporation's general functions were to issue indemnities protecting and indemnifying owners of residential buildings against loss or damage from defects or deterioration of residential buildings, and make good such defects, damage or deterioration. However, there were a number of concerns with the performance of the Building Performance Guarantee Corporation and its ability to achieve its objectives. These included:

- the high cost of claims and the availability of similar schemes in the private sector
- suggestions that the scheme was not established or operated on a sound actuarial basis and concerns about the government's potential contingent liability
- a high proportion of small claims with assessed liability of less than \$500 (indicating builders leaving the finishing work and contract maintenance work uncompleted)
- builders and building companies refusing to carry out remedial work
- problems with builders and building companies refusing to co-operate in settling claims.

These concerns underline the potential moral hazard and fiscal risks discussed above. The *Building Performance Guarantee Corporation Act 1977* was repealed by the *Finance Act 1987* and the Building Performance Guarantee Corporation was disestablished.

### **Consultation with building and construction sector**

In April 2019, as part of the Building System Legislative Reform Programme consultation, and the release of a discussion document, MBIE sought feedback from building sector stakeholders on a proposal requiring that a guarantee and insurance product for building defects be put in place for all residential new builds and significant alterations. In other words, making it a mandatory requirement, but one where homeowners could actively opt-out.

The majority of submitters supported a proposal requiring a guarantee and insurance product for residential new builds, with the most common reason that it would provide better protection for homeowners. It was not considered a solution to increasing building consenting efficiency nor improving building quality. However, there was wide-spread concern about the ability and capacity of the current insurance market to offer a viable quality product. Some described the market as 'immature' and 'underdeveloped'.

While many submitters supported the proposal for a mandatory guarantee and insurance product for residential new builds and alterations, there were significant concerns about the potential impact on the building sector, including that it may constrain the supply of builders and increase building costs. Other submitters considered there should be a greater focus on measures to lift the quality of building work to reduce the risk of defects in the first place.

Many submitters emphasised that any requirement for a guarantee and insurance product was reliant on successfully reforming the building sector first through implementing the other proposals in the discussion paper. Many considered better quality buildings and clearer roles, responsibilities and accountabilities will increase insurer confidence and enable insurers to make an informed decision about participating in the market.

Another regular comment from submitters was that a guarantee and insurance product is not the best way to respond to issues of building industry quality and performance, as it acts as the 'ambulance at the bottom of the cliff'.

### **Overseas experience and insights**

A review of overseas residential building warranty insurance regimes highlights a wide range of different approaches, design features and levels of government involvement. For example, home building insurance schemes are mandatory in every Australian state except Tasmania. Every Australian scheme, including schemes underwritten by government, are last resort schemes (except Queensland).

In contrast, all insurance warranty schemes in Canada are privately provided and are mandatory first resort schemes. And in five Canadian provinces, builders are required by law to provide home buyers with a third-party new home warranty. But in the rest of Canada new home warranties are voluntary. Likewise, in the United Kingdom the major providers are private sector, who mostly offer first resort warranty insurance products, and participation in warranty insurance schemes is voluntary.

Like New Zealand, most U.S. states have a set of statutory warranties that are implied in contracts. In these states, participation in warranty insurance plans is voluntary. It is up to the

builder to decide whether to rely on that state's implied warranties, offer a written warranty of its own, or purchase a third-party warranty from an independent insurance company.

To the extent that the risk and liability of future building defects is transferred to an insurer (either public or private), there are strong incentives for the insurer to manage potential future liability. What can be seen from a close examination of different overseas insurance and warranty regimes are the different ways insurance providers manage risk and the prospect of pay-outs to homeowners. For example:

- tightly specified conditions where building work is deemed inadequate
- strict coverage exclusions
- maximum claim values
- conditions that exclude pay-outs for weathertightness issues
- terms of cover (from one year to 10 years).

There are also examples overseas where the insurer imposes strict conditions on building work through setting their own minimum building standards. These need to be satisfied before insurance cover is provided, and sometimes the standards exceed actual building regulatory requirements.

Obviously, the differences observed in overseas building insurance regimes reflect different jurisdictional contexts, legal frameworks, market dynamics and political economy trade-offs. For this reason, there needs to be caution when considering possible lessons in the New Zealand context.

