



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Prop:EP&D:RHgl2002108

21 December 2020

Design and Building Practitioners Regulation 2020 Consultation
Policy and Strategy
Better Regulation Division
NSW Department of Customer Service
Locked Bag 2906
LISAROW NSW 2252

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

Dear Sir/Madam,

Regulatory Impact Statement and Draft Design and Building Practitioners Regulation 2020

The Law Society of NSW appreciates the invitation to comment on the Regulatory Impact Statement ("RIS") and the Draft Design and Building Practitioners Regulation 2020 ("Draft Regulation"). The Law Society's Property Law and Environmental Planning and Development Committees have contributed to this submission.

Our responses to the questions in the RIS within our expertise are set out in the attached Table A, and our brief comments on the Draft Regulation are set out in the attached Table B.

Thank you for the opportunity to comment. Any questions in relation to this submission should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Richard Harvey
President

Encl.

TABLE A

**Design and Building Practitioners Regulation 2020
Responses to Regulatory Impact Statement**

Submission by the Law Society of NSW – December 2020

NO.	DISCUSSION POINTS – QUESTIONS	COMMENTS
Scope of the reforms		
1	Do you think the reforms should be expanded to other types of buildings over time? Why/Why not? If so, which types of buildings do you think should be next?	Yes, the Law Society agrees that consideration could be given to extending the reforms to Class 1a buildings under the <i>Building Code of Australia</i> (BCA) and the <i>National Construction Code</i> (NCC), having regard to matters such as the complexity and costs of the regime, but only after the legislation has been in operation for a minimum period of time, such as one year, to allow an informed decision to be made as to how is it working for buildings in current scope. In the view of the Law Society, the remedies under the <i>Home Building Act 1989</i> are limited and therefore difficult to access. We consider more generally that prevention at the building stage is better than trying to access a remedy well after completion of the building work. The legislation provides the opportunity to ensure that the construction of residential dwellings is completed to the standards required by legislation and the BCA. It also ensures that departures from a development consent, approved plans or legislation are recognised and rectified as an integral part of the building process.
2	Do you agree that the reforms should only apply to existing arrangements where the Complying Development Certificate or Construction Certificate has been applied for on or after 1 July 2021? Why/Why not?	Yes, the design professionals covered by the legislation will need adequate time to prepare for the significant and important changes implemented by these reforms.

NO.	DISCUSSION POINTS – QUESTIONS	COMMENTS
Regulated design		
3	Are the proposed exclusions from ‘building work’ appropriate? Why/Why not?	The Law Society believes the proposed exclusions to be appropriate because they essentially capture work that is not subject to a development consent, or work that is of a relatively small value. Previously the Law Society favoured a monetary value approach for simplicity, but we acknowledge that using the established criteria of exempt development as one category of excluded building work has merit given exempt development is generally low impact in nature.
4	Are there other works that should be exempted? Please provide the basis for the exemption and when the exemption should be effective (for example, a description of the works or threshold of the value including the reason for that value).	No. The Law Society believes that the application of the Regulation should be as comprehensive as possible. Exemptions should only apply where inclusion of the particular building work would involve undue inconvenience without any associated benefit.
Registration of Compliance Declaration Practitioners		
6	Are there other types of Design Practitioners that should be included or any that should be removed? If so, what are they and why?.	We defer to the expertise of others as to whether the classes include sufficient and appropriate areas of expertise. In our view none of the proposed classes should be removed.
7	Do you support the proposed qualification, skills, knowledge and experience requirements for each class of practitioner? Why or why not? Please make suggestions for additional or alternative requirements.	We do support the proposed knowledge and experience requirements for each class of practitioner and note that the proposal has some similarities with the requirements for the legal profession which are at least five years post admission experience in order to be able to conduct a sole practice or apply to become an accredited specialist practitioner. The legal profession has had this threshold for a number of years and it has generally proved to be appropriate. As to qualifications and skills, we defer to the expertise of others.
8	Other than qualifications, skills, knowledge and experience, are there any other eligibility criteria that applicants should meet to be eligible for registration?	No, subject to the comments of expert stakeholders, and that the applicant be fit and proper.

NO.	DISCUSSION POINTS – QUESTIONS	COMMENTS
9	Do you agree that practitioners should be required to have 5 years of recent and relevant practical experience?	Yes, subject to the comments of expert stakeholders.
10	Some classes of practitioner have been proposed with authority to work on low and medium rise buildings? Do you support this approach?	Yes, subject to the comments of expert stakeholders.
Registration of Professional Engineers		
13	Pathway 1 will require an engineer to satisfy certain qualifications, skills, knowledge and experience requirements. Are there any other eligibility criteria that engineers should meet before being registered?	We defer to the expertise of other stakeholders but suggest a general requirement to be fit and proper.
14	The Regulation proposes recognition of Washington Accord accredited qualifications. Do you think this is appropriate? If not, what alternative approach do you suggest?	Yes, subject to the comments of expert stakeholders.
16	Would you be supportive of professional bodies developing a PSS for Pathway 3 to be available?	Yes, subject to the comments of expert stakeholders.
17	Do you agree that Professional Engineers should be required to have 5 years of recent and relevant practical experience?	Yes, subject to the comments of expert stakeholders. We refer you to comments in response to question 7.

