



COVERSHEET

Minister	Hon Dr Megan Woods	Portfolio	Building and Construction
Title of briefing	Building Consent System Review: Release of Discussion Document	Date to be published	15 August 2022

List of documents that have been proactively released

Date	Title	Author
June 2022	Building Consent System Review: Release of Discussion Document	Office of the Minister of Building and Construction
29 June 2022	Building Consent System Review: Release of Discussion Document DEV-22-MIN-0155 Minute	Cabinet Office

Information redacted

YES

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reason of Confidential advice to Government.

In Confidence

Office of the Minister for Building and Construction

Cabinet Economic Development Committee

Building Consent System Review: Release of Discussion Document

Proposal

- 1 This paper seeks agreement to release:
 - 1.1 an issues discussion document *Review of the building consent system* for public consultation, to build a shared understanding of system-wide issues as a basis for assessing opportunities for changes to the current building consent system; and
 - 1.2 a companion policy position statement *Risk, liability and insurance in the building sector*, to provide clarity on the Government's position on the risk, liability and insurance settings for the building and construction industry.

Executive Summary

- 2 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.
- 3 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 the first time'.
- 4 I seek agreement to publicly consult on a review of the building consent system. Public consultation on the issues discussion document *Review of the building consent system* will build a shared understanding of issues as a basis for change. The issues discussion document presents the case for a whole-of-system approach to getting building work right first time.
- 5 I seek agreement to release the issues discussion document on or about 5 July 2022. Public consultation will occur for a minimum of six weeks.
- 6 Alongside consultation on the building consent system, I seek agreement to release the policy position statement *Risk, liability and insurance in the building sector*. This document seeks to provide clarity on the Government's position on the risk, liability and insurance settings for the building and construction industry. Risk and liability issues are likely to arise during consultation on the issues discussion document, and this supporting document will provide clarity to those submitters who consider those issues important.

- 7 I intend to report back to Cabinet *Confidential advice to Government* with findings from public consultation on the issues discussion document, and a draft discussion document on options for a new or revised building consent system for public consultation.
- 8 I also intend to report back to Cabinet on the policy position statement *Risk, liability and insurance in the building sector*, as part of the report back on the review of the building consent system *Confidential advice to Government*.

Background

- 9 The purpose of the building consent system is to provide assurance that buildings comply with minimum performance requirements under the Building Code. The Building Code aims to ensure that buildings are healthy, durable and safe.
- 10 The Government's pre-election manifesto committed to delivering a better building consent system to ensure that New Zealanders have access to secure, healthy and affordable housing.

The importance of conducting this review now

- 11 A review of the building consent system will be a key contributor to the Government's Economic Plan for a productive, sustainable and inclusive economy by helping to transform our housing market to unlock productivity growth and make houses more affordable.
- 12 The current building consent system originates in a system first established in 1991. This was when the building sector was predominantly producing detached, single-storey, timber-framed buildings. Over the following 30 years, the demand for different types of buildings has increased to address demographic changes and pressures on housing affordability. Design, procurement and building processes have also changed. Building and housing types have become increasingly diverse, and the relevant building and construction trades have become more specialised.
- 13 The building and construction sector is also going through a period of strong growth with increased demand to build at scale and at pace. Government initiatives aimed at stimulating urban development, increasing the supply of housing, including affordable housing, will place further pressure on the building consent system.
- 14 While the building consent system is processing a record volume of consents, it is under significant strain. There have been complaints about delays in processing building consents and long wait times for inspections before a code compliance certificate can be issued.
- 15 Building consent authorities also report significant challenges with attracting and retaining staff to cope with the current volume of consent applications and the expectation that consents will be processed in a timely manner. This

expectation creates a tension with the need for robust checking systems to minimise the risks of building defects and failure.

- 16 Further challenges are expected as the sector continues to innovate, for example, by adopting new technologies and design methodologies. Climate change and a focus on more sustainable use of resources will also impact the way we build in future.
- 17 The *Building Act 2004* and related measures, including the establishment of the licensed building practitioner scheme and the accreditation of building consent authorities, were introduced and implemented as system-level responses in the wake of the leaky homes crisis.
- 18 While these changes were a strong first step to improve the system, and there have been a number of subsequent changes to improve consenting efficiency, it has become apparent that further work is needed to support the sector and to get the system working the way it was intended.

