THE LAW SOCIETY
OF NEW SOUTH WALES

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15 October 2019

Design and Building Practitioners Bill 2019 consultation
Better Regulation Division, Regulatory Policy
McKell Building
2-24 Rawson Place
Sydney NSW 2001

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

Dear Review Team,

Public Consultation on the Design and Building Practitioners Bill 2019

Thank you for the opportunity to make a submission on the Design and Building Practitioners Bill 2019. The Law Society's Litigation Law and Practice, Environmental Planning and Development, and Property Law Committees contributed to this submission. We note that while the proposed changes may require practitioners in the design, building and construction sector to review and change their current practices, on balance the changes introduced in the draft Bill are considered positive.

1. General comment

Significant details across the draft Bill remain to be prescribed by regulation. For instance, it is the regulations that will provide which classes of buildings are going to be subject to the new duty of care provisions (see definition of "building" in clause 26(1)). Any broadening or narrowing of the buildings covered by regulation should be carefully considered.

Without seeing a draft of the proposed regulation, it is difficult to provide a full submission on the impact of the draft Bill. We do understand that on a practical level, it is sensible to allow for flexibility of regulation making to shape the application of the draft Bill. However, this approach is particularly problematic where the draft Bill defines a key term but provides that a regulation may subsequently reduce the scope of that definition. Examples of this approach in this draft Bill include clause 4 which defines building work, clause 6 which defines building elements and clause 7 which defines building practitioners.

This approach results in less comprehensive public scrutiny being applied to changes in legislative reform. Scrutiny is an important part of our parliamentary process, allowing the general public, stakeholders and interest groups the opportunity to consider and comment upon any proposed changes.

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Below we set out our detailed comments on the draft Bill, in the limited time available.

2. Part 1 Preliminary

We suggest that consideration could be given to adding a new clause to this Part that sets out the objects of the draft Bill. This is useful as explanatory material for the new reforms and assists in tracking the utility of the legislation when reviewed in later years.

3. Part 2 Regulated designs and building work

We note that clause 15(1) provides:

> A registered building practitioner must provide a building compliance declaration and other required documents to a person for whom the practitioner does building work before an application is made for an occupation certificate for the building to which the work relates.

Clause 18(2) provides that:

> If a building compliance declaration sets out steps proposed to be taken to ensure compliance with the *Building Code of Australia* and other requirements, the building practitioner must give a written notice containing the proposed steps to the principal certifier who is to be responsible for issuing an occupation certificate for the building work.

These are two examples where the draft Bill imposes requirements for declarations before an occupation certificate issues. However, there is no requirement to maintain a depository where these declarations and documents are kept and made available to the general public. Such a depository would give transparency to the process and accessibility to declarations and documents, including plans, especially if this is needed in the future.

Consideration should also be given as to whether amendments to the *Environmental Planning and Assessment Act 1979* (NSW) ("EPA Act") which abolish "interim" and "final" occupation certificates and replace them with occupation certificates which may issue for either "part of" or "a whole building", will impact upon the draft Bill.

Clause 22 (Requirements for compliance declarations before issue of building certificates) contemplates providing one or more declarations or final regulated designs before the complying development certificate or a certificate under Part 6 of the EPA Act issues. We refer you to the submission we made dated 24 July 2019 to the NSW Government's Building Stronger Foundations Discussion Paper, in particular our responses to questions 2, 3 and 4 (attached). We suggest that the Bill could go much further in order to protect the general public by requiring the giving of declarations at the various certification stages under the EPA Act, depending on circumstances. The regulations may be critical in this regard.

We note that under clause 11 (Registered design practitioners to be indemnified), clause 14 (Registered principal design practitioners to be indemnified) and clause 20 (Registered building practitioners to be indemnified) there is the obligation to be "adequately insured". It is not clear what provision for insurance is made where the practitioner dies or becomes bankrupt. A claim may be made some years later (subject to limitation issues). What if a relevant design or building practitioner has ceased business or for whatever reason no longer has insurance? We note the regulation making power provided by clause 25 (Regulations relating to insurance requirements). We expect that

further consideration will be given to matters such as run-off cover and whether there may be a role for some type of industry insurance scheme.

In circumstances in which application for registration may be at three or five year intervals and not annually (under clause 38), we query who will make sure that insurance is maintained each year after the policy is taken out and registration granted. Will insurance companies provide insurance for three or five years and permit the insured to pay the premium for three or five years in advance in circumstances in which the practitioner must apply for registration at three or five year intervals, as the case may be? There appear to be practical issues here which require further consideration.