A notable insight from Canada and Australia is that building permit approvals are not being granted any faster despite mandatory warranty legislation appearing to have removed some of the liability risk from building authorisation organisations at the local government level. Likewise, a review of mandatory building defects warranty and insurance legislation in the United Kingdom and Australian states also suggests that, on their own, mandatory policies are not a panacea for building quality problems. Consumer organisations in these jurisdictions have reported extensive complaints about the quality of new-build dwellings.

### **Policy position**

There is a weak case for establishing a publicly provided insurance scheme for building defects after weighing up the costs, risks and potential benefits. The design of such schemes is complex, fraught with uncertainty and unintended effects, and presents a significant fiscal risk to the government that it is not best-placed to manage compared with the private market. While the public policy case for a government provided insurance scheme is currently not justified, this situation could change in the future to the extent the policy problem becomes clearer and where there are material changes in the costs, risks and potential benefits of such a significant public policy intervention.

## Risk allocation across the consenting model

Risk and liability settings differ depending on the type of building consent approval required (if any) and how this allocates responsibilities and accountabilities across industry participants. In 2021, the Government implemented reforms that improve the efficiency of consenting processes and pathways, support housing supply and improve housing affordability. At the same time, these new approval pathways also reallocate risk, responsibility and liability to other parties in the building system.

These reforms are:

*New additions to the list of Schedule 1 Exemptions.* The Building Act 2004 enables some types of building work to be exempt from requiring a consent. In 2021 this list was expanded to include larger buildings that are low risk. Building consent authorities do not oversee exempt work, and the risk and liability sits with the homeowner and tradespeople.

*Kāinga Ora approved as an accredited building consent authority.* Consentium is an independent consenting agency and is approved as an accredited building consent authority providing building consent services for residential state housing owned and retained by Kāinga Ora, excluding mixed tenure dwellings. In order to become registered, Consentium had to meet the standard adequate means test, which includes 10-year liability cover. This change will reallocate the risk and liability for consenting these types of houses from councils to Kāinga Ora, which will now perform the function of a building consent authority for its housing programme.

*The introduction of the Modular Component Manufacturing scheme.* This provides a new certification scheme for prefab and modular components. Certification schemes provide assurance that the building product or method complies with the Building Code. This will increase consenting efficiency and limits both the consenting activities and liability on building consent authorities by shifting liability to the certification body and certified manufacturers.

*Improvements to product certification (CodeMark).* CodeMark is a product certification scheme that provides an assurance that the product complies with the Building Code. CodeMark places more liability on product certification bodies and product manufacturers, which reduces building consent authority liability for buildings that use products that have a CodeMark certificate. Changes to the CodeMark scheme are underway which aim to improve confidence in the scheme and increase uptake.

*Increasing uptake of MultiProof.* MultiProof is a national multiple use approval that enables building designs to be approved as compliant with the Building Code once, and then used multiple times at different sites. With MultiProof approvals, building consent authority liability is limited to the scope of their involvement - usually site-specific considerations. There is an opportunity to actively promote uptake of MultiProof which has been relatively low to date.

Together, these reforms will deliver meaningful improvements in the performance of the building control system and the efficiency of different pathways for consenting approval, particularly in the way new, innovative and efficient building methods are supported. At the same time, these reforms effectively reallocate risk across the system to where it is best placed to be managed, thereby reducing the chance of things going wrong during and after the building process.

## Strategic direction: a whole-of-system approach to risk and liability in the building sector

A whole-of-system perspective to risk and liability in the building sector takes into account and leverages the many elements of the building control system, with the aim of getting building work right first time. Therefore, risk management in the building system focuses on ensuring inputs into the building process are high quality, rather than focusing on liability and culpability when things go wrong. The focus is on strengthening the incentives, accountabilities and behaviours of industry participants to enable efficient consenting, quality building, improved sector capability, and positive outcomes for homeowners.

These system elements are:

- quality building standards that are effectively monitored and enforced
- occupational regulation and professional standards
- building consent authority institutional form, governance and processes
- building product and process certification schemes
- liability rules, warranties and insurance
- building consent authority capability and capacity
- building professional information disclosure requirements
- disputes resolution processes, information and education

There has been, and continues to be, active reform of the building regulatory control system across all these elements. This reform programme started following the weather-tightness issues that emerged in the 1990s and the systemic failure in the building industry.

