

LGNSW Submission to NSW Department of Customer Service on the Design and Building Practitioners Regulation 2020

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1. Opening

Local Government NSW (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.

LGNSW welcomes the opportunity to make a submission on the draft Design and Building Practitioners Regulation 2020 (the draft Regulation) and supporting documents.

This submission was endorsed by the LGNSW Board in February 2021.

2. Background

The draft Regulation and the following supporting documents were released by the NSW Government on 20 November 2020 for public comment until 11 January 2021:

- Regulatory Impact Statement (RIS)
- Draft Continuing Professional Development (CPD) Guidelines- Prescribed Practitioners
- Draft Continuing Professional Development (CPD) Guidelines – Professional Engineers

The draft Regulation is intended to provide legislative support for the operation of the *Design and Building Practitioners Act 2020* to facilitate its implementation from 1 July 2021. The Act:

- requires the registration of practitioners involved in design and building work
- imposes new obligations on these practitioners to declare their work complies with the Building Code of Australia
- introduces protections for property owners by clarifying that a legal duty of care is owed them by the people who carry out construction work
- provides for the registration of engineers carrying out professional engineering work.

The objectives of the draft Regulation are to:

- set out the form and content of regulated designs and compliance declarations
- establish the classes of registration available for Design Practitioners, Principal Design Practitioners, Building Practitioners and Professional Engineers, including what each class is authorised to do
- prescribe the qualification, experience, skills, knowledge, insurance and fees required for each class of practitioner and the continuing professional development requirements
- provide for the requirements for lodging designs and compliance declarations
- set out the requirements for the recognition of professional engineering bodies
- provide for a Code of Practice which sets out required professional and ethical standards
- strengthen compliance and enforcement by prescribing penalty notice amounts for offence provisions in the Act and Regulation.

3. General Comments

LGNSW supports the draft Regulation which sets out further detail about the system of registration of building designers and practitioners; compliance declarations to ensure buildings are constructed according to plans that are compliant with the Building Code of Australia (BCA); and options for registration of engineers that will commence from 1 July 2021.

LGNSW acknowledges that these reforms represent an important component of the Construct NSW reform agenda which has been established to address decades-long issues with accountability and liability in the building and construction sector.

The local government sector has campaigned for many years to have strong building regulations and this is one of LGNSW's key advocacy priorities. The proposed system of improved registration and accountability through compliance declarations for certain classes of buildings proposed is therefore a positive step towards ultimately restoring public trust in the system. LGNSW and councils contend it will be important to maintain the momentum and broaden the focus from class 2 buildings to other building classes.

While the draft Regulation is generally supported, LGNSW remains concerned about some aspects of the proposed approach. These are set out below.

4. Issues

4.1 Scope of reforms

LGNSW notes that the "initial focus" of the *Design and Building Practitioners Act 2020* (D&BP Act) is on 'high-risk' residential apartment buildings (Class 2 multi-unit residential buildings) consistent with the focus of the *Building Confidence Report*¹. The provisions in the Act and draft Regulation (except for the duty of care provisions in Part 3) will only apply to this class of buildings.

While LGNSW acknowledges the increased risk profile of such developments compared with some other forms of building and agrees that it is appropriate to start with this class of buildings, this submission seeks assurance that long term, the application of the Act will not stop at Class 2 (multi-unit residential) buildings. As LGNSW has highlighted in previous submissions, there is a perception and expectation from the public that the tightening of regulation of building designers and practitioners will apply to all construction, not just to selected building forms.

For the public trust to be restored, the Government must remain committed to extending these reforms to other building classes where there are also risks to quality, safety and non-compliance, so these will be captured under this legislation in future. The government's acknowledgement in the RIS of its commitment to implementing the reforms across other classes of construction is welcomed. To ensure the momentum is maintained LGNSW would like to see public commitment by government to a program 'roadmap' (with clear timeframes

¹ *Building Confidence. Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*. Professor Peter Shergold and Bronwyn Weir, February 2018

and resources) for these expanded reforms. This would also enable industry, including the local government sector, adequate time to prepare for their transition into the new scheme.