Wider government reform and connections with the building consent system

- 19 The review of the building consent system supports the 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.
- 20 This review of the building consent system is considering connections and will be mindful of outcomes across other government work programmes.
- 21 The review of the building consent system is occurring at the same time as Three Waters Reform, and the Future of Local Government Review.
- 22 The Commerce Commission is also undertaking a market study into residential building supplies. The timing and outcomes of the Commerce Commission market study will also be considered as part of the review of the building consent system.
- 23 In addition, the resource management system is currently undergoing substantial reform. Work across the resource management and building consent systems provides an opportunity to consider how the relationship between the two systems could be streamlined and improved. There are opportunities to minimise areas of duplication or improve alignment between the building consent and resource management systems.

Review of the building consent system

- 24 I am undertaking a first-principles review that will look at all elements of the building consent system starting from the point at which buildings are designed. These elements are:
- 24.1 institutions – how the regulatory regime is structured;
 - 24.2 practice – how regulation is implemented; and
 - 24.3 system management – how the regulatory system is managed.
- 25 All of these elements need to be present and working well in order for the building consent system to be successful. Together, these elements determine the behaviours, incentives and consequences that building consent authorities and building industry participants face and, ultimately, the ability of the system to be successful and achieve desirable outcomes.
- 26 The issue of risk and liability in the building sector has been raised by some stakeholders as part of the building consent system. Good risk management necessarily focuses on getting building work right the first time therefore resulting in fewer building defects and exposure to building disputes. However, the liability rule for damages in civil matters in the building and construction industry (joint and several liability) is out of scope for this review.
- 27 Instead, I am taking a whole-of-system approach to this review and indicating that system-level change is a better approach for managing risk in the building regulatory system. Taking a whole-of-system approach to risk and liability includes quality building standards that are effectively monitored and enforced, a skilled and competent building workforce, and informed and empowered consumers, as well as a modern building consent system.
- 28 It is important to develop a shared understanding of system-wide issues and the direction of travel for further work. This is because perceived issues and potential solutions are often wide-ranging, contentious and potentially contradictory. The review includes three key steps:
- 28.1 an issues discussion document to build a shared understanding of system-wide issues and desirable outcomes to set a clear direction on options for system change;
 - 28.2 a discussion document on options for a new or revised building consent system; and
 - 28.3 advice on a preferred set of options for building consent system change.
- 29 To further support stakeholder input into the review, the Ministry of Business Innovation and Employment (MBIE) has established the Building Consent System Review Sector Reference Group. The group includes representatives

from local government, peak bodies, and relevant industry organisations. This group will inform policy development and public consultation.

- 30 Alongside commencement of this review, the Construction Sector Accord has identified short-term, non-regulatory interventions to alleviate immediate system pressures. The Accord's first Transformation Plan includes operational projects focussed on supporting quality building consent applications, supporting partner programmes, and enabling quality documentation of a build to support remote inspections. These projects bridge the gap between now and medium-term change, and are expected to be completed by 30 June 2022. The Accord is now developing a second Transformation Plan to cover the period from 2022-25.

Development of the issues discussion document *Review of the building consent system*

- 31 The first step in the review is to release an issues discussion document for public consultation. The issues document seeks to build a shared understanding of system-wide issues as a basis for considering future system-wide change.
- 32 The discussion document draws on evaluation and research undertaken in 2021, including international jurisdictional analysis, sector trends, findings and insights from previous reviews of the building regulatory system and the MBIE formal evaluation of the building consent system.
- 33 The discussion document has been further refined by a range of informal engagements with more than 30 key stakeholders (including local government, peak bodies and industry organisations) during February and March 2022, including the first meeting of the Building Consent System Review Sector Reference Group. These stakeholders expressed broad support for a first principles approach that would consider all of the factors that may be affecting the efficiency, effectiveness and predictability of the building consent system.
- 34 The issues discussion document is attached at Appendix 1 and covers three key areas:
- 34.1 the **role of government**, in providing assurance that buildings are safe, healthy and durable;
 - 34.2 **desirable outcomes** that a good building consent system should seek to achieve; and
 - 34.3 **issues** with the current building consent system.
- 35 The details of the outcomes and issues outlined in the attached issues discussion document are summarised as follows.

Desirable outcomes for the building consent system

- 36 Being clear on the outcomes the Government wants the building consent system to achieve is an important first step in the review. Testing and confirming desirable outcomes through consultation will help to secure sector buy-in for system change. Feedback from informal engagements to date suggests that there is a divergence of views on both the extent of change that is required and what the system needs to achieve.
- 37 Clear outcomes will help us to describe what we want the building consent system to do – what its objectives ought to be, what it should deliver, and how it should perform. This will set the direction for further work and provide a sound basis for considering options for change.
- 38 The issues discussion document sets out four critical outcomes that are necessary for any building consent system to be successful. The following outcomes have been informally tested with stakeholders in the sector:
- 38.1 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;
 - 38.2 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;
 - 38.3 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; and
 - 38.4 regulatory requirements and decisions – regulatory requirements are clear and decisions are robust, predictable, transparent and broadly understood.
- 39 Collectively, these outcomes work together to support a high performing building and construction sector that delivers healthy, safe and durable buildings the first time.