NO.	DISCUSSION POINTS – QUESTIONS	COMMENTS
Compliance Declaration Scheme: practitioner requirements		
19	Do you support the proposal that all construction issued regulated designs must be lodged before any building work can commence? Why or why not?	Yes, the Law Society supports this proposal. Anecdotally, our members report that the current use of “Design and Construct” contracts has led to failures to build to standard and in some cases, a failure to build to design (sometimes building without a design; wet areas are a major source of complaint). Accordingly, designing the whole structure before commencing work on any part of it, and requiring a Design Compliance Declaration in respect of each element is, in our view, likely to significantly reduce instances of building defects.
20	Do you support the Building Practitioner being primarily responsible for lodging regulated designs on the NSW Planning Portal? Why or why not? If not, who do you think should be responsible at the different lodgement points? Please explain your answer	Yes, the concept of acceptance of responsibility for professional work carried out by a Design Professional is, in our view, an important aspect of these reforms. It ensures that there is a nominated and known individual to whom concerns about the design can be referred without the risk of a claim that the responsibility lies elsewhere. In our view, accountability is fostered by having the primary responsibility for lodging regulated designs on the NSW Planning Portal assigned to the Building Practitioner.
23	Do you support the proposed title block? Are there any other matters that should be included in the title block?	Whilst this concept appears to provide a sensible way of identifying with precision the point in the design process reached by the titled design, we defer to other stakeholders who have the specialist knowledge to be able to comment on this question.

NO.	DISCUSSION POINTS – QUESTIONS	COMMENTS
25	Do you support the proposal that varied regulated designs be lodged within 1 day of the varied building work being commenced? Why or why not?	<p>In our view this is a sensible approach. Until the varied design is lodged, work may be stopped or delayed which may be costly. However, one day appears to be a very short timeframe, and there may be good reasons why the varied regulated design is not lodged within that time frame. Accordingly we suggest that it should be a defence to a prosecution for a failure if the practitioner can provide a reasonable excuse to explain the delay.</p> <p>We also suggest that it may be more appropriate to require lodgement of the varied regulated design within one 'business day'. We note the definition of 'business day' in s 4(1) of the <i>Building and Construction Industry Security of Payment Act 1999</i> which is utilised in s 11 of that Act. We also note the reference to 'business days' in s 7B and s 7BA(1) of the <i>Home Building Act 1989</i>. In our view, it would be fairer and more in keeping with industry practice to specify one business day.</p>
26	Do you support the proposal that the Building Compliance Declaration, regulated designs and variation statements be lodged prior to the application for the Occupation Certificate? Why or why not?	The Law Society regards this is a sound proposal to ensure the integrity of the Occupation Certificate.
Insurance		
29	Do you support the approach proposed for insurance requirements for Design Practitioners and Professional Engineers? Why or why not?	Broadly yes, subject to confirmation by expert stakeholders that the requirements are in line with market expectations. Additionally, to ensure appropriate insurance is in place, we would prefer that the registration of practitioners and recognition of professional engineers be conditional upon provision of satisfactory insurance to the Secretary annually. In due course, consideration might also be given to a level of standardisation of insurance policies. There are advantages for the consumer of services if the terms and conditions of insurance policies are standard.

NO.	DISCUSSION POINTS – QUESTIONS	COMMENTS
30	Do you think additional insurance requirements should be prescribed for Design Practitioners and Professional Engineers? If so, what?	Yes, to ensure adequate consumer protection, we suggest that a minimum amount for professional indemnity insurance should be prescribed. We also suggest consideration should be given to prescribing that the insurance policy includes run off cover where appropriate, and cover where the practitioner dies or becomes bankrupt.
31	Do you support the proposed transitional arrangements that exempt Building Practitioners from being insured for issuing Building Compliance Declarations? Why or why not?	Yes, subject to confirmation by expert stakeholders, as the exemption is not a blanket exemption.
Continuing Professional Development (CPD)		
32	Do you support the proposed CPD requirements for Design and Building Practitioners? Why or why not?	Yes, subject to confirmation by expert stakeholders that the approach is consistent with existing requirements.
33	What types of training, education or topics would be relevant for the functions carried out by Design and Building Practitioners?	An ethics component in CPD training is an important aspect of being regarded as a professional.
34	Do you support the proposed CPD requirements for engineers under Pathway 1?	Yes, but we defer to the expertise of other stakeholders.
35	Do you support the mandatory CPD topic areas? Why/why not? Please make any suggestions for amendments and explain why they are necessary	Yes, but we defer to the expertise of other stakeholders.
Penalty notice offences		
36	Do you support the proposed penalty notice offences and amounts in Appendix 1? Why or why not?	We query why the penalties for falsely representing insurance coverage (under ss 11(1), 14(1), 24(1), 33(1)) are significantly lower than other penalties when the implications of the conduct are significant.