On page 16, the RIS asks should the reforms be expanded over time to other building types. LGNSW recommends a staged approach, including as a priority in stage two:

- Class 1b (smaller boarding houses);
- Class 3 (which includes boarding houses, guest houses, hostels/backpacker accommodation);
- class 9 (ie 'public' buildings which include health-care, education and public-assembly facilities);
- Classes 6, 7 and 8 are also considered by some councils to be of sufficient importance to be considered a priority in the next stage. (For example, some councils are experiencing an increased number of complaints from Fire and Rescue RNSW about factory and warehouse buildings in particular, and report that the poor quality (or non-existent) documentation, particularly around alternative solutions, is challenging when carrying out fire safety audits. While these buildings do not normally pose the same level of risk to occupants, they open a weak point in the overall leadership of a process to improve standards across the board, and can be very costly to fix when they go wrong).

Once buildings in these classes have been included, the third stage should add classes 1a, 4 and 5. Some councils report seeing considerable non-compliance with class 1a building standards. Although unlike multi-storey buildings which affect many occupants, the extent of non-compliant and unauthorised work in single occupancy dwellings can nevertheless have far-reaching consequences if the practice is widespread. LGNSW recognises that class 1a design and building practitioners will need a lead-in time to undertake necessary transition to any minimum standards of qualifications. Rural and regional situations in particular may be challenged by insufficient numbers of qualified practitioners as the regulation is expanded to other building classes.

LGNSW supports the NSW Building Commissioner signalling to the construction sector that he would like to see quality participants in the building market. This new regime needs to be in place to support the quality players in the market and tighten regulations on the poor performers – for all building types. At this time when the NSW Government is promising economic stimulus measures like fast-tracking developments and construction, tax incentives and major planning reforms in response to the COVID-19 pandemic, advancing these reforms to other building types is crucial to ensure that construction industry financial goals do not compromise building quality and safety across all building forms.

Recommendation 1:

LGNSW seeks the NSW Government's public commitment to a program, timeframe and resources to expand these provisions beyond class 2 (multi-unit residential) buildings, so that other forms of building where there is a risk to quality, safety and non-compliance will be captured under this legislation in future.

Recommendation 2:

LGNSW recommends a staged approach for expansion of the reforms to other building types, with class 1b, 3 and 9 buildings as a priority in stage two along with retail, warehouses and other class 6, 7 and 8 buildings, followed by classes 4,5 and 1a in stage three.

Application of reforms to existing arrangements

The RIS proposes that the reforms will apply “if the first application for the issue of a Complying Development Certificate (CDC) or Construction Certificate (CC) for the building is made on or after 1 July 2021”². LGNSW appreciates the practical reasons for taking this approach, however, in local government areas with large areas of land available for multi-unit development, there is a concern that councils may see a surge of CDC and CCs prior to the 1 July 2021 cut-off date. This could place a heavy load on council and private registered certifiers to meet timely approvals.

4.2 Excluded building work**Monetary threshold**

In earlier feedback during the stakeholder consultation process, LGNSW was concerned that having very low monetary thresholds³ was not appropriate as this would capture basic alterations or additions which might commonly include kitchen/bathroom renovations by an owner of a sole occupancy unit (SOU). LGNSW acknowledges that the RIS has taken on board some of this feedback.

On page 23, the RIS asks if the proposed exclusions from building work are appropriate. There is still some concern from a practical standpoint about the impacts that the provisions will have on relatively small scale alterations to a class 2 and associated mixed use development (e.g. alterations within a residential or commercial SOU, shop fit-out etc), resulting in increased complexity, red-tape and costs. Many of these small-scale works are also carried out under a CDC, which is intended to be a more cost-effective, streamlined process for applicants.

LGNSW acknowledges comments in the RIS that do not support having a monetary threshold, but it may be prudent to consider whether a reasonable threshold (e.g. \$50k) should apply, particularly if the works are limited to being within one SOU.

