



LOCAL GOVERNMENT NEW ZEALAND SUBMISSION

In the matter of the Review of Joint and Several Liability

To the Law Commission

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Introduction

1. *Local Government New Zealand* (LGNZ) welcomes the opportunity to submit on the Review of Joint and Several Liability.
2. LGNZ is a member based organisation representing all 78 local authorities in New Zealand. LGNZ's governance body is the National Council. The members of the National Council are:
 - Lawrence Yule, President, Mayor, Hastings District Council
 - John Forbes, Vice-President, Mayor, Opotiki District Council
 - John Bain, Zone 1, Deputy Chair, Northland Regional Council
 - Richard Northey, Zone 1, Councillor, Auckland Council
 - Meng Foon, Zone 2, Mayor, Gisborne District Council
 - Jono Naylor, Zone 3, Mayor, Palmerston North City Council
 - Adrienne Staples, Zone 4, Mayor, South Wairarapa District Council
 - Maureen Pugh, Zone 5, Mayor, Westland District Council
 - Tracy Hicks, Zone 6, Mayor, Gore District Council
 - Len Brown, Metro Sector, Mayor, Auckland Council
 - Dave Cull, Metro Sector, Mayor, Dunedin City Council
 - Stuart Crosby, Metro Sector, Mayor, Tauranga City Council
 - Brendan Duffy, Provincial Sector, Mayor, Horowhenua District Council
 - Stephen Woodhead, Regional Sector, Chair, Otago Regional Council
 - Fran Wilde, Regional Sector, Chair, Greater Wellington Regional Council.
3. This submission has been prepared under the direction of the National Council. Councils may choose to make individual submissions. The LGNZ submission does not derogate from these individual submissions.
4. The final submission was endorsed under delegated authority by Lawrence Yule, President, LGNZ.
5. LGNZ would be pleased to meet with the Law Commission for further discussion on any points raised in this submission.

Recommendations

6. LGNZ recommends a change to proportionate liability.

Comments

7. Local authorities carry out administrative functions for the Building Act 2004 under delegation from the Crown. The day to day administration of the Act generally occurs under national policy and national standards, not under local policy. Administration by local authorities provides accessible local service delivery as well as administrative efficiency alongside related regulatory and property based services.

8. Since 2003, local authorities are on record as advocates for a change from joint and several to proportionate liability. Both the LGNZ submission to the Building Bill (2003) and the Building Act review (2010) support change. The submission to the Building Act review also suggested a Government backed surety or backstop for warranties.
9. Local authorities continue to support a change to proportionate liability. While broader proposals to improve accountability of building practitioners are being implemented, (the licensed building practitioner scheme for example) local authorities and their communities continue to be unreasonably exposed to litigation costs under joint and several liability.
10. Local authorities are not unsympathetic to the argument that plaintiffs are unable to fully recover costs when those responsible cannot be found. We cannot however see the logic of the wider community, the ratepayers, having to pay compensation as currently exists under the joint and several liability. As noted in your report “apportionment of the share of leaky home damages actually paid in completed residential cases averaged around 45% despite a typical territorial authority contribution being adjudicated and ordered at 20-30%.” Community members are, in effect, subsidising poor building practices.
11. In dollar terms this equates to projected costs in long term plans (2012-2022) of \$470 million for Auckland Council and community, \$7.5 million for Thames Coromandel District Council (with a ratepayer base of approximately 25,000) and Tauranga City Council, \$2.5 million.
12. The Spencer on Byron case may see these costs increase.
13. This is a significant disincentive for local authorities engaged in delivering building services. Local authorities providing building inspection services are subject to a strict regime of accreditation to ensure appropriate systems are in place to deliver building services. This has not proven to make any substantive difference to the apportionment of costs when subject to litigation.
14. As noted earlier, local authorities carry out administrative functions for the Building Act 2004 under delegation from the Crown. Under the current regime local authorities can be unwilling to assess alternative designs and look for central guidance on what constitutes acceptable alternatives. The Canterbury Earthquakes Royal Commission reports signal the need for more leadership and greater direction from the Ministry of Business, Innovation and Employment building group. Approximately a third of the recommendations support this. This message is reinforced in the Productivity Commissions draft report *Towards Better Regulation*. The Commission has found a number of shortcomings in the way that regulations are made at the central level including “a lack of implementation analysis, poor consultation and weak lines of accountability.”¹
15. Government has a programme (Building and Construction Productivity Partnership) in place for improving building sector productivity. The culture within the building sector has been described by this group as “lacking in customer focus, demonstrating poor risk management, being slow to embrace change and not always well co-ordinated.”² It is clear it will take time to embed change in the building industry.
16. Both Riskpool and the Society of Local Government Managers (SOLGM) have noted in their submissions that local authorities historically insured themselves against losses of this nature. The leaky homes issue has increased the risk profile of local authorities and impacted on the cost of insurance. As Riskpool’s submission has noted, this has reached the point where insurance for some types of claims are no longer available. SOLGM and Riskpool are in agreement that there should be a change to proportionate liability.

