

**INQUIRY INTO REGULATION OF BUILDING
STANDARDS, BUILDING QUALITY AND BUILDING
DISPUTES**

Organisation: Local Government NSW

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Draft Submission to the Public Accountability Committee on the Design and Building Practitioners Bill 2019

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Opening

Thank you for your invitation to make a submission to the Public Accountability Committee on the Design and Building Practitioners Bill 2019 (the draft Bill) as part of the Committee's Inquiry into the Regulation of Building Standards, Building Quality and Building Disputes. Local Government NSW (LGNSW) made a submission on this Bill to the NSW Government on 15 October.

LGNSW is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

This is a draft submission awaiting review by the LGNSW Board. Any revisions made by the Board will be forwarded.

Purpose

This submission outlines LGNSW's comments on the Design and Building Practitioners Bill 2019, which was introduced into NSW Parliament by the Government on 23 October 2019. This is a supplementary submission to LGNSW's initial submission to the Public Accountability Inquiry in August 2019, which is available on the LGNSW website¹.

The draft Bill proposes reforms that target the design, building and construction sector to improve the quality and compliance of design documentation and strengthen accountability. LGNSW understands that if the draft Bill is passed by NSW Parliament, it would apply to arrangements for the preparation of 'regulated designs' or the carrying out of building work entered into after its commencement.

These reforms are part of a wider context of reforms needed to strengthen the building and construction sector. These include the implementation of *Building and Development Certifiers Act 2018* (which has not yet come into force²), measures to address the independence of private certifiers and perceived conflicts of interest, and a four-point plan announced by the Government in December 2018 which included an ambitious commitment to annual audits. We note that concurrent with this consultation on the draft Bill, a new Building and Development Certifiers Regulation 2019 and a Regulatory impact Statement (RIS) have been released for public comment, with submissions closing on 28 October³.

This submission primarily responds to the content of the draft Bill and what is proposed to be prescribed in the supporting regulations. Notably, it also provides some additional comments about the role of the Building Commissioner and the relationship between the draft Bill and the *Environmental Planning and Assessment Act 1979* (EP&A Act).

¹ <https://www.lgnsw.org.au/about-us/submissions>

² <https://www.legislation.nsw.gov.au/#/view/act/2018/63/history>

³ <https://www.fairtrading.nsw.gov.au/consultation-tool/building-and-development-certifiers-regulation-2019>

General comments

LGNSW supports the proposals to register building designers and practitioners and to require these building practitioners to declare that plans are compliant with the Building Code of Australia (BCA) and that buildings are constructed according to BCA-compliant plans. The proposal to ensure an industry-wide duty of care is owed to subsequent homeowners is also supported. It is understood that the duty will benefit a wide range of owners, including owners' corporations and successors in title.

We appreciate that the government is implementing these reforms in an effort to address accountability and liability issues in the building and construction sector. Through improved documentation and registration of some key players, the reforms will assist in widening the responsibilities of those involved in design and construction of certain buildings. This is a positive step towards ultimately restoring public trust in the system. However, **it is difficult to comment fully on whether the legislation will achieve what it sets out to do without the benefit of the detail which is to be provided in yet-to-be-developed regulations.** The regulations to follow will provide more detail in respect of who is suitable to be a 'registered practitioner' and 'authorised officer' and also the classes of buildings to which the duty of care relates.

Focus on multi-unit residential buildings

LGNSW notes that the "reforms are focused on high-rise residential construction"⁴ according to statements in the Discussion Paper and the government's response to the Shergold Weir Building Confidence Report. However, **we believe there is a perception and expectation from the public that the promised tightening of regulation of building designers and practitioners will apply to all construction, not just to selected building forms.**

Discussions with officers in the Department of Customer Service (Fair Trading) have confirmed that initially, the provisions in the draft Bill (with the exception of the duty of care provisions in Part 3) will only apply to multi-unit residential buildings. We acknowledge the increased risk profile of such developments compared with some other forms of building, however LGNSW would like assurance that long term, the application of the draft Bill will not stop at multi-unit residential buildings. **For the public trust to be restored, it will be necessary that over time, these reforms will continue so that other buildings where there is a risk to quality, safety and non-compliance will be captured under this legislation in future.**

Recommendation 1: LGNSW requests the government's assurance that these reforms to the documentation and declaration of plans and building work will not stop at class 2 (multi-unit residential) buildings and will continue over time, so that other forms of building where there is a risk to quality, safety and non-compliance will be captured under this legislation to in future.