4. Part 3 Duty of care

We note that clause 26(1) defines "owner" of land by reference to "individuals". We expect that this was intentional to distinguish legal persons from corporate legal entities. We note for the purposes of Part 3, "owner" includes an owners corporation under the *Strata Schemes Management Act 2015* or the relevant association under the *Community Land Management Act 1989* (if relevant for the subject land). We are concerned that protections are missing for impacted "unsophisticated" corporate entities even though this was the underlying intent in the NSW Government's response, where a key reform proposal was "ensuring that building practitioners owe a common law duty of care to owners' corporations and subsequent residential homeowners, as well as unsophisticated development clients."[1] Furthermore, on their face, the provisions could be open to circumvention by other corporate entities, through transferring the land into the name of a director, if the defects were sufficient to overcome the cost of transfer duty.

5. Part 4 Registration of practitioners

Further to our comments made above regarding the period of insurance and the period of registration, it may be appropriate to revise clause 38 so that registration is an annual process, similar to legal practitioners renewing practising certificates annually. This facilitates annual checking that requisite insurance is in place.

In our view, clause 36(2) (Grounds for an opinion that a person is not a suitable person to carry out work) and related clauses in Part 4 Division 1 do not go far enough to address the problem of "phoenix companies". We suggest there should be specific reference to an applicant's involvement in any company previously wound up and the obligation to provide further details.

6. Part 7 Enforcement

In relation to clauses 78 (Stop work orders) and 79 (Review by Civil and Administrative Tribunal), we suggest it would be more appropriate to have decisions regarding stop work orders reviewed by the Land and Environment Court, particularly as that Court has jurisdiction in relation to injunctions under clause 80.

We are particularly concerned with the short limitation period of three years provided by clause 82(5) for proceedings for an offence under the draft Bill or regulations. In our view three years is too short given the time taken for some building issues to appear, the serious consequences and financial hardship suffered as a result of substandard building work and having regard to other limitation periods in construction legislation such as the *Home Building Act 1989*.

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[1] NSW Government, Building Stronger Foundations Discussion Paper, p9.

7. Part 8 Miscellaneous

We note that the particulars listed in clause 86(3) (Practitioner's registers) are not exhaustive, but we suggest that a reference to stop work orders, injunctions and undertakings, which are referred to Part 7 of the draft Bill, would also be appropriate.

8. Penalties and disciplinary proceedings

We note that some offences carry serious maximum penalties which we support. For example, clauses 9(6), 12(4), 15(4) and 24(2); which have a maximum penalty of 2,000 penalty units or imprisonment for 2 years or both. We also note that the penalty under clauses 17(1) and 17(2) is 3,000 penalty units (for body corporate) or 1,000 (in any other case). However, in our view, other maximum penalties imposed are insufficient for the offences created by the draft Bill, given the enormous amounts of money involved in the construction industry.

In terms of disciplinary proceedings, we note that under clause 55(1)(c) the Secretary may impose a penalty not exceeding $220,000 (in the case of a body corporate) or $110,000 (in the case of a or individual). Again, we query whether these are sufficient maximum penalties given the conduct that the draft Bill is intended to prevent and the context in which these reforms are being introduced.

The Law Society thanks you for the opportunity to make this submission. If you have any questions please do not hesitate to contact Gabrielle Lea, Policy Lawyer, on (02) 9926 0375 or at gabrielle.lea@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Prop/EP&D/LL/BL:EEgl1762502

24 July 2019

Building Stronger Foundations consultation
Regulatory Policy, Better Regulation Division
Department of Finance, Services and Innovation
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HAYMARKET NSW 2000

By email: BCR@finance.nsw.gov.au

Dear Sir/Madam,

Building Stronger Foundations Discussion Paper ("Discussion Paper")

The Law Society of NSW appreciates the opportunity to comment on the Discussion Paper. The Law Society's Property Law, Environmental Planning and Development, Litigation Law and Practice and Business Law Committees contributed to this submission.

We understand that the Government is currently considering other ways to restore confidence in the building sector, which we support. We note that relevant Ministers met recently to discuss these matters at a national level, and we support harmonising legislation and remedies across Australia. We would welcome an opportunity to participate in further consultation as appropriate.

Our responses to the questions raised in the Discussion Paper, which should be read subject to the comments contained in this covering submission, are set out in the attached table.