**Appendix 1** provides an overview of the reforms implemented, underway and proposed that strengthen the institutions, laws, processes and formalities that underpin the building regulatory control system. These reforms aim to get building work right first time. Together, they lower the potential liability risk in the sector and, importantly, mitigate the potential for systemic failure in the building industry in the future.

### Current focus: the Building System Legislative Reform Programme

The Building System Legislative Reform Programme commenced in 2019, with the overarching focus to lift the efficiency and quality of building work and provide fairer outcomes if things go wrong.

Following public consultation in April 2019, Cabinet agreed that the Reform Programme be split into three phases. This decision reflected the fact that some policy work was more advanced and some policy interventions had more sector support. As a result:

- Phase 1 of the Reform Programme focuses on building products, building methods and putting systems and processes in place to speed up consenting for new and innovative ways of building. It also made changes to the building levy, offences and penalties, notification requirements and Schedule 1 exemptions. This was completed in 2022.
- Phase 2, which is currently underway, focuses on the professionals in the sector. It is progressing reforms to occupational regulation of engineers and other practitioners in the building and construction sector, so that people can have more confidence in these

Professions and their work. It will also respond to issues raised through the Canterbury Earthquakes Royal Commission.

- Phase 3 was originally established to investigate options to address risk allocation in the building and construction sector and the lack of a building warranty insurance market. As outlined earlier, these policy options will not be progressed in favour of a whole-of-system approach.

## **New focus: building system reforms**

Past reforms and progress made on the Building System Legislative Reform Programme has provided a strong base to deliver bigger and better system improvements. The Government's future whole-of-system approach will focus on the following.

### **Occupational regulation reforms**

The Government is making reforms to the way building and construction sector professionals are regulated. The objectives of occupational regulation reform are to ensure that:

- practitioners are providing services with reasonable care and skill
- practitioners are operating within their areas and levels of expertise
- practitioners can be held accountable for substandard work and poor behaviour
- regulation is proportionate to the risks to public safety and wellbeing.

The initiatives that sit under this piece of work include:

- a new, two-tier regulatory regime for engineers
- strengthening the licensed building practitioner regime
- improving the operation of the plumbers, gasfitters and drainlayers regime
- a review of the occupational regulation regimes that apply to electrical workers and registered architects.

Consumers and regulators need to be able to rely on the work of building and construction professionals. Strong and appropriate regulation of the building and construction sector's professions leads to increased trust and confidence that practitioners are competent and their work will be free of defects or, if things do go wrong, they will take responsibility for putting it right.

### **Consumer protection**

The Government is evaluating consumer protection outcomes in the building and construction sector. The objectives of this work are to:

- improve the way consumers manage their own risks in the building process
- provide the right protections, so consumers are not bearing the risks of others
- improve access to ways to hold poor practitioners to account.

An evaluation of consumer protection is currently underway to:

- assess the extent to which consumer protection mechanisms under the *Building Act 2004* are working as intended
- assess the extent to which homeowners are aware of consumer protection mechanisms
- identify any necessary improvements to better achieve the public policy objectives and ensure that they are fit-for-purpose today, and in the future.

It is appropriate that building professionals and regulators take most of the responsibility for good building work - they are the experts. Consumers have a role to play by making sure they choose competent people to do building work and hold to account those who perform poorly. It is important that consumers have access to the right information, tools and processes to do these things.

### **Building consent system review**

The Government is undertaking a first-principles review of the building consent system. The aim of the building consent system review is to modernise the system to provide assurance to building owners and users that building work will be done right first time, thereby ensuring that buildings are well-made, health, durable and safe.

The review will investigate the building consent system from the commissioning of building work through to the issuing of a code compliance certificate. It will examine how the:

- regulatory regime is structured and the institutional arrangements
- regulatory requirements are implemented by various people involved in building work
- how the overall building consent system is managed.

Everyone connected with buildings and building work - such as owners, developers, product suppliers, designers, builders and regulators - relies on the building consent system to ensure buildings are safe, durable and comply with the Building Code. It is important that the building consent system meets their expectations.