Recommendation 3:

LGNSW recommends giving further consideration as to whether a reasonable threshold (e.g. \$50k) should apply to exclude certain works, particularly if the works are limited to being within one SOU.

² Regulatory Impact Statement - Design and Building Practitioners Regulation, p 16

³ \$5,000 was initially proposed in the Concept Papers

List of excluded works

On page 23, the RIS asks whether there are other works that should be exempted. The list of excluded building work in clause 13 of the Regulation should be expanded to exclude work specified in an Order issued under the *Local Government Act 1993*. Councils use these provisions to require certain work or matters to be addressed on buildings, which may be outside the scope of an Order under the *Environmental Planning and Assessment Act 1979* (EP&A Act) – for example to address the safety of a building, awning or retaining wall or other health and safety matter).

Recommendation 4:

The list of excluded building work in clause 13 of the Regulation should be expanded so that work specified in an Order issued under the *Local Government Act 1993* is also excluded.

4.3 Relationship between Compliance Declaration Registration System and Development Approval Process

The new Compliance Declaration Registration System under the D&BP Act sits alongside and separate to the development approval and certification process in the *Environmental Planning and Assessment Act 1979* (EP&A Act). LGNSW seeks to ensure that the introduction of the new process for compliance declaration of design documents and as-built drawings does not undermine or confuse the existing process for issuing Construction Certificates (CC) and Occupation Certificates (OC) under Part 6 of the EP&A Act.

There is a risk of substantial departures from the approved CC drawings by allowing amendments to occur through multiple variations to designs which are declared by a principal design practitioner. Further, some variations may comply with the BCA and Australian Standards but could be inconsistent with the original development consent, with the potential for documents being lodged for work that is non-compliant.

LGNSW has consistently highlighted the need to ensure that declared designs and building work under the D&BP Act do not depart from the original development consent. The onus must be on the person giving the declaration to confirm the designs are consistent with the CC. Accordingly, the draft regulation (Division 2 (Requirements relating to compliance declarations) and Schedule 6 (Design compliance declaration form) should be amended to include a statement requiring the declaration to state that the regulated design is consistent with the development consent. The recently published *Practice standard for registered certifiers*⁴ contains a section on consistency (refer p 26) which can be used as a guide for the appropriate terminology to include in the Regulation.

Recommendation 5:

LGNSW seeks assurance that the new compliance declaration registration system will align with the development approval process and does not undermine the existing process for issuing Construction Certificates and Occupancy Certificates under the EP&A Act. Division 2 (Requirements relating to compliance declarations) and Schedule 6 (Design compliance

⁴https://www.fairtrading.nsw.gov.au/data/assets/pdf_file/0009/902349/Practice_standard_for_registered_certifiers_0920.pdf, pp 26-27

declaration form) should be amended to include a statement requiring the declaration to state that the regulated design is consistent with the development consent. LGNSW suggests basing this on similar terminology as used in the Practice standard for registered certifiers.

While LGNSW strongly supports holding building practitioners to account, it is important that the role of certifiers is recognised and supported. Section 27 of the *Design and Building Practitioners Act* requires a principal certifier who is responsible for issuing an OC for building work to consider instances of non-compliance when deciding whether to issue the certificate. They must also meet their obligations under the *Environmental Planning and Assessment Act 1979*.

LGNSW questions whether enough consideration has been given to ensuring the process and responsibilities for building practitioners and certifiers under the compliance declaration registration system and the approval process are aligned. As a minimum, the Practice Standard for Registered Certifiers⁵ must include details of the compliance declaration requirements so that certifiers understand where these plans fit within the existing process for issuing CCs and OCs.

Recommendation 6:

LGNSW recommends the Practice Standard for Registered Certifiers be amended to include details of the compliance declaration requirements.

4.4 Electronic lodgement of declared plans and compliance declarations

LGNSW supports the requirement that all regulated designs and compliance declarations be lodged on the NSW Planning Portal. This is important to ensure consistency and ease of access for all users (community, industry and government).