Issues identified within the building consent system

- 40 The issues discussion document aims to test five key issues, identify other issues, and gather evidence on the scale and significance of these issues.
- 41 In conjunction with informal feedback from stakeholders, MBIE has identified the following systemic and overlapping issues that are undermining the achievement of consenting system outcomes described above:
- 41.1 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.

- 41.2 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.
- 41.3 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.
- 41.4 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.
- 41.5 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 variable processes, tools and functions being implemented across building consent authorities, and difficulties maintaining a professional workforce. Projects requiring both building and resource consents may also face inefficiencies and additional costs.

Proposal for public consultation

- 42 I propose to release the issues discussion document *Review of the building consent system* for public consultation, on or about 5 July 2022 for a period of six weeks.
- 43 I seek authorisation to approve the final release date of the discussion document, and to make minor and technical changes to the discussion document and supporting documents before they are released.
- 44 The purpose of this consultation will be to develop a shared understanding of system-wide issues and the direction of travel for further work. Developing a shared understanding now is important because perceived issues and potential solutions are often wide-ranging, contentious and potentially contradictory. Feedback from stakeholders will also support connections between the building consent system and other regulatory systems, such as resource consent processes.
- 45 Public consultation will target the full breadth of public interest including home and building owners, building product manufacturers, building consent authorities, peak bodies, building professionals, and building product users.

- 46 Following consultation, MBIE will analyse the submissions and undertake further work to confirm issues and potential options for a new or revised building consent system. An options discussion document for public consultation is scheduled for public consultation **Confidential advice to Government**, which will set out preferred options for change.
- 47 This timeframe is intended to align with the expected timeframe for a Government response to the Commerce Commission market study into residential building supplies and a report to the Minister of Local Government on the Future of Local Government Review. The findings from these reviews will be used to help inform the options for system change.

Policy position statement on *Risk, liability and insurance in the building sector*

- 48 Liability arises when things go wrong. The principal liability rule in New Zealand for allocating liability for damages in civil matters in the building and construction industry is joint and several liability. Under joint and several liability, defendants that are liable for the same damage are liable for the whole of that damage, regardless of how many other defendants are also at fault. The joint and several liability rule is primarily concerned with protecting the injured plaintiff (homeowner).
- 49 Risk, liability and insurance settings in New Zealand's building and construction sector have been extensively examined and debated for more than 20 years. For the building and construction sector, a key question has been whether to retain the current joint and several liability rule or move to proportionate liability¹.
- 50 The Law Commission has twice considered whether the joint and several liability rule remains appropriate in the New Zealand context. Its last review, completed in 2014, recommended that the joint and several liability rule remain, and made a number of recommendations for further work in relation to the building and construction sector.
- 51 MBIE has recently undertaken the further work recommended by the Law Commission, as part of the Building System Legislative Reform Programme. This included public consultation in 2019 on policy options to cap building consent authority liability and introduce a residential building guarantee scheme.
- 52 MBIE's subsequent analysis did not find a strong case for options suggested by the Law Commission. Advice provided in 2021 to the previous Minister for Building and Construction, the Minister of Finance, and me, in my capacity as the Minister of Housing, instead recommended the presenting issues (e.g. claims of excessive risk averse behaviour and lack of accountability) be addressed at the system level to get building work right in the first place and minimise the risk of building disputes where liability issues are most visible.

¹ Under the proportionate liability rule, defendants are liable only for the proportion of the loss or damage that a court determines is just, taking into account each defendant's relative level of fault or comparative responsibility.

- 53 Some stakeholders, particularly those with a connection to local government, have asked for the review to consider the current joint and several liability rule. These stakeholders consider that any reform of the building consent system will not be successful without considering a move away from the joint and several liability rule.
- 54 Noting the recommendations of previous Law Commission reviews, recent advice to Ministers on those reviews and informal engagement with industry stakeholders, the attached draft issues discussion document confirms that the liability rule falls outside the scope of this review.
- 55 Instead, the issues discussion document makes the case for a whole of system approach to risk and liability in the building and construction sector. A whole of system approach to risk and liability includes quality building standards that are effectively monitored and enforced, a skilled and competent building workforce, informed and empowered consumers, as well as a modern building consent system.
- 56 To address stakeholder concerns that the joint and several liability rule is not in scope for the building consent system review, I propose to release a companion policy position statement *Risk, liability and insurance in the building sector* alongside the building consent system review issues discussion document (Appendix 2 refers).
- 57 This policy position statement has been prepared in order to effectively communicate to the building sector recent decisions by Ministers in this area and basis for these decisions. It sets out the last 20-plus years of risk, liability and insurance work undertaken by MBIE and its predecessor agencies and covers the following matters:
- 57.1 an outline of the two Law Commission reviews of joint and several liability, as well as the rationale behind the Government's response to each of these reviews;
 - 57.2 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;
 - 57.3 recent Ministerial decisions taken on the Law Commission recommendations;² and
 - 57.4 the strategic direction and 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, and the direction of future reforms.
- 58 The policy position statement *Risk, liability and insurance in the building sector* will support consultation on the future direction of the review of the