¹ New Zealand Productivity Commission. http://www.productivity.govt.nz/sites/default/files/towards-better-local-regulation-draft_0.pdf

² Building and Construction Productivity Partnership. <http://buildingvalue.co.nz/culture>

Consumer interests

17. In 2011 Buddle Findlay and Sapere Research Group reviewed joint and several liability for the Department of Building and Housing.³ The Sapere report concluded that if proportionate liability were to be adopted, it was essential to have a system of compulsory home warranty insurance to deal with what would otherwise be unacceptable unfairness to consumer homeowners. Achieving a satisfactory warranty system will be difficult and most likely impossible without government support.
18. Building Amendment Bill (No 4) implements policy decisions from the Building Act review (2009) to provide incentives for building professional and trades people to take responsibility for their work and to stand behind it. The Bill is waiting a second reading. In the Select Committee report they note that a significant number of submitters raised the issue of joint and several liability and a mandatory home warranty insurance scheme. The Select Committee states that these have been referred to the Law Commission for review and “Government is awaiting the outcome of this work.”
19. The amendments the Select Committee have proposed to the Bill would clarify:
 - the minimum requirements for residential building contracts by way of an example
 - that Part 4A does not include design work
 - the relationship between the head building contractor and any of their subcontractors are not included.
20. We believe it is timely to support the changes proposed in the Bill with a change to proportionate liability. It is not acceptable that a shortfall in the insurance market or regulations leaves councils and the communities they serve to pick up the burden of plaintiff costs.
21. There is also considerable scope for better informed consumers. The intention of the building reform package places significantly more responsibility on homeowners who typically interact with the building industry infrequently or only once in a lifetime. Regardless of the scale of investment compared with other purchases, general consumer understanding of the risks is low and reliance on the regulatory system for protection of their investment is high.
22. We support the proposition that plaintiffs insure themselves against missing negligent defendants. This is in line with consumer options for other purchases, extended warranties for example. Regardless, targeted education of the risks is required and may need to be mandated via recognised intermediaries such as mortgage lenders. Potential homeowners should be using a registered, reputable building practitioner and making decisions based on factors other than price alone.
23. We note in the conclusions of the Law Commission report that if New Zealand were to shift to proportionate liability it should be applied universally to all negligence actions claiming economic loss or property damage. While the sector does not have a view on wider application of a proportionate liability, LGNZ does not see this as a reason not to make the change. We agree with the Law Commissions view that “the essential test is which rule or combination of measures is most likely to produce results that are efficient and fair to and between parties”.
24. We realise that the Law Commission is reviewing the law as it pertains to liability and stress the need to view this in the context of measures that the Government is implementing, many of which will take some time to produce change.

³ April 2011. “Review of the application of joint and several liability to the building and construction sector”. Buddle Findlay and Sapere Research Group for the Department of Building and Housing.

Conclusion

25. The leaky homes crisis understandably sparked demands for better apportionment of costs where there are multiple defendants. The present joint and several liability regime disadvantages local authorities as they cannot liquidate to avoid accountability and hence remain the “last man standing.” This at considerable cost to them and the communities they serve.
26. While not unsympathetic to the argument that plaintiffs should be able to fully recover losses, we cannot see the logic or justice in the wider community, the ratepayers, having to pay compensation where defendants are missing. A change to proportionate liability should be viewed as part of the suite of changes to improve accountabilities throughout the building and construction sector – consumers, builders and regulators.
27. Local authorities strongly support a change to proportionate liability.
28. LGNZ thanks the Law Commission for a very comprehensive review of joint and several liability and the opportunity to comment on this report.

Submission by Local Government New Zealand

IN THE MATTER OF:

Review of Joint and Several Liability

To the Law Commission

31 JANUARY 2013