Review and enhancement of the current protections under the *Home Building Act 1989*

The Discussion Paper notes the existing protections afforded to consumers under the *Home Building Act 1989* ("HBA"). Before creating a new statutory duty of care, as proposed in the Discussion Paper, we recommend thorough consideration be given to enhancing the protections already available under the HBA and filling any gaps in the protections currently available.

The current statutory warranties scheme under the HBA provides a clear and streamlined method for a plaintiff to obtain a non-apportionable right of recovery from a builder or developer, avoiding the requirement to establish a duty of care. The statutory warranties scheme also applies to subsequent owners. For these reasons, we consider the current scheme provides better protection, at least for residential owners, than a statutory duty of care, where a plaintiff would be required to determine such matters as who should be liable, and damages would be subject to questions of apportionment.

Instead of creating a new statutory duty of care regime, we consider enhancing the statutory warranties scheme and broadening its application may address many of the issues raised in the Discussion Paper. For example, we note the insurance protections afforded to consumers under the HBA only apply to buildings up to three storeys in height. We consider this limitation is arbitrary and should be reviewed urgently.

We also recommend consideration be given to the timeframes that operate in relation to HBA claims, both the limitation periods for major and non-major defects, as well as the commencement date of the warranties from completion of the work. We recommend any review of the HBA should also include consideration of:

- whether the distinction between major and non-major defects is fit for purpose,
- mechanisms to address remaining gaps in protections for residential property owners, and
- whether the HBA warranties should be expanded to also include architects or other appropriate professionals, such as engineers.

We would welcome an opportunity to participate in further discussions about opportunities for enhancing protections under the HBA scheme.

If the Government does pursue the creation of a statutory duty of care, our comments in relation to that scheme are in the attached table.

Building Commissioner

The Discussion Paper outlines the NSW Government's intention to establish the new position of Building Commissioner. The Law Society recommends that, if established, a Building Commissioner must be properly resourced as well as given an appropriate suite of compliance and enforcement powers.

We would be pleased to meet with you to further discuss the matters raised in this submission. Any questions should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Elizabeth Espinosa
President

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Discussion Paper – Building Stronger Foundations

Submission by the Law Society of NSW – July 2019

NO.	QUESTIONS	COMMENTS
Part 3 – Introducing 'building designers' into NSW legislation		
3.2. Role and function of 'building designers'		
3.2.1. Declaring that plans comply with the BCA and other relevant requirements		
Future process		
Q.1.	What kinds of plans should be signed off and declared by a statutory declaration?	This is a question of a technical nature which is better answered by those whose business it is to plan and to build large residential and commercial structures and those whose business it is to regulate that activity. However from a broad perspective, it seems appropriate to insist that a plan of an element which is essential to the stability, integrity or the safety of a completed building and which if it were to fail or to become unsafe, would cause significant loss, damage or injury to occupiers, neighbours owners or passers-by, should provide all of the detail required to ensure that, at completion of the works there exists, a reliable, stable, safe and durable structure. What benchmarking should be used to determine that the plan is of a safe durable structure when completed is a difficult but important question.
Q.2.	Could plans be statutorily declared at the CC/CDC stages? If not, why not?	Yes, we consider that the starting point for a system of declared plans is at the CC/CDC stage of the building programme. These are the plans which are required to be compliant with the development consent or the complying development standard and absent further examination of any variations, should represent the building when completed. In addition to declarations at the CC/CDC stage, we suggest that the "as built" plans be declared at the OC stage with a full set of "as built" plans.

NO.	QUESTIONS	COMMENTS
Q.3.	To what extent should changes to plans be submitted to the regulator?	At every point as we consider there is little point in declaring plans which are ultimately not the plans of the built structure. This may be inconvenient, but anecdotally, it appears that the changes to plans made after the CC/CDC stage give rise to the greatest danger precisely because they have not necessarily been checked by the original professional draftsman and declared as compliant with any required standard.
Q.4.	Should a statutory declaration accompany all variations to plans or only major variations?	It follows from the Law Society's answer to Question 3, that we regard that the integrity of a system of declared plans is placed in question if any plan of an element of a completed building which is essential to the stability, integrity or the safety of a completed building is not subject to the proposed process of declaration whether that plan is prepared at the outset, or during the construction phase.
Q.5.	Are there any obstacles that would prevent a person from submitting a statutory declaration for variations? If so, what are those obstacles?	• It is a question of balancing this inconvenience against the greater potential loss and damage which could result from a major variation from plans which are safe to those which are not. • On the question of statutory declarations generally, we note that a requirement that matters be verified by statutory declaration can create practical problems at a time where there is increasing reliance on electronic creation, execution and transmission of documents. The issue was addressed in part by the Parliament in 2017 in amending various statutes set out in Schedule 2 of the *Electronic Transactions Legislation Amendment (Government Transactions) Act 2017*. Consideration should be given to whether there is an alternative form of verification that is appropriate.
Q.6.	What other options could be workable if there are variations to plans?	The Law Society has no comments on this question.
Q.7.	How could the modifications process be made simpler and more robust?	The Law Society has no comments on this question.