# Appendix 1: Reform strengthening the building control system

## Quality building standards that are effectively monitored and enforced

The introduction of the Building Act 2004 repealed the Building Act 1991 and introduced substantive changes to the law governing building work. The changes were introduced in stages between 2005 and 2012.

The objective of the Building Act 2004 is to “design and build it right first time” through improving the control of, and encourage better practices in, building design and construction to provide greater assurance to consumers, including:

- o setting clear expectations of the standards buildings should meet
- o guidance on how to meet those standards
- o more certainty that capable people are undertaking design, construction and inspection
- o scrutiny of the building consent and inspection process
- o protection for homeowners through mandatory warranties.

The Building Act 2004 has been subject to reviews and amendments since its introduction to make technical adjustments and introduce improvements in building controls for the sector.

An annual Building Code maintenance programme is undertaken to ensure effective management of the Building Code and its documents (such as the development of standards). This can include updating Building Code regulation, Acceptable Solutions, Verification Methods and published guidance information.

## Occupational regulation and professional standards

Licensed Building Practitioners Scheme was introduced, setting out standards and skills required to carry out or supervise certain types of building work (2007).

Restricted building work regime was introduced, requiring certain residential building work can only be carried out or supervised by a Licensed Building Practitioner (2012).

The Licensed Building Practitioner Scheme is being strengthened, which will include the introduction of a code of ethics to establish clear and concise behavioural expectations and standards, amendments to licensing processes and improvements to complaints and disciplinary processes (2021-2023).

Further reforms to the Licensed Building Practitioner Scheme are being examined, with a focus on the structure of the licence classes.

Cabinet agreed to establish a new regulatory regime for engineers, including the introduction of a code of ethics, raised competency standards and strengthened administration and disciplinary functions (2022).

A statutory review of the regulatory regime for plumbers, gasfitters and drainlayers has been completed and reforms are proposed (2021).

## **Building consent authority institutional form, governance and processes**

Introduction of MultiProof approvals (2009). MultiProof is a national, multiple-use approval that enables building designs to be approved as compliant with the Building Code once and then used multiple times at different sites.

New additions to the list of Schedule 1 Exemptions (2020). The Building Act 2004 enables some types of building work to be exempt from requiring a consent. This list was recently expanded to include larger buildings that are low risk.

The Building Amendment Act 2012 introduced a risk-based consenting approach. These changes provided for a streamlined consenting process for low-risk building work and a more rigorous process for complex and commercial work. In approving these amendments to the Building Act 2004, Cabinet set a number of conditions that must be met before risk-based consenting could be implemented. Those conditions have not yet been met, and the scheme remains dormant in the Building Act 2004.

MBIE is undertaking a first-principles review of the building consent system. The aim of the building consent system review is to modernise the system to provide assurance to building owners and users that building work will be done right first time, thereby ensuring that buildings are well-made, healthy, durable and safe.

## **Building product and process certification schemes**

The introduction of the Modular Component Manufacturing (MCM) scheme, which provides a new certification scheme for prefab and modular components. Certification schemes provide assurance that the building product or method complies with the Building Code. This will also increase consenting efficiency (2022).

Introduction of CodeMark, a building product certification scheme that provides assurance that building products or method comply with the Building Code (2008).

The CodeMark scheme is being strengthened to improve confidence in the scheme and increase uptake (implemented 2022-2023).

## **Liability rules, warranties and insurance**

Introduction of implied warranties provided for in the Building Act 2004. These are automatic, apply for 10 years from the build date (including a 12-month defect repair period) and cover almost all aspects of building work. They apply regardless of whether there is a written contract.

Government agreement to the Law Commission inquiry recommendation that joint and several liability remain the liability rule for the building and construction sector, and more generally (2014).

## **Building consent authority capability and capacity**

Introduction of the Building Consent Authority Accreditation Scheme (2006), requiring building consent authorities to meet specific standards to be accredited. This aims to ensure that building consent authorities can carry out their consenting function to a high standard. Performance of their consenting function is periodically audited. Building consent authorities must have specific policies and procedures in carrying out their building control function, as well as specific education and skill requirements (2006).

Kāinga Ora approved as an accredited building consent authority. An independent agency, Consentium, was established and registered to provide building consent services to Kāinga Ora, with an initial focus is on basic consents and is restricted to residential state housing owned and retained by Kāinga Ora (excluding mixed tenure dwellings). The scope of Consentium's consenting operation is to be expanded to include complex consents (2021).

