



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PLC:JvdPgl051022

5 October 2022

Policy and Strategy
Department of Customer Service
Locked Bag 2906
LISAROW NSW 2252

By email: HBAReview@customerservice.nsw.gov.au

Dear Sir/Madam,

Draft Building Legislation Amendment (Building Classes) Regulation 2022

Thank you for the opportunity to comment in this consultation on the Draft Regulation. The Law Society's Property Law Committee has contributed to this submission.

Our feedback on relevant questions in the Regulatory Impact Statement is provided in the **attached** comments table.

Any questions in relation to this letter should be directed to Gabrielle Lea, Policy Lawyer, on (02) 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Sonja Stewart
Chief Executive Officer

Encl.

Building Legislation Amendment (Building Classes) Regulation 2022 – Regulatory Impact Statement

Comments from the Law Society of NSW

QUESTIONS	COMMENTS
Expanding the DBP Act to Classes 3 and 9c	
<p>Question 1: Do you support the expansion of the DBP obligations to Class 3 and 9c buildings? If not, why?</p>	<p>Yes, we support the proposed expansion. Given the breadth of the reforms in the <i>Design and Building Practitioners Act 2020</i> (“DBP Act”), in our view it was appropriate to limit its operation initially to Class 2 buildings. However, maintaining that limitation would, as noted at page 25 of the Regulatory Impact Statement, expose other building classes to the risk of “poor practitioners” concentrating their work in those other building classes, to the overall detriment of the clients of such practitioners and building standards generally.</p>
<p>Question 2: Is the proposed timetable for commencement of the reforms suitable? If no, what should change?</p>	<p>We are concerned that preparation for, and education about, the proposed commencement of Stage 2 may be impacted by the State Election in March 2023. We suggest that a June commencement date, rather than an April commencement date, would be more manageable, with Stage 3 commencement extended until December 2023.</p>
Building work exemptions	
<p>Question 3: What exemptions, if any, do you think should be introduced for building work on Class 3 or 9c buildings? Why?</p>	<p>In answer to questions 3 to 6 inclusive, we believe that as a general proposition the existing exemptions should apply to the new classes of buildings. As to any possible modifications, we defer to other stakeholders with technical expertise.</p>
<p>Question 4: Are there particular exemptions that should apply to certain types of buildings within these classes? For example, allowing waterproofing work for multiple units in a boarding house without being subject to the DBP Act. Why?</p>	
<p>Question 5: The requirements will also apply to the non-Class 3 and 9c parts of a mixed-use building. Are there exemptions needed specifically for these parts? Why?</p>	
<p>Question 6: Should any of the existing exemptions not apply to Class 3 or class 9c building work? Why?</p>	

QUESTIONS	COMMENTS
Design Practitioner classes	
Question 7: Should practitioners registered under existing classes in DBP for Class 2 work be automatically eligible to work on Class 3 and 9c buildings?	Yes, in our view, it is difficult to see why eligibility should not be automatic.
Question 8: Are further practitioners required for Class 3 and 9c buildings? Why?	Implementation will need to ensure that there are sufficient practitioners to undertake the increased volume of work that is likely to arise from the expansion of projects required to be undertaken by registered practitioners.
Question 10: Should there be an unrestricted class of building designer? Why or why not?	In our view, there is a need for an additional class of building designer, as SEPP 65 does not apply to Class 3 or 9c buildings, and building designers are currently restricted to work on medium and low-rise buildings for Class 2 work under the DBP Act registration scheme. If an additional class is not created, those who are currently only able to work on medium and low-rise buildings may attempt to work on more complex buildings without necessarily having the appropriate expertise.
Question 11: Should the temporary pathways for registration ('grandfathering provisions') and competency assessments that were available when the legislation first applied to Class 2 be reopened for the expansion to Classes 3 and 9c? Why?	Yes. For experienced practitioners who do not have, nor need, formal qualifications, in our view it is appropriate to allow grandfathering. Given grandfathering provisions were used when the legislation first applied to Class 2, we suggest that before reopening the provisions for Classes 3 and 9c, an assessment should be undertaken as to whether the provisions worked satisfactorily for Class 2.
Building Practitioner classes	
Question 13: Will further practitioner classes be required to cover work on a building part that might be mixed with a Class 3 or 9c building? Why?	Additional practitioner classes may be required for work on Class 3 or Class 9c building work which is part of a more complex mixed use development.
Question 14: Are the existing qualifications appropriate for registration as a Building Practitioner for Class 3 and 9c work?	Yes, in our view it is appropriate to mirror the qualifications needed for registration as a general builder under the <i>Home Building Act 1989</i> ("HBA") and we support that harmonisation. The building industry is also familiar with these qualifications, which will assist with compliance.
Question 15: As Building Practitioners registered for DBP won't also have licences under the HB Act, should these practitioners be subject to additional CPD or other requirements?	Yes. Building Practitioners who are not licensed under the HBA should be subject to additional CPD requirements which are, at a minimum, equivalent to the CPD requirements under the HBA.