⁴ Discussion Paper, June 2019, p 9; and NSW Government Response to the Shergold Weir Building Confidence Report, February 2019, p 6

Role and functions of Building Commissioner

The draft Bill is silent on the role and functions of the new Building Commissioner, despite statements in the Government's Response to the Shergold Weir Report that building plans would be submitted to the Building Commissioner ("so that they may be audited") and he would have a role to register building practitioners⁵. The Response was explicit that "The Commissioner will administer all building laws that are or will be in the Minister for Innovation and Better Regulation's portfolio."⁶

The Discussion Paper also referred to "the role of the Building Commissioner as the consolidated building regulator"⁷ and this is reinforced throughout the paper. It is noted that the Discussion Paper proposes that "The Building Commissioner would have the power to audit the documentation to ensure compliance."⁸

However, any provisions to receive or audit documentation rest with the Secretary (Department of Customer Service) and the draft Bill is silent on the powers of the Building Commissioner. The role, function and statutory powers of the Building Commissioner remain unclear, as do the details of funding and administrative support. **The new provisions in the draft Bill will be ineffectual unless they are supported by a regulatory body that is independent, well-resourced and backed by the requisite statutory powers.** In our submission to the Government on the draft Bill, LGNSW has requested that the Government clarify these matters as soon as possible.

Recommendation 2: The NSW Government clarifies the statutory provisions proposed for the Building Commissioner and commits to adequate funding and resourcing to support this critical role.

Part 1 Preliminary

Objects of the draft Bill

The draft Bill would benefit with the addition of a clear statement of its purpose and intent, by amending it to include objects based on the aims outlined in the Discussion Paper. With clarity of intent, this would help guide the preparation of the regulations in due course. The objects of the Bill should reflect the following:

- "The reforms seek to hold the most appropriate practitioner accountable for their portion of work. They aim to strengthen the confidence and competency of builders by imposing obligations on design practitioners, who builders rely on, to demonstrate the compliance of their work. Certifiers and builders would also benefit by having access to better-quality documentation prepared by design practitioners."⁹

⁵ NSW Government Response to the Shergold Weir Building Confidence Report, February 2019, p 5-6

⁶ NSW Government Response to the Shergold Weir Building Confidence Report, February 2019, p 6

⁷ Building Stronger Foundations: Discussion Paper, June 2019 p 16

⁸ Building Stronger Foundations: Discussion Paper, June 2019 p 16

⁹ Building Stronger Foundations: Discussion Paper, June 2019, p 9.

- “Collectively, these requirements aim to ensure safe and compliant construction of buildings.”¹⁰
- “The aim of this reform is to ensure that property owners have more avenues, and easier access, to seek redress for defective building and related damages and loss. The benefit of the duty of care protection will also be considered for other parties, including subsequent title holders and small businesses, who may not have been party to the original contract.”¹¹

Recommendation 3: The draft Bill be amended to include specific objects, based on the aims of the reforms as outlined in the *Building Stronger Foundations Discussion Paper*.

Definitions

To avoid confusion and ensure alignment with the building provisions of the EP&A Act (Part 6), it would be desirable that where possible, the definitions of terms used in the draft Bill (such as ‘building work’ and ‘principal contractor’) are consistent with those in the planning legislation.

Recommendation 4: Where possible, the definitions used in the draft Bill should be consistent with those used in the EP&A Act.

Details to be prescribed in regulations

There is a significant reliance on the supporting regulations to provide the detail of what building forms and which building practitioners will be captured by this legislation. For example, the definition of ‘building work’ in clause 4(1) is not limited to a particular class of buildings, and the intention is for the regulations to prescribe the classes of buildings to which this will apply (clause 2(b)). The legislation could conceivably apply to all classes of building (from detached houses, boarding houses and aged care accommodation to hotels/motels, commercial and mixed-use buildings for example). However, as stated previously, we understand the Government’s focus initially is on multi-unit buildings (ie Class 2 buildings). LGNSW therefore assumes the regulations will in the first instance limit the definition to these residential building forms.