## **Building professional information disclosure requirements**

Requirements for a written disclosure of certain information from the prospective building contractor, prior to an offer of contract (2015).

Requirement for a written contract for residential building work above \$30,000 in value (2015).

Requirement for building contractors to provide consumers with any critical information on product maintenance and documentation of key product warranties at the completion of building work (2015).

## **Disputes resolution processes and information and education**

The Government is currently evaluating the consumer protection measures in the Building Act 2004 and supporting disputes procedures. This review will determine if these measures are working as intended, the extent homeowners are aware them, are fit-for-purpose and identify any necessary improvements to better achieve objectives (2022-2023).

Amendments to the Construction Contracts Act 2002 to enable parties to residential construction contracts to better use the Act to resolve building disputes (around 2015).



**Te Kāwanatanga o Aotearoa**  
New Zealand Government

**BRM 8308**



# Review of the building consent system

DAYS LEFT  
**45**

**OPEN**

Submissions due: 04 September 2022, 5pm

The Ministry of Business, Innovation and Employment (MBIE) is asking for feedback on issues with the current building consent system.

Review of the building consent system issues discussion document

The building consent system provides assurance that new building work complies with minimum performance requirements under the Building Code.

The review is an end-to-end review of the building consent system – from the building design phase through to the issuing of a code compliance certificate.

MBIE is consulting on an issues discussion document as the first step in the review of the building consent system.

The Review of the Building Consent System issues discussion document aims to build a shared understanding of issues with the current consenting system as a basis for considering future system change.

The discussion document is broken into 3 key sections:

1. the role of government and third parties, such as builders, designers and architects, in providing assurance that buildings are safe, healthy and durable;
2. desirable outcomes that good building consent regulation should seek to achieve; and
3. issues with the current building consenting system.

The issues discussion document identifies 4 desirable outcomes that an efficient and effective building consent system should have. MBIE seeks your feedback on whether these are the right ones, and the extent to which the current system already delivers on these outcomes.


1. The system is efficient, risk-based, has proportionate compliance costs, and allows for innovation
2. Roles and responsibilities are clear so that all participants across the system have a good understanding of their own responsibilities and the extent they can rely on others for assurance
3. The system is responsive, flexible and agile, and seeks to continually improve and adapt to changing circumstances
4. Regulatory requirements are clear and decisions are robust, predictable, transparent and broadly understood.

The issues discussion document also identifies a number of issues that are barriers to achieving an efficient and effective building consent system. MBIE seeks your feedback on whether we have identified the right issues, whether there are other issues, and your experience.

1. Roles and responsibilities across the system are not always well understood, accepted, applied or consistently enforced.
2. Building consent authorities and the sector face capacity and capability constraints in dealing with an increasing volume and complexity of building work.
3. All consents go through the same basic process, which is not always responsive to the level of risk, complexity of the building work, or type of project.
4. Performance of the system is insufficiently monitored and MBIE is not yet the strong central regulator that was contemplated in the original system design
5. The processing of building consent applications is devolved to territorial authorities, which has led to variability and unpredictability in the consent process and its outcomes

If you work within the building consent system, or have used it to get approval for building work in the past, we would like to hear from you. Your views on the building consent system will help to set the direction for future changes. Following public consultation, MBIE will analyse the submissions and undertake further work to confirm the key issues and develop options for a new or revised building consent system for public consultation in 2023.

This is a summary of the proposed changes only. Please refer to the discussion document for more detailed information.

 **[Risk, Liability and Insurance in the Building Sector – Policy position statement \(/dmsdocument/22842-risk-liability-and-insurance-in-the-building-sector-policy-position-statement\)](/dmsdocument/22842-risk-liability-and-insurance-in-the-building-sector-policy-position-statement)**

Published: 21 Jul 2022


A policy position statement explaining the Governments policy position on risk, liability and insurance in the building sector.

**Type**

[Consultation document\(/document-library/search?type\[65\]=65\)](/document-library/search?type[65]=65)

**File**

PDF, 806KB, 28 pages

 **[Issues discussion document: Review of the building consent system \(/dmsdocument/22845-issues-discussion-document-review-of-the-building-consent-system\)](/dmsdocument/22845-issues-discussion-document-review-of-the-building-consent-system)**

Published: 21 Jul 2022


A document discussing issues identified during the review of the Building Consent System, and posing questions for public consultation.