QUESTIONS	COMMENTS
<p>Question 16: Should there be additional qualifications required for this work?</p>	<p>No. Even if construction of Class 3 and Class 9c buildings is considered more complex than construction of Class 2 buildings, these complexities are more likely to arise and be covered in the design and engineering phase rather than in the building work/construction itself. Further, those who engage building practitioners will likely choose practitioners with experience appropriate to the building project.</p>
<p>Professional Engineers Scheme</p>	
<p>Question 17: Do you support the expansion of the Professional Engineering Scheme to Classes 3 and 9c? Why or why not?</p>	<p>Yes, it is appropriate to expand the Professional Engineering Scheme to Class 3 and 9c to provide greater consumer confidence, promote stricter builder compliance with engineering work, and reduce the occurrence of building defects.</p>
<p>Question 18: It is proposed for the expansion to occur in April 2023. Do you support this timeframe? If not, why?</p>	<p>We suggest that a June commencement date rather than an April commencement date would be more appropriate, as per Question 2 above.</p>
<p>Question 19: For the first year of the Professional Engineering Scheme, practitioners who did not meet the qualification requirements could become registered for Class 2 buildings if they successfully completed a competency assessment and had 10 years relevant experience in the previous 15 years. Should this alternate registration pathway be reopened when the scheme is expanded to those working on Class 3 and 9c buildings? Why?</p>	<p>Yes, in our view an alternative registration scheme should be available to those working on Class 3 and 9c buildings, and it would be appropriate to apply the same pathway available to professionals working on Class 2 buildings.</p>
<p>A levy to maintain momentum restoring confidence in the industry</p>	
<p>Question 20: Do you think industry should contribute to the cost of the Construct NSW reforms? Why or why not?</p>	<p>Yes, there needs to be a transparent contribution by the building industry, given the greater focus on accountability, and the need to ensure the long term sustainability of the reforms.</p>
<p>Question 21: Are the ranges for the graduation of rates appropriate for Class 3 and 9c? Why or why not?</p>	<p>Yes. We note the ranges for the graduation of rates are unchanged from those currently applying to Class 2 buildings under the <i>Residential Apartment Buildings (Compliance and Enforcement Powers) Regulation 2020</i>, sections 7 and 8. We see no reason why different ranges should apply for Class 3 and 9c, and consistency between the classes will aid in industry awareness and compliance.</p>

QUESTIONS	COMMENTS
<p>Question 22: Do you support the levy attaching to each ECN? Why or why not?</p>	<p>Yes. As discussed in the paper, it is appropriate for the payment of the levy to occur prior to that stage of the works being completed. This allows for potential transfers between developers after certain stages and does not overly burden the developer.</p>
<p>Question 23: Are the existing exemptions appropriate for Class 3 and 9c building work? Why or why not?</p>	<p>Yes, the exemptions identified at pages 55 and 56 of the Regulatory Impact Statement are appropriate in our view to ensure consistency.</p>
<p>Question 24: Are further grounds for the waiver, reduction, postponement or refund of levy needed? If so, what are they?</p>	<p>We suggest that the grounds to waive, reduce, postpone or refund a levy for financial hardship should be expanded to also include an owners corporation or community association undertaking rectification works.</p>