It is also noted that the regulations will prescribe other important details, including which designs (plans, specifications etc) are to be termed a ‘regulated design’ (clause 5(1)) and which building practitioners (professionals and tradespeople) the Act will apply to (clause 7(4)). The regulations will also be relied on to prescribe the ‘form and manner’ that declarations are made. LGNSW assumes this will include details of process, repository for these declarations, and possible formats/templates to ensure a level of consistency for these documents.

As regulations are not subject to the same level of parliamentary process and scrutiny as the passing of an Act in parliament, **it will be important the supporting regulations are developed with measured and comprehensive stakeholder input.** We await further consultation on the regulations in 2020 and we have requested that the Government allow a minimum period of six weeks be provided for this critical consultation with all stakeholders, including councils.

¹⁰ *Building Stronger Foundations: Discussion Paper*, June 2019. p 12

¹¹ *Building Stronger Foundations: Discussion Paper*, June 2019 p 25

Recommendation 5: A minimum six-week period should be provided for detailed consultation on the regulations during 2020.

Part 2 Regulated designs and building work

Electronic lodgement and custodian of declared plans and compliance declarations

The draft Bill makes provision for the supporting regulation to require electronic lodgement of regulated designs, building compliance declarations and other compliance declarations through an internet site or an application established by or on behalf of the Department of Customer Service¹². **The ultimate custodian of these declarations and other documents is not made clear in the draft Bill and there appears to be nothing in the Bill that specifies where these declarations and documents will be stored and whether they are to be publicly available.** We note that the Government has previously indicated that these 'declared' plans "will be lodged in a digital format with the Building Commissioner. This will enable risk-based audits of practitioners and documents."¹³ This suggests that the Building Commissioner may be the custodian of these plans, although the draft Bill is silent on this and on the role of the Building Commissioner in general.

LGNSW assumes the details of electronic lodgement and the custodian of these plans will be spelled out in the supporting regulations. **It is logical that these declarations together with other relevant plans, reports, compliance certificates etc are all stored electronically in one place.** The NSW Planning Portal¹⁴ is established and continually evolving as the digital space where community, industry and government can store and access planning and development digital services, publications and open data tools. The Planning Portal would be the logical central database for storing and accessing plans and compliance certificates declared under the draft Bill. Data access agreements and/or protocols may be required alongside the regulations to clarify who has legitimate access to the relevant documents and how this works in practice.

Recommendation 6: The draft Bill and/or supporting regulations must provide for the declared plans and compliance certificates required under the draft Bill to be lodged and stored in a single, central database, such as the NSW Planning Portal database, to ensure consistency and ease of access for all users (community, industry and government).

Relationship between compliance declarations and building certificates

The obligations of design and building practitioners to provide compliance declarations under certain circumstances and to whom are specified in clauses 9, 12 and 15 specify. The provision of these declarations is where the draft Bill interfaces with the certificates issued under the EP&A Act (Part 6). These new declarations should form an integral part of the final package of documents that are attached to the occupation certificate application, so that the practitioner making the declaration is proportionately liable for their component of the construction (ie

¹² Refer to clauses 9(5), 12 (3) and 15(3) of the draft Bill

¹³ *Building Stronger Foundations: Discussion Paper*, June 2019 p 35

¹⁴ <https://www.planningportal.nsw.gov.au/>

design and building). This provides an audit trail. Construction certificates and complying development certificates should be referenced in these clauses.

Clause 22 (p 15) of the draft Bill is as follows:

“The regulations may make provision for or with respect to prohibiting the issue of a complying development certificate or a certificate under Part 6 of the *Environmental Planning and Assessment Act 1979* unless one or more compliance declarations or final regulated designs have been provided to the issuer of the certificate.”