NO.	QUESTIONS	COMMENTS
Q.8.	How should plans be provided to, or accessed by, the Building Commissioner?	This is a technical matter where building professionals may be able to point to an optimal system. However, electronic lodgement of plans seems to be the simplest method because of the speed at which they can be lodged accessed and dealt with.
Q.9.	What types of documents should 'building designers' provide to the Building Commissioner?	This is a technical matter which construction experts should address.
3.2.2. Explaining through documentation how any performance solutions used in the design and construction of the building comply with the BCA		
Future process		
Q.10.	In what circumstances would it be difficult to document performance solutions and their compliance with the BCA?	The BCA is often a performance-based document. It also uses "deemed-to-satisfy" provisions to permit variations to design that, while not strictly complying with the Code, are taken to satisfy it. This leads to subjective determinations of compliance. In the circumstances out of which this inquiry arose, this seems highly undesirable where the design being considered is of an essential structural element or one required for the safety of a completed building.
Q.11.	Would a performance solution report be valuable as part of this process? If not, why not?	Only if peer-reviewed by an independent professional. If the performance solution report goes unread, there can be no determination as to whether it provides an appropriately safe result.
Q.12.	Are there any other methods of documenting performance solutions and their compliance that should be considered?	This is a technical matter which construction experts should address.
3.2.3. Declaring that buildings are constructed according to building plans		
Q.13.	What would the process for declaring that a building complies with its plans look like?	Process is properly a matter best addressed by construction experts.

NO.	QUESTIONS	COMMENTS
Q.14.	What kind of role should builders play in declaring final building work?	One of the difficulties in the current system is the identification of who bears ultimate responsibility for defective building work. The Discussion Paper rightly notes that what may be appropriate for a single-storey free standing building would be inadequate for multi-storey residential buildings. For more complex building projects, it may be appropriate to identify "key risk" or "critical" areas and require certification by the relevant contractor for at least those items. Alternatively, it may be appropriate for the builder or principal contractor to provide the certificate on which primary reliance is placed, with that party prudently obtaining declarations from at least some of the other contractors.
Q.15.	Which builders involved in building work should be responsible for signing off on buildings?	As suggested by the previous answer, there would ideally be a single "key entity" for beneficiaries of the building work to pursue in the case of non-compliance with the plans. Given the number of players involved in, and the complexities associated with, for example, the construction of a multi-storey residential building, the Law Society notes the practical difficulty in identifying the correct entity.
Q.16.	Are there any circumstances which would make it difficult for builders to declare that buildings are constructed in accordance with their plans? If so, what are those circumstances?	Identification of such circumstances is best left to other stakeholders.
Part 4 – Registration of 'building designers'		
4.1. Overview of registration		
Q.17.	Are existing licensing regimes appropriate to be accepted as registration for some builders and building designers, such as architects, for the new scheme?	No, existing regulatory regimes have developed at different times, with differing focuses and distinct mandatory criteria. A practitioner who is licensed or registered under an existing framework will not necessarily meet all the necessary competencies for a building designer.

NO.	QUESTIONS	COMMENTS
4.2. The registration scheme		
Individuals to be registered		
Q.18.	What occupations or specific activities are involved in 'building design' and should be in scope for the registration scheme?	This question is best left for discussion led by representative groups from the practitioner sectors (and the existing regulators of those practitioners) identified at page 20.
General requirements for registration		
Q.19.	What should be the minimum requirements for a registration scheme?	• The bullet points at the bottom of page 20 of the Discussion Paper set out the most common criteria that licensing regimes take into account. Two other criteria which might be considered include: o solvency, and o given the prevalence of phoenixing in the sector, the history of prior entities with which the applicant has been concerned. • Consideration will need to be given in the medium term to developing a core set of competencies which will form the basis of a formal qualification of "building designer".