**Type**

[Consultation document\(/document-library/search?type\[65\]=65\)](/document-library/search?type[65]=65)

**File**

PDF, 2.2MB, 48 pages

 **[Review of the Building Consent System \(/dmsdocument/22848-review-of-building-consent-system\)](/dmsdocument/22848-review-of-building-consent-system)**

Published: 21 Jul 2022


An infographic illustrating the review of the building consent system including what is under review, desirable outcomes and issues that have been identified.

**Type**

[Factsheet / Brochure\(/document-library/search?type\[69\]=69\)](/document-library/search?type[69]=69)

**File**

PDF, 73KB, 1 page

 **[Submission Form - Building Consent System Review \(/dmsdocument/22857-submission-form-building-consent-system-review\)](/dmsdocument/22857-submission-form-building-consent-system-review)**

Published: 21 Jul 2022

The Ministry of Business, Innovation and Employment (MBIE) is asking for feedback on issues with the current building consent system.

**Type**

[Form\(/document-library/search?type\[70\]=70\)](/document-library/search?type[70]=70)

**File**

DOCX, 400KB, 20 pages

## Risk, liability and insurance

To support the building consent system review, MBIE has released the Risk, Liability and Insurance position statement.

The joint and several liability rule is out of scope for the review of the building consent system. MBIE is not consulting on the policy position statement.

The policy position statement provides supplementary background and context that clarifies the Government's position on risk, liability and insurance matters for the building and construction sector. Submitters may find the information in the policy position statement useful in preparing their submissions.

The policy position statement sets out:

- why the joint and several rule is the appropriate liability rule for the building and construction sector
- why the capping of building consent authority liability costs or limiting building consent authorities' duty of care is not considered necessary or beneficial at this time
- why a publicly-provided building defects insurance scheme is not currently justified.

The statement also presents the case for a whole-of-system focus to building reforms, which includes reviewing:

- the building consent system
- occupational regulation of building and construction professions
- consumer protection in the building and construction sector.

A whole-of-system approach will support the sector to get building work right the first time, while ensuring there is a fit-for-purpose assurance system that manages the risks associated with building work.

## How to make a submission

You can have your say through the following methods:

- Complete an [survey online](https://www.research.net/r/BZK5IDQ)(<https://www.research.net/r/BZK5IDQ>)
- By sending your submission as a Microsoft Word document to [building@mbie.govt.nz](mailto:building@mbie.govt.nz)(<mailto:building@mbie.govt.nz?subject=Building%20Consent%20System%20Review%20Submission>)
- By mailing your submission to:

Consultation: Review of the Building Consent system  
Building System Performance  
Building Resources and Markets  
Ministry of Business, Innovation and Employment  
PO Box 1473  
Wellington 6140  
New Zealand

Please direct any questions that you have in relation to the submissions process to [building@mbie.govt.nz](mailto:building@mbie.govt.nz)(<mailto:building@mbie.govt.nz>)

## TAGS

[BUILDING AND CONSTRUCTION REGULATION\(HTTPS://WWW.MBIE.GOV.T.NZ/HAVE-YOUR-SAY/?TOPIC\[51\]=51\)](https://www.mbie.govt.nz/have-your-say/?TOPIC[51]=51)

[REGULATORY SYSTEMS\(HTTPS://WWW.MBIE.GOV.T.NZ/HAVE-YOUR-SAY/?TOPIC\[49\]=49\)](https://www.mbie.govt.nz/have-your-say/?TOPIC[49]=49)

[BUILDING RESEARCH AND DATA\(HTTPS://WWW.MBIE.GOV.T.NZ/HAVE-YOUR-SAY/?TOPIC\[53\]=53\)](https://www.mbie.govt.nz/have-your-say/?TOPIC[53]=53)

[BUILDING\(HTTPS://WWW.MBIE.GOV.T.NZ/HAVE-YOUR-SAY/?TOPIC\[1\]=1\)](https://www.mbie.govt.nz/have-your-say/?TOPIC[1]=1)



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<https://www.mbie.govt.nz/have-your-say/building-consent-system-review/>

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