² Noting that the Government Response to the Law Commission Report *Liability of Multiple Defendants* in 2014 had already accepted the Law Commission's recommendation that the liability rule remain unchanged, and recent advice to Ministers has reconfirmed that position.

building consent system by providing further information to stakeholders. Formal submissions will not be sought on the policy position statement on risk, liability and insurance. However, MBIE officials would welcome discussions with interested stakeholders to help inform further thinking on the building consent system review.

- 59 I will report back to Cabinet with a final policy position statement, which takes into account any further thinking as work continues on the building consent system review. This report back will occur at the same time as Cabinet agreement is sought to release the building consent system review options discussion document, currently planned for Confidential advice to Government

Financial Implications

- 60 There are no financial implications from the proposal to consult.

Legislative Implications

- 61 There are no immediate legislative implications from the proposal to consult on the discussion document.
- 62 I will report back to Cabinet seeking approval to further consult on policy options following the initial consultation on the issues discussion document.

Impact Analysis

Regulatory Impact Statement

- 63 There are no regulatory proposals in this paper, and therefore Cabinet's impact analysis requirements do not apply.

Climate Implications of Policy Assessment

- 64 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply as there are no emissions impacts at this stage.

Population Implications

- 65 The outcomes and issues in this issues discussion document are broadly focussed on finding ways to improve the operation and performance of the building and construction system; they are not directed at any one specific population group. Public consultation on the issues discussion document will seek to engage with population groups.
- 66 Equity considerations affecting different population groups will be taken into account during options development.

Human Rights

- 67 The proposals in this paper have no implications under the *New Zealand Bill of Rights Act 1990* or the *Human Rights Act 1993*. There are no gender or disability implications arising from this paper.

Consultation

- 68 MBIE consulted with the following government agencies on the draft Cabinet paper, the draft issues discussion document and draft policy position statement: Department of the Prime Minister and Cabinet; the Treasury; Ministry of Justice; Ministry of Housing and Urban Development; Ministry for the Environment; Ministry of Social Development; Ministry of Education; Ministry of Health; Ministry of Defence; Ministry of Transport; Te Puni Kōkiri; Department of Internal Affairs; Department of Corrections; Ministry for Pacific Peoples; Commerce Commission; and Ministry for Primary Industries.

Communications

- 69 I will be making a media statement to accompany the release of the issues discussion document and the policy position statement *Risk, liability and insurance in the building sector*. The issues discussion document and the policy position statement will be made publicly available on MBIE's website.

Proactive Release

- 70 I propose to release this Cabinet paper and associated Cabinet Minute in full.

Recommendations

The Minister for Building and Construction recommends that the Committee:

- 1 **note** that a key priority for the Government is delivering a better building consent system to ensure that New Zealanders have access to secure, healthy and affordable housing;
- 2 **note** the importance of engaging with the building and construction sector on the review of the building consent system to build a broad understanding of system-wide issues and to set the direction of travel for further work on options for change;
- 3 **agree** to the release of the attached issues discussion document *Review of the building consent system*, for public consultation;
- 4 **note** that a policy position statement *Risk, liability and insurance in the building sector* has also been prepared to clarify the Government's position on the risk, liability and insurance settings for the building and construction industry and to support consultation on the review of the building consent system;

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- 5 **agree** to release the policy position statement *Risk, liability and insurance in the building sector* alongside the issues discussion document on the review of the building consent system;
- 6 **authorise** the Minister for Building and Construction to make minor amendments and refinements to the issues discussion document and supporting documents before they are released;
- 7 **note** that the Minister for Building and Construction intends to release the issues discussion document on or about 5 July 2022, and will be making a media statement on the release;
- 8 **note** that the Minister for Building and Construction intends to report back to Cabinet **Confidential advice to Government** with a further discussion document on options for system change.

Authorised for lodgement

Hon Dr Megan Woods

Minister for Building and Construction

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Appendices

Appendix 1: Issues discussion document: *Review of the building consent system*

Appendix 2: Policy position statement: *Risk, liability and insurance in the building sector*