This clause appears to be the only reference to the important link between the requirements under the draft Bill and the issue of complying development and other certificates (such as for construction, completed building work or to occupy a building) under the EP&A Act. LGNSW supports this provision. **For the system to work, a certifier must have the necessary compliance declarations or final regulated designs before they can issue a certificate of approval for development, work or occupancy.** LGNSW considers this is therefore essential that the regulations include these provisions with respect to prohibiting the issue of a complying development certificate unless one or more compliance declarations or final regulated designs have been provided to the issuer of the certificate.

Recommendation 7: Clauses 9, 12 and 15 of the draft Bill should reference construction certificates and complying development certificates.

Recommendation 8: The regulations must include provisions that prohibit the issue of a complying development certificate or a certificate under Part 6 of the *Environmental Planning and Assessment Act 1979* unless one or more compliance declarations or final regulated designs have been provided.

Compliance declarations by building practitioners

Division 3 contains the obligations for registered building practitioners to provide compliance declarations and other relevant documents. This is a key area where the draft Bill and the new provisions in the EP&A Act for an owners building manual (section 6.27) must be aligned and work together. The documents provided by registered building practitioners under the draft Bill will be critical elements of the building manual.

Recommendation 9: The draft Bill and supporting regulations must contain provisions that reference the critical linkage between the compliance declarations and other key documents to be provided by building practitioners and the owners building manual.

Part 3 Duty of Care

LGNSW understands that unlike Parts 1 and 2 of the draft Bill (which will apply initially to only class 2 buildings, ie multi-unit residential buildings), this Part could apply to different building classes, specifically 1, 2, 3 and 10).

LGNSW welcomes recognition in clause 27(1) that a person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the work. Our members continue to express a desire for laws to be

introduced to ensure adequate compensation is available for landowners who suffer measurable financial hardship as a result of negligent certifiers and other building practitioners.

Parts 4, 5, 6 & 7 Registration, disciplinary action, investigations & enforcement

LGNSW understands the provisions in Parts 4 through 7 of the draft Bill are generally standard provisions for compliance and enforcement and disciplinary powers for licensed persons and they are consistent with similar provisions already contained in the *Building and Development Certifiers Act 2018*.

Registration of practitioners

We note that registration requirements will be specified in the regulations and that this will contain detail of certain classes of registration. As such, the precise details about which practitioners will be registered are not known at this stage. As noted earlier, there is a public expectation that announcements about stronger regulation of the building and construction sector will apply to all the key players. However, it is unclear whether developers - unless they are actually designing or carrying out the building work - will be required to give declarations under the draft Bill.

It is critical that the registered practitioners will be required to have professional indemnity insurance and compulsory training and professional development. The effectiveness of the draft Bill to improve documentation and distribute liability and accountability more fairly across the construction chain will be undermined unless registration, insurance and compulsory professional development is required for all practitioners.

Recommendation 10: The requirements for all registered practitioners must include professional indemnity insurance and compulsory professional development.
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Other comments

Relationship with other legislation

Building regulation and certification provisions in the updated *Environmental Planning and Assessment Act 1979* (EP&A Act), together with the *Building Professionals Act 2005* (Building Professionals Act) and the *Home Building Act 1989*, all play a key role in underpinning the design, construction and safety of buildings in NSW.

If passed, this new law will introduce an additional stand-alone piece of legislation into an already-complex system of legal requirements for building and construction. LGNSW notes that **some commentators have suggested it may be worth considering whether these reforms could be implemented through an amendment to the EP&A Act, given there are already provisions in the Act to allow for 'compliance certificates' to be issued by building practitioners** (section 6.17). We understand these provisions have been in the legislation since 1997 and were introduced as "an integral part of the proportional liability in

this system”.¹⁵ However there have not been regulations introduced to list the practitioners who should be required to issue these certificates.

It is suggested that the Minister for Innovation and Better Regulation and the Minister for Planning and Public Spaces consider the merits of expanding on existing provisions in the EP&A Act to deliver these reforms.

Recommendation 11: The Minister for Innovation and Better Regulation and the Minister for Planning and Public Spaces consider the merits of expanding on existing provisions in the EP&A Act to deliver these reforms.