Councils are often called upon to address compliance issues after projects are completed. For major and complex projects, it is likely there will be multiple compliance documents. It is important that the system and form of documents is standardised and that the final approved designs held within the NSW Planning Portal can be clearly identified and easily accessed by councils, without the need for significant and costly modification of their IT systems, or time-consuming manual adjustments.

While councils are supportive of e-Planning and the improvements in customer experience, access and streamlining the planning application process, the cost to local government to integrate this service has been borne by councils' ratepayers. To achieve full integration of councils' systems with the NSW Planning Portal it is estimated that the upfront costs for each council could be approximately up to \$50,000 in addition to ongoing costs of upwards of \$30,000 for annual licencing fees, staff/specialist training, community awareness education and system maintenance.

⁵https://www.fairtrading.nsw.gov.au/data/assets/pdf_file/0009/902349/Practice_standard_for_registered_certifiers_0920.pdf

It is important for the e-Planning platform to have the capabilities to handle all the additional requirements now being placed on it. Such upgrades need to be well-tested and in place before any changes are made. It is therefore important that councils are consulted as the system of lodgement and record keeping for e-Construction on the NSW Planning Portal is progressed.

Recommendation 7:

LGNSW requests that councils be consulted as the system for lodgement of designs and compliance declarations on the NSW Planning Portal is developed. This is important to ensure that the requirements and costs of system integration are known early and future investigation of compliance issues can be dealt with as efficiently as possible and is not a cost impost on councils.

Lodgement prior to issue of OC

The requirement in clause 18 of the draft Regulation to lodge various documents “before an application is made for an occupation certificate” (i.e. prior to the ‘lodgement’ of an OC) should be changed to prior to the ‘issue’ of a relevant OC. The reason being that on major developments the applicant may lodge an OC with the certifier weeks or more before the OC is actually issued. During this period numerous documents would be provided to the certifier and the certifier is likely to be undertaking multiple inspections around and up until finalisation of the work. If the application cannot be made before all of these documents are provided to the Secretary, it may result in delays in the assessment and compilation of documents, inspections and issue of the OC by the certifier.

Recommendation 8:

Amend clause 18 of the draft Regulation to require documents to be lodged prior to the ‘issue’ of an OC rather than prior to the ‘lodgement’ of an OC.

4.5 Registration of engineers

General comments

LGNSW supports registration of professional engineers, in line with the principle that all practitioners, from design to completion, should be held accountable and must operate within a robust regulatory framework.

Councils employ many engineers and some architects involved in designing and building public/community assets. As the *Design and Building Practitioners Act 2020* and draft Regulation is currently limited to professional engineers who design components of Class 2 buildings, LGNSW understands that professional engineers employed by councils will not be required to be registered at this stage, as they do not perform work on class 2 buildings.

The government has indicated that in time, the scope of the proposed system of registration for professional engineers will be extended to other classes of building and infrastructure. To date, LGNSW has engaged with the Department of Customer Service and councils to better understand the potential cost that this regulatory regime may have on local government as a

significant employer of professional engineers. Some councils have sought clarification of the likely financial implications and indicated they may face challenges when the provisions are eventually extended to other classes of building and infrastructure. This is due to the following:

- With the breadth of assets for which councils are responsible, many engineers in councils perform a wide range of engineering tasks and these do not necessarily sit neatly within the five prescribed areas of single registration that are proposed. For example, on any single day a professional engineer in a regional and rural council may be required to work on engineering work that ranges from sewerage, stormwater, roads or electrical engineering work.
- Limiting staff to only work in the prescribed areas may have workload and cost implications for councils as they may have to employ additional staff to cover prescribed areas or require staff to be registered across multiple categories.
- In rural and regional areas where councils often have lower staff ratios and it is difficult to attract and retain skilled engineers, having engineers that have the requisite experience and degree/tertiary qualification to be registered may prove difficult. For example, LGNSW research in 2018 established that 86% of councils reported skills shortages, with engineers the top skill shortage occupation, the sector also has an ageing workforce and apprenticeships have declined significantly (falling by 64% between 2012 to 2017, compared to 13% across all-industries).

As it is the Department of Customer Service's intentions to expand the scope of professional engineers to capture other work functions over time, it is important that local government is consulted as the scheme is designed to ensure the system is workable for councils.

Pathway Options

LGNSW is not in a position to comment on the optimal pathway for registration of professional engineers, however alignment with Queensland and Victorian schemes is considered to be a sound approach, provided the unique circumstances of council engineers can be considered. Many border communities use practitioners from other states and the transferability and recognition of registration is essential.

Experience

To be registered, it is proposed that engineers will be required to show five years' experience *in the kind of work that they are seeking to be registered in*. This is supported-in-principle; however, some flexibility may be required as the scheme is expanded to acknowledge the breadth of engineering work undertaken by local government engineers as noted above.

Qualifications

It is proposed that applicants for registration as a Professional Engineer must demonstrate the completion of a relevant qualification, for example a 4-year degree or Master of Engineering that is recognised by the Washington Accord, or a qualification assessed as being equivalent for a qualification that was conferred by an Australian or foreign university or tertiary institution.

While this is supported-in-principle, there are a number of highly experienced engineers that have worked in the local government sector for many, many years who hold a local government engineering certificate or other qualification that is not at a degree level. As the scheme is expanded it will be important to include some flexibility around the assessment of

qualifications, and consider a mixture of qualifications and experience as in some instances practical experience is as valuable as a qualification.

Insurance

LGNSW supports the proposal for practitioners to be adequately insured for the work they are doing, including the requirement to be adequately insured against any liability they may become subject to as a result of carrying out their work. LGNSW also supports the proposal for practitioners to decide what insurance is 'adequate' in their circumstances, noting that in councils, professional engineers may be covered under their organisational policy and LGNSW contends that in these circumstances an individual policy should not be mandated, as this would create additional unnecessary costs.

Continuing Professional Development (CPD)

As the RIS notes, CPD obligations impose a cost on practitioners and their employers and require them to take time away from their work. This is particularly challenging for engineers in rural and regional councils with limited staff, who may have limited access to formal training courses and facilities and long distances to travel to attend courses in metropolitan or major regional areas.

LGNSW has consistently advocated for a flexible approach to CPD and other provisions in the design of the registration system for professional engineers. LGNSW is therefore pleased to see that the design of the proposed CPD requirements has intentionally sought to minimise cost, with courses available on a digital platform and CPD activities consisting of both informal and formal activities, meaning practitioners can complete their CPD obligations at a time and location that will best accommodate their work commitments.

Under Pathway 1, it is proposed that 30 out of a total of 60 points per year must relate to the professional engineer's area of practice. As noted above, some flexibility may be required as the scheme is expanded to acknowledge that many local government engineers work across multiple areas of practice not just one area.

LGNSW agrees with the proposal for the Regulation to provide for up to 10 surplus CPD points to be able to be carried into the following year, but would also support flexibility around CPD point deficits, as engineers from rural and regional areas may face greater barriers in completing the required number of CPD activities annually.

Expansion of the scheme

LGNSW advocates for a public commitment by government to a program 'roadmap' for the expansion of these reforms to other building classes and classes of construction and professional engineering work post 1 July 2021. This should include consideration of transition and grandfathering arrangements to enable councils and their engineering employees sufficient time to prepare for their transition into the new scheme and to meet the new requirements.

LGNSW also requests that the local government sector be consulted during the development of an expanded registration scheme that would eventually capture local government engineers.

Recommendation 9:

LGNSW seeks the NSW Government's assurance to design a flexible scheme that recognises the unique circumstances of local government engineers' experience and competency, and that local government will be consulted well in advance of any expansion of the system of registration of engineers.