NO.	QUESTIONS	COMMENTS
Requirements for insurance		
Q.20.	What form of insurance should be mandatory for 'building designers'? Why?	• The Law Society agrees that insurance should be mandatory. The matters to which a policy should respond should broadly be as identified in the Discussion Paper. • Any insurance should include run-off cover. • Given the current state of the insurance market in the building sector, it may be that the private insurance market will not be willing to provide the coverage which would deliver an appropriate level of consumer protection. Consideration may need to be given to a Government-backed (or at least Government-supplemented) scheme.
Q.21.	What kinds of minimum requirements should be prescribed for the insurance policy (for example, value, length of cover, etc.)?	• The Law Society considers that the value of insurance cover should be sufficient to pay for the remediation of building defects and should be required for all residential building work above a specified threshold (such as $20,000) irrespective of the number of storeys of the construction. Insurance cover should be available for claims made within the relevant limitation period for making a claim. • Targeted consultation should occur with insurers, insurance brokers, strata managers, building and construction lawyers and strata lawyers involved in business disputes.
Requirements for skills, qualifications and experience		
Q.22.	What skills should be mandatory for 'building designers'?	This is a technical matter which construction experts and their professional bodies should address.

NO.	QUESTIONS	COMMENTS
Q.23	Should specific qualification(s) be required?	This is a technical matter which construction experts and their professional bodies should address.
Q.24.	Should there be other pre-requisites for registration?	This is a technical matter which construction experts and their professional bodies should address.
Power of the regulator		
Q.25	What powers should be provided to the regulator to support and enforce compliance by registered 'building designers'?	• The Law Society considers that the regulator should be empowered to de-register building designers who do not meet solvency criteria or who have been an officeholder in a company that is placed into liquidation or wound up without having resolved claims made against it. • The regulator should also be empowered to de-register building designers who are found to have failed to comply with a core set of competencies.

NO.	QUESTIONS	COMMENTS
Part 5 – Duty of care of building practitioners		
5.3. Establishing a duty of care		
Scope of duty		
Types of practitioners and work		
Q.26.	Which categories of building practitioners should owe a duty of care?	• We consider that all building practitioners who are capable of causing foreseeable harm by their conduct to those in a relationship of proximity who are vulnerable to the economic consequences of the practitioner's negligence, should owe a duty of care. • Further consideration should be given to the practice of phoenixing and how this might be addressed when creating a statutory duty of care. • We note the question of timing for the commencement of such a reform and limitation periods are difficult issues.
Q.27.	What should be the scope of the duty of care? Should it apply to all or certain types of work? If so, which work?	The Law Society believes that any attempt to differentiate between structural and non-structural defects or major and other defects is fundamentally flawed. The scope of the duty should extend to all types of work.
Q.28.	How will the duty of care operate across the contract chain?	The owner of the work should have primary recourse to the "key entity" that provided sign off as contemplated in the responses to questions 14 and 15. Successors in title should have the benefit of a statutory cause of action subject to an appropriate limitation period.

NO.	QUESTIONS	COMMENTS
Individuals to be protected by the duty		
Q.29.	What types of consumers should be owed a duty of care?	Consistent with the response to Q.26 above, the Law Society considers that the duty of care should be owed to all consumers (including both residential and commercial owners corporations and their respective lot owners in those strata schemes) and should extend to successors in title, subject to common law principles on questions of proximity, and consideration of the vulnerability of the owner. Careful consideration will also need to be given in relation to the interplay of competing causes of action and respective limitation periods that will apply.
Q.30.	On what basis should a particular consumer be afforded the protection?	• The common law has recognised a duty of care owed by the builder of a free-standing dwelling to a successor in title in Bryan v Maloney (1995) 182 CLR 609. The High Court has applied different principles to more complex construction projects with adverse outcomes for subsequent owners in cases such as Brookfield. • The Law Society believes that following the events of the last few months it could fairly be said that purchasers of lots in multi-storey buildings (including but not limited to strata schemes) are "vulnerable", particularly as they are not currently afforded protection under the *Home Building Act 1989*. It could be argued that when one compares the purchaser of a house (who prudently obtains a pre-purchase building inspection), with a purchaser of a unit (who typically doesn't obtain such an inspection but often will rely solely on the records of the owners corporation which may be lacking in detail about defects), the latter are more vulnerable than the former. It could also be said that lot owners who buy off-the-plan are vulnerable as they are not able to negotiate any contractual conditions about the common property, are often unable to negotiate changes to the purchase contract and are purchasing prior to the structure being built.