Local government role in the planning and building system

Local government plays a key role in the planning and building approval system, including:

- acting as a consent authority for the requirements of state and local environmental planning instruments;
- using inspection and enforcement powers to achieve compliance with the *Environmental Planning and Assessment Act 1979* (EP&A Act). This may be a combined responsibility between the council and private certifier appointed as the Principal Certifying Authority (PCA), and includes protecting local communities from the environmental impact of the building and construction process, and responding to complaints;
- providing advice and assistance to residents and developers in assisting them to undertake developments; and
- acting as a data custodian for all building matters for the council area.¹⁶

Councils have a keen interest to see a robust and reputable regulatory framework that delivers well-built, safe and compliant buildings that protect the public interest. The reforms outlined in the recent Discussion Paper and the draft Bill represent just part of a suite of changes needed to improve the entire framework for regulating the building and construction sector. LGNSW and councils have outlined these in previous submissions

¹⁵ Transcript of Public Hearing, 16 August 2019, p 76-77, Public Accountability Committee, *Inquiry into Regulation of Building Standards, Building Quality and Building Disputes* - Brett Daintry, Director, Daintry Associates:

“When this legislation was written in 1997 Mr Brett Whitworth, who was one of the key architects of the legislation, sat down with many of us and explained the purpose of compliance certificates. They were an integral part of the proportional liability in this system—and accountability and responsibility, which are those key words that come out of the Campbell report. Section 6 (17) states:

A compliance certificate may be issued by:

a) a certifier [that is that list], or

b) a person of a class prescribed by the regulations as being authorised to issue a compliance certificate in relation to the matters to be certified.

Ever since 1 July 1998 that provision in a similar form has been in the *Environmental Planning and Assessment (Amendment) Act*.... There has never been a regulation passed to list them.”

¹⁶ Lambert, Michael, Independent Review of the Building Professionals Act 2005 – Final Report, October 2015, p 205

and seek a commitment from the government to commit to taking a more holistic approach to building reform going forward.

Recommendation 12: The NSW Government commit to a comprehensive set of reforms, with an implementation plan, meaningful, achievable timeframes, proper resources and expert industry/local government input.

Summary of recommendations

Recommendation 1: LGNSW requests the government's assurance that these reforms to the documentation and declaration of plans and building work will not stop at class 2 (multi-unit residential) buildings and will continue over time, so that other forms of building where there is a risk to quality, safety and non-compliance will be captured under this legislation to in future.

Recommendation 2: The NSW Government clarifies the statutory provisions proposed for the Building Commissioner and commits to adequate funding and resourcing to support this critical role.

Recommendation 3: The draft Bill be amended to include specific objects, based on the aims of the reforms as outlined in the *Building Stronger Foundations Discussion Paper*.

Recommendation 4: Where possible, the definitions used in the draft Bill should be consistent with those used in the EP&A Act.

Recommendation 5: A minimum six-week period should be provided for detailed consultation on the regulations during 2020.

Recommendation 6: The draft Bill and/or supporting regulations must provide for the declared plans and compliance certificates required under the draft Bill to be lodged and stored in a single, central database, such as the NSW Planning Portal database, to ensure consistency and ease of access for all users (community, industry and government).

Recommendation 7: Clauses 9, 12 and 15 of the draft Bill should reference construction certificates and complying development certificates.

Recommendation 8: The regulations must include provisions that prohibit the issue of a complying development certificate or a certificate under Part 6 of the *Environmental Planning and Assessment Act 1979* unless one or more compliance declarations or final regulated designs have been provided.

Recommendation 9: The draft Bill and supporting regulations must contain provisions that reference the critical linkage between the compliance declarations and other key documents to be provided by building practitioners and the owners building manual.

Recommendation 10: The requirements for all registered practitioners must include professional indemnity insurance and compulsory professional development.

Recommendation 11: The Minister for Innovation and Better Regulation and the Minister for Planning and Public Spaces consider the merits of expanding on existing provisions in the EP&A Act to deliver these reforms.

Recommendation 12: The NSW Government commit to a comprehensive set of reforms, with an implementation plan, meaningful, achievable timeframes, proper resources and expert industry/local government input.

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To discuss this submission further, please contact LGNSW Strategy Manager, Planning and Transport, _____ on _____ or at _____.