NO.	DISCUSSION POINTS – QUESTIONS	COMMENTS
		<p>We consider making a compliance declaration without authority (s 23) is as serious as failing to give notice of steps required for compliance (s 22(2)) and these penalties should be the same in our view.</p> <p>Similarly, a corporation's failure to ensure only authorised practitioners provide compliance declarations (s 28(2)), or the offences under s 57(1) and s 58(b), are as serious as a Building Practitioner making a Building Compliance Declaration without registration or authority (s 23) and the penalties for these offences should be the same as those under s 23.</p> <p>Generally we consider the penalties under the Regulation are too low (in circumstances where these are the maximum penalties and not those that will necessarily be imposed) and therefore may not achieve the purpose of discouraging the offence. We consider the penalties should rather be in the range of \$5,000 for corporations and \$3,000 for individuals.</p>
37	Do you think the proposed penalty notice offences and amounts are fair and reasonable?	Not all amounts are appropriate in our view; please see our response to question 36.
Fees		
38	Do you support the reasons for the proposed fees? Why or why not?	Yes, a fee should be imposed to not only help pay for the administration of the scheme but also to give efficacy to the serious nature of the application for registration.
39	What do you think NSW Fair Trading should consider in determining the fees?	A balance between the costs of administering the scheme, the affordability for applicants and the need to ensure they are not so high that applicants do not apply.

TABLE B

Comments on the Draft Design and Building Practitioners Regulation 2020

Submission by the Law Society of NSW – December 2020

Clause or Part	Comment
Clause 8	<p>We suggest that the obligations of the clause might be clearer if amended to read:</p> <p style="padding-left: 40px;">For the purposes of section 8(1)(b) of the Act, it is an applicable requirement that a regulated design <u>must, so far</u> as is reasonably practicable, <u>integrate</u> details . . .</p>
Clause 9	<p>We note the requirement in clause 9(d) that the declaration must specify whether or not specialist advice was sought and considered in preparing the design. We suggest that if the purpose of this subclause is to identify that the declarant has not relied entirely on their own expertise, it may be better if the specialist is identified and the aspect of the work in respect of which the advice was sought and considered is specified in the declaration.</p>
Clause 11	<p>As an observation going to both fairness and compliance, we suggest that any proposed change to a form obtainable from the NSW planning portal should be notified to Design and Building Professionals well in advance of it being available from the planning portal.</p>
Clauses 16 and 17	<p>We support the principle embodied in these clauses. The provision of the documents specified to the planning portal is an important step in building up a database of all elements of the building process, to be made available to those who might have need of this knowledge in the future.</p>
Clause 17	<p>We support the principle that every variation declaration and documentation be provided as soon as possible after the variation is commenced, but we are concerned that there may be cases where it is simply not possible to do so. We suggest that consideration be given to providing a defence to a prosecution for a breach of clause 17(2) if the registered building practitioner has a reasonable excuse as to why the document was not provided in accordance with clause 17 (3).</p>
Clauses 18 and 19	<p>The Law Society supports these provisions on the grounds that they will strengthen the reliability of the planning portal.</p> <p>In clause 18(1)(a) and (2), for abundant caution, it may be advisable to make it clear that there is nothing stopping an occupation certificate being issued for the part of the building not affected.</p> <p>In clause 18(1)(a), we suggest revising the words to read “before an application is made for an occupation certificate for a building (<u>or part of a building</u>) to which building work relates....” .</p> <p>In clause 18(2), we suggest revising the words to read “before a subsequent application for an occupation certificate is made <u>in respect of the relevant building or part...</u>”</p>

Clause or Part	Comment
Clauses 26 and 27	The Law Society believes that it is for building and design practitioners to comment as to whether the process and timelines for dealing with variations proposed by the Regulation are appropriate, noting that the interaction between the operation of clauses 17, 26 and 27 of the Regulation and s 20 of the <i>Design and Building Practitioners Act 2020</i> may cause delays in the construction timeline.
Clause 73	We note this clause imposes a requirement to retain records for 10 years. Although, as mentioned in the Note, other legislation may impose a requirement that the document be kept longer, we are concerned that retention of records for 10 years is not sufficient. We suggest that a longer timeframe should apply, such as 12 years, having regard to the 10 year limitation period for an action for defective building or subdivision work under s 6.20(1) of the <i>Environmental Planning and Assessment Act 1979</i> and the need to preserve records for evidentiary purposes.