

**Government Response to Law Commission
Report *Liability of Multiple Defendants***

Presented to the House of Representatives

Government Response to Law Commission Report *Liability of Multiple Defendants*

Introduction

The Government has considered the Law Commission Report, *Liability of Multiple Defendants* (NZLC R132) (the Report) presented to the House of Representatives on 24 June 2014. The Government responds to the Report in accordance with Cabinet Office circular CO (09) 01.

The Government has carefully considered the Commission's recommendations. The Government accepts the Law Commission's main recommendation to retain joint and several liability. The Government has identified the need for further work on the other recommendations.

Law Commission Report

The Law Commission report deals with how liability is distributed among multiple defendants who are found to have caused the same damage.

Background to the review

The Government referred the issue of how to allocate liability among multiple defendants to the Law Commission in 2011. It asked the Commission to consider whether joint and several liability should be retained generally and in relation to particular professions or industries. The question arose in the context of the leaky home issue. Several stakeholder groups considered that they had been required to pay more than their 'fair share' because of joint and several liability.

Joint and several liability means that when multiple defendants are found to have caused the same damage, each defendant can be obliged to pay up to the full amount of the loss suffered by the plaintiff.

The alternative to joint and several liability is proportionate liability, where each defendant is liable for no more than their relative share of fault. This means that the plaintiff bears the risk of defendants who cannot pay.

Law Commission report

The Law Commission report contains 17 recommendations. The Commission recommends retaining joint and several liability across the legal system, including for the building sector and professional services markets, subject to some modifications.

Retaining joint and several liability (recommendations 1, 2, 8 and 12)

The Law Commission found that joint and several liability provides the best assurance that the plaintiff will be compensated for their loss. Under proportionate liability, if there

is an absent defendant, the blameless plaintiff will be out of pocket. The Commission says:

[T]he Commission is of the view that 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 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 reviewed the evidence as to which liability rule is more likely to produce economic efficiency. The Commission concluded that there is no sound evidence that proportionate liability would be more efficient within the wider economy. Therefore it concludes that joint and several liability should be retained.

However, the Commission also recommends some modifications to joint and several liability where the effects on liable defendants would otherwise be particularly harsh.

Relief for a minor defendant (recommendations 3-5)

The Law Commission found that joint and several liability can be harsh on defendants who only contributed to the wrongdoing in a minor way. If a minor defendant is the only solvent defendant, it is liable to the plaintiff for the full loss.

The Law Commission recommends that courts have discretion to relieve a minor defendant from the full burden of joint and several liability if the result would otherwise be unduly harsh and unjust. The court would be required to balance the interests of the plaintiff and minor liable defendant, and ensure that the plaintiff would still receive an effective remedy.

Supplementary contribution (recommendations 6-7)

Under joint and several liability any liable defendant can be required to pay the full loss to the plaintiff. The rules of contribution require other liable defendants to reimburse a defendant who has paid more than their share of the plaintiff's loss.

The Law Commission recommends a change to the rules of contribution to more fairly share liability for uncollected shares among available and solvent defendants. Currently the defendant first pursued by the plaintiff pays a greater proportion of uncollected shares of insolvent or missing liable defendants. The Law Commission recommends that this cost be shared proportionately among the remaining defendants.

Building sector recommendations (recommendations 9-11)

The Law Commission recommends that joint and several liability should be retained in the building sector. The Commission considers that whilst solvent defendants are

sometimes forced to meet uncollected liability shares of absent defendants, it could find no evidence of a systemic problem that would create economic efficiencies sufficient to justify the introduction of proportionate liability.

However, the Commission is of the view that Building Consent Authorities differ from other potential defendants in that they do not enter the market voluntarily, cannot adjust their fees based on the level of risk they assume, have limited opportunity to insure and their resources make them attractive defendants. It therefore also recommends that the liability of Building Consent Authorities be capped. The Commission also acknowledges the anecdotal evidence that the unique position of Building Consent Authorities may cause them to be 'risk averse'. It recognises that this may be caused by a range of other factors that Building Consent Authorities face and may therefore be addressed through means other than the liability regime.

The proposed cap for Building Consent Authorities would initially be set at:

Type of building	Proposed liability cap
Single dwelling	\$300,000
Unit in a multi-unit development	\$150,000 per unit
Multi-unit development	\$3 million

The Commission also recommends:

- exploring the feasibility of, and implementing, a residential building guarantee scheme, and
- amending the Building Act 2004 to clarify the extent of Building Consent Authorities' liability for commercial consents.

A residential building guarantee scheme could require that builders offer a suitable warranty product to each customer, who decides whether or not to purchase the warranty. Such a scheme could potentially provide protection for consumers if caps were introduced.

Amending the Building Act 2004 would clarify the extent and limits of Building Consent Authority liability for commercial consents, in a similar form to the sections which set out limited responsibilities for simple or low risk consents.

Liability caps for auditors and audit firms (recommendations 13-17)

The Law Commission also recommends that liability of auditors conducting large audits should be capped. The Commission considers caps would allow New Zealand audit firms to remain competitive and reduce the risk associated with a catastrophic loss event.

The proposed caps would be based on audit firm revenue, with a three tier system:

Annual revenue for large and complex audits	Proposed liability cap per audit
Greater than \$20 million	\$80 million
Between \$10 million and \$20 million	\$10 million
Less than \$10 million	\$2.5 million

The auditor would be required to have professional indemnity insurance up to the capped level.

Government Response

The Government thanks the Law Commission for its Report.

The Government accepts the Law Commission’s recommendation to retain joint and several liability across the legal system, including for the building sector and professional services markets (recommendations 1, 2, 8 and 12).

The Government notes that the Law Commission report has highlighted some misunderstanding about joint and several liability and how it operates. The Commission says:

Joint and several liability only arises where there is an indivisible loss. This is where each liable defendant has caused or contributed to a single indivisible loss suffered by the plaintiff. The unfairness of the proportionate system of liability is that the risk of the uncollected share will be carried by a party, the plaintiff, who has not actually caused and is not in any sense responsible for the loss. Our conclusion is that the asserted “unfairness” of joint and several liability to some defendants is, at best, overstated.

The Government also notes that the Law Commission’s recommendation to retain joint and several liability accords with previous Law Commission reports on this issue and independent advice to the Department of Building and Housing.

Need for further consultation and regulatory impact analysis

The Law Commission has identified some potential issues around the operation of joint and several liability and recommended the changes to joint and several liability described above. Further analysis of the issues raised, as well as of the regulatory impact of those proposed changes is required. The Government also notes that the Law Commission’s specific proposals have not been the subject of public consultation.

Further work will consider the regulatory impact of the recommendations regarding:

- relief for a minor defendant (recommendations 3 to 5)
- supplementary contribution (recommendations 6 to 7)
- building sector recommendations (recommendations 9 to 11)
- liability caps for auditors (recommendations 13 to 17).

Next Steps

The Government has directed the Ministry of Justice and the Ministry of Business, Innovation and Employment to further analyse the value and potential impact of the recommendations identified above and report back to their respective Ministers.