Recommendation 10:

LGNSW seeks the NSW Government's public commitment to a program 'roadmap' for the expansion of these reforms post 1 July 2021 to encompass the registration scheme envisaged for all professional engineering work.

Recommendation 11:

LGNSW considers that professional engineers working for a local council organisation should not need to hold individual insurance, as the council is responsible for managing these risks within the local government context.

4.6 Resourcing, Monitoring and Review

The new system of registration of building and design practitioners and compliance declarations that is proposed must be adequately resourced by the NSW Government.

The proposed reforms introduce significant new responsibilities for practitioners and greater complexity to the system of building regulation. LGNSW is of the view that the new requirements for practitioners will only be effective if they are backed by a well-resourced system of monitoring and compliance. LGNSW does not want to see a repeat of the problems caused by inadequate levels of oversight and auditing of the private certification system over the 20 years or more since it was introduced.

To assess whether the new provisions are working as intended and appropriately resourced, LGNSW requests that the NSW Government commit to a program of monitoring and review and for local government, industry and other stakeholders to be able to provide feedback.

Recommendation 12:

LGNSW recommends that the NSW Government commits to appropriate and ongoing resourcing and a program of monitoring and review, with sufficient resources for auditing and enforcement to effectively implement the Design and Building Practitioners Act and Regulation from 1 July 2021.

5. Conclusion

Local government plays a key role in the planning and building approval system. While the focus of the Design and Building Practitioners Act 2020 and draft Regulation is on practitioners, the system of registration and compliance has implications for councils given their role as a consent authority, their inspection and enforcement powers (together with private certifiers) to achieve compliance with the *Environmental Planning and Assessment Act 1979* and more broadly the advice and assistance they provide to residents and developers in

assisting them to undertake developments. In short, council are the first port of call for many in the community when things are seen to go wrong with building and construction.

Councils have a keen interest to see the new regulatory framework deliver well-built, safe and compliant buildings that protect the public interest. It is important that close consultation with local government is maintained so that issues can be promptly addressed. This is particularly the case for the expansion of the registration scheme for professional engineers, as these requirements will result in additional costs and other impacts for councils, which will require considered design and reasonable transition before they are implemented.

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To discuss this submission further, please contact LGNSW Strategy Manager, Planning and Transport, Jane Partridge on 02 9242 4093 or at jane.partridge@lgnsw.org.au.

Appendix 1 Summary of Recommendations

Recommendation 1

LGNSW seeks the NSW Government's public commitment to a program, timeframe and resources to expand these provisions beyond class 2 (multi-unit residential) buildings, so that other forms of building where there is a risk to quality, safety and non-compliance will be captured under this legislation in future.

Recommendation 2

LGNSW recommends a staged approach for expansion of the reforms to other building types, with class 1b, 3 and 9 buildings as a priority in stage two along with retail, warehouses and other class 6, 7 and 8 buildings, followed by classes 4, 5 and 1a in stage three.

Recommendation 3

LGNSW recommends giving further consideration as to whether a reasonable threshold (e.g. \$50k) should apply to exclude certain works, particularly if the works are limited to being within one SOU.

Recommendation 4

The list of excluded building work in clause 13 of the Regulation should be expanded so that work specified in an Order issued under the *Local Government Act 1993* is also excluded.

Recommendation 5

LGNSW seeks assurance that the new compliance declaration registration system will align with the development approval process and does not undermine the existing process for issuing Construction Certificates and Occupancy Certificates under the EP&A Act. Division 2 (Requirements relating to compliance declarations) and Schedule 6 (Design compliance declaration form) should be amended to include a statement requiring the declaration to state that the regulated design is consistent with the development consent. LGNSW suggests basing this on similar terminology as used in the Practice standard for registered certifiers.

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Recommendation 9

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that local government will be consulted well in advance of any expansion of the system of registration of engineers.

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LGNSW seeks the NSW Government's public commitment to a program 'roadmap' for the expansion of these reforms post 1 July 2021 to encompass the registration scheme envisaged for all professional engineering work.

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