

Design and Building Practitioners Regulation 2020

Stakeholder Feedback Template Form

Your Name: Dr Kirsten Orr, Registrar

Organisation Name: NSW Architects Registration Board

Date: 11 January 2021

About you

The NSW Architects Registration Board ('the Board') is the government agency that administers the *Architects Act 2003* (NSW), which regulates architects in NSW. Its role is to:

- protect consumers of architectural services by ensuring that architects provide services to the public in a professional and competent manner
- establish and maintain a register of architects in NSW
- discipline architects who have acted unprofessionally or incompetently
- accredit architectural qualifications for the purpose of registration
- inform the public about the qualifications and competence of individuals or organisations holding themselves out as architects
- promote a better understanding of architectural issues in the community

For more information visit: www.architects.nsw.gov.au

Thank you for this opportunity to provide feedback on the proposed Design and Building Practitioners Regulation 2020. The Board welcomes the RIS process and looks forward to working collaboratively with NSW Fair Trading and supporting the implementation and administration of the new legislative regime.

Regulatory Impact Statement (RIS)

Scope of reforms (page 15)

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?
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?

Regulated design (page 17)

3. Are the proposed exclusions from 'building work' appropriate? Why/Why not?
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).

Registration of Compliance Declaration practitioners (page 23)

5. Do you support the proposed classes of Design Practitioner? Why or why not?

The Board supports separate categories for 'design practitioner—architectural' and 'design practitioner—building design (restricted)' for the following reasons:

First, Pt 2 Div 2 of the *Architects Act 2003* (NSW), accompanied by reg 9 of the Architects Regulation 2017 (NSW) mandates that only an individual who is registered as an architect under the *Architects Act* can be referred to by themselves or others as an 'architect', an 'architectural designer' or as providing 'architectural services'. If the *Design and Building Practitioners Act 2020* (NSW) ('the Act'), along with the draft Design and Building Practitioners Regulation 2020 ('the Draft Regulation') seeks to regulate building designers who are not architects, it will need to include a separate class that does not contain the term 'architect' or its derivatives. The class 'design practitioner—building design (restricted)' achieves this end.

It should be noted that the Board does not endorse the design of class 2 buildings, absent the involvement of an architect.

Second, while all architects will have regulated and consistent minimum qualifications and skills (due to the standardisation of accredited university courses), as well as a measurable amount of relevant knowledge and experience (due to the initial and ongoing requirements of registration), other types of building designers have vastly varying qualifications, experience, knowledge and skills. It is therefore suggested that the separate class 'design practitioner—building design (restricted)' should be distinguished from 'design practitioner—architectural', not only in terms of building type, but also with regard to the level of regulation required under the Act and the Draft Regulation. Members of the 'design practitioner—architectural' class will already be subject to Schedule 2 of the Architects Regulation (NSW Architects Code of Professional Conduct). Additionally, the Board's CPD policy provides that architects are required to complete 20 hours of CPD each year, a process that seeks to ensure currency and adequacy of their expertise. By contrast, individuals falling into the 'design practitioner—building design (restricted)' class are not subject to such requirements.

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?
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.
8. Other than qualifications, skills, knowledge and experience requirements, are there any other eligibility criteria that applicants should meet to be eligible for registration?

9. Do you agree that practitioners should be required to have 5 years of recent and relevant practical experience?

The Board does not agree with this assertion with regard to ‘design practitioner—architectural’ for the following reasons:

First, the Board is of the view that the registration process under the *Architects Act* will ensure that architects have the requisite experience to competently carry out their obligations under the Act and Draft Regulation.

In order to register as an architect under the *Architects Act*, an individual must have completed an accredited architecture qualification (a 3 year bachelor’s degree in architecture followed by a 2 year Master of Architecture) and must have gained a minimum of 2 years of practical experience (or full-time equivalent) in the architectural services profession. The curricula of accredited architecture qualifications that individuals study must include development of skills against prescribed performance criteria (‘PC’) from the National Standard of Competency for Architects. This includes PC 3.4 ‘Design response incorporates assessment of relevant legislation, codes and industry standards’; and PC 5.3 ‘Evaluation and integration of regulatory requirements’, as well as building documentation for construction.

Applicants for registration are subjected to a comprehensive assessment process that involves:

- Submission of a logbook in which a minimum 3300 hours must be logged against 15 prescribed performance criteria (‘PC’) from the National Standard of Competency for Architects. This includes PC 3.4 ‘Design response incorporates assessment of relevant legislation, codes and industry standards’; and PC 5.3 ‘Evaluation and integration of regulatory requirements’, as well as building documentation for construction. At least 40 hours of experience must be gained at the Executive level in each of at least five of the 15 prescribed PCs
- Submission of a Statement of Practical Experience to provide evidence of satisfaction of the practical experience requirement
- Completion of Part 2 national written examination paper
- Completion of Part 3 examination by interview by 2 assessors

Thus, the Board believes that the adequacy of the recent and relevant practical experience of the ‘design practitioner—architectural’ class is already dealt with under the *Architects Act* and the various pathways to registration as an architect.

Second, the Board notes that ‘relevant’, as regards practical experience in Sch 2 cl 4 of the Draft Regulations may be construed to relate only to experience on class 2 buildings. The Board is of the view that a ‘design practitioner—architectural’ with experience in the design of a ‘building element’ or ‘performance solution’ in other classes of complex building would have the requisite qualifications, experience, knowledge and skills to satisfy the purposes of the Act and Draft Regulation.

For this reason, the Board suggests that ‘relevant’ include qualifications, experience, knowledge and skills in class 2 buildings as well as other sufficiently complex buildings. Examples might include multi-storey buildings in classes 3, 5, 8, 9a and 9c.

Finally, the Board perceives a lack of clarity around a determination of what constitutes recent relevant practical experience for the purposes of Part 3 of the Draft Regulation. Issues to be clarified include whether ‘5 years’ of ‘practical experience’ would involve the practitioner working full time on regulated designs during the proscribed period, or, if not, what amount of time would be satisfactory. Issues of how a practitioner would prove that they had obtained this experience would also need to be clarified.

10. Some classes of practitioner have been proposed with authority to work on low and medium rise buildings? Do you support this approach?

See 5 above and comments on Schedule 1 below.

Registration of Professional Engineers (page 29)

- 11. Are there any other areas of engineering that should be captured for the purposes of designing or constructing a class 2 building, or a building containing a class 2 part?
- 12. Do you support a co-regulatory approach for the registration of 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?
- 14. The Regulation proposes recognition of Washington Accord accredited qualifications. Do you think this is appropriate? If not, what alternative approach do you suggest?
- 15. Under Pathway 2 what criteria do you think the professional engineering body should satisfy to be eligible to perform their function?
- 16. Would you be supportive of professional bodies developing a PSS for Pathway 3 to be available?
- 17. Do you agree that Professional Engineers should be required to have 5 years of recent and relevant practical experience?
- 18. Do you support the proposed generic list of skills and knowledge requirements for all classes of engineering (excluding fire safety)? If not, please outline what you think the specific skills and knowledge for each class of engineer should be.

Compliance Declaration Scheme: practitioner requirements (page 38)

- 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?
- 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.
- 21. Do you support the matters covered in the Design Compliance Declaration? Why or why not?

22. Do you consider any other matters should be included in the Design Compliance Declaration?
23. Do you support the proposed title block? Are there any other matters that should be included in the title block?
24. Do you support the title block being available in a.dwg format?
25. Do you support the proposal that varied regulated designs be lodged within 1 day of the building work being commenced? Why or why not?
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?
27. Are there further matters that should be included in the Building Compliance Declaration? If so, what are they?
28. Are there further matters that should be included in the Principal Compliance Declaration? If so, what are they?

Insurance (page 51)

29. Do you support the approach proposed for insurance requirements for Design Practitioners and Professional Engineers? Why or why not?
30. Do you consider additional insurance requirements should be prescribed for Design Practitioners and Professional Engineers? If so, what?
31. Do you support the proposed transitional arrangements that exempt Building Practitioners from being insured for issuing Building Compliance Declarations? Why or why not?

Continuing professional development (CPD) (page 54)

- 32. Do you support the proposed CPD requirements for Design and Building Practitioners? Why or why not?**

The Board supports the proposed CPD requirements for design practitioners.

As mentioned above, architects are currently required to complete 20 hours of CPD each year, comprised of at least 10 hours formal, and up to 10 hours informal CPD (Architects Regulation cl 16 and the Board's CPD policy.)

The Board would welcome 3 hours of CPD under the Act and Draft Regulation that could be integrated into this regime. The Board notes that each hour could be equivalent to an hour or point under the Board's scheme.

To ensure successful integration of the 2 schemes, tailored CPD for 'design practitioner—architectural' should be developed in consultation with the Board. This would ensure that the modules were relevant and accessible to architects.

33. What types of training, education or topic areas would be relevant for the functions carried out by Design and Building Practitioners?

The Board has data indicating that 'technical compliance' and 'ethics and professional responsibility' are two areas of weakness in the wider architectural services profession that would benefit from focused CPD activity.

The Board welcomes compulsory CPD that addresses:

- skills and learning gaps in the construction sector
- obligations under the Act and Draft Regulation
- understanding of the National Construction Code and Building Code of Australia.

34. Do you support the proposed CPD requirements for engineers under pathway 1?

35. Do you support the mandatory CPD topic areas? Why/why not? Please make any suggestions for amendments and explain why they are necessary.

See response at Question 33 above.

Penalty notice offences (page 57)

36. Do you support the proposed penalty notice offences and amounts proposed in Appendix 1? Why or why not?

For comments on penalty notices, see Schedule 5 below.

37. Do you think the proposed penalty notice offences and amounts are fair and reasonable?

For comments on penalty notices, see Schedule 5 below.

Fees (page 59)

38. Do you support the reasons for the proposed fees? Why or why not?

39. What do you think NSW Fair Trading should consider in determining the fees?

40. Are you interested in being involved in targeted stakeholder consultation on fees?

Proposed Design and Building Practitioners Regulation 2020

1. Part 2 – Regulated designs and types of work

As outlined at 5 of the RIS above, Pt 2 Div 2 of the *Architects Act* creates offences for representing individuals as architects when they are not registered under the *Architects Act*.

In particular, a person cannot use ‘architectural design’ as a description of services provided by a person who is not an architect (*Architects Act* s 13 (1)(c); Architects Regulation reg 9 (b)).

The Board is concerned that Schedule 1 cl 6 (Design practitioner—building design (restricted)) of the Draft Regulation may lead to confusion and possible breaches of the *Architects Act* because the section ‘authorises’ building designers in this class to ‘prepare or vary a regulated design in relation to the architectural design of a [permitted] building’ (ccl 6(1)(a), 6(1)(c)(i)).

Similarly, Sch 1 cl 6 (b) and (c)(ii) could lead to building designers in this class breaching the *Architects Act* through making a design compliance declaration in relation to an ‘architectural design’.

While the Board understands that it is necessary to distinguish between different types of building design, it is concerned that this use of the phrase ‘architectural design’ is undesirable in light of Part 2 Division 2 of the *Architects Act*.

Alternate phrasing along the lines of ‘Building design of a type that is also carried out by an architect’ would be acceptable to the Board.

2. Part 3 – Requirements for designs and building work

Lodgement of designs and compliance declarations, requirements of principal design practitioners and building practitioners

3. Part 4 – Registration of practitioners

Applications and conditions of registration and registration obligations

4. Part 5 – Recognition of professional bodies of engineers

Applications and requirements for recognition or registration scheme

5. Part 6 – Insurance

Insurance for design and principal design practitioners, professional engineers, building practitioners and adequacy of cover

6. Part 7 – Record keeping

Record keeping for design and principal design practitioners, professional engineers, building practitioners

7. Part 8 – Miscellaneous

Authorised and penalty notice officers, exchange of information, transitional arrangements for insurance for building practitioners and qualifications for fire system designers and work done under existing arrangements.

8. Schedule 1 – Classes of registration

Classes of registration for practitioners and scope of work

The Board is of the view that the class ‘design practitioner—architectural’ should align with State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65) of the Environmental Planning and Assessment Act 1979 (NSW) and the Environmental planning and Assessment Regulation 2000 (NSW) (EPAA Regulation) to avoid complication and confusion.

The EPAA Regulation requires the involvement of a qualified designer – defined as a registered architect (regs 50(1A), 3) – in residential apartment development. Clause 4 of SEPP 65 covers all new, or significant alterations to, residential flat buildings, shop top housing or mixed use development with a residential accommodation component that is 3 or more storeys (not including levels below ground/ at ground car parking) that contain 4 or more dwellings.

This is to be contrasted with the Act and Draft Regulation, which seek to differentiate ‘low rise building’ (defined as the construction of class 2 buildings or buildings that contain a class 2 part ((unless they are below a certain floor area or are of type A/B construction)) and ‘medium rise building’ (defined as class 2 with no more than 3 storeys ((apart from Type A construction and other criteria)) (Draft Regulation dictionary) from unrestricted buildings.

While the objectives of SEPP 65 are very different to, and not inconsistent with, the Act and Draft Regulation, the Board is of the view that having two such regimes applying to residential apartment buildings could cause confusion. For this reason, it is suggested that ‘design practitioner—building design (restricted)’ be defined by reference to the definitions and exclusions in reg 50 (1A) of the EPAA Regulation and cl 4 of SEPP 65.

9. Schedule 2 – Qualifications, experience, knowledge and skills

For building practitioners, design practitioners, principal design practitioners and professional engineers

10. Schedule 3 – Continuing professional development

CPD for prescribed practitioners and CPD for professional engineers

11. Schedule 4 – Code of practice

Code for prescribed practitioners and code for professional engineers

The Board is of the view that members of the ‘design practitioner—architectural’ class should not be subject to the Code of Practice for prescribed practitioners contained in Sch 4 of the Draft Regulations (Code of Practice) because the existence of two overlapping codes would cause confusion among consumers and practitioners.

The Board suggests that the purposes of both acts would be better served through making minor alterations to the NSW Architects Code of Professional Conduct to bring it into alignment with relevant parts of the proposed Code of Practice.

The NSW Architects Code of Professional Conduct is a detailed code that is familiar to, and binding upon, all architects. It covers many of the issues in the Code of Practice, as well as numerous others. Importantly, it regulates the generality of the work undertaken by a practitioner in the course of their practice, not just specific areas. By contrast, the

Code of Practice will apply to a person 'only in the person's capacity as a prescribed practitioner' (Sch 4 cl 2(2)). Thus, some acts of an architect (such as the design of building elements) will attract the Code of Practice while others (such as the design of internal staircases) will not. As regulated designs will often be integrated with non-regulated designs in a single drawing, it may be difficult for consumers and architects to determine which code pertains in a particular situation.

The Board proposes a consultative approach in which key elements presently contained only in the Code of Practice are incorporated into the NSW Architects Code of Professional Conduct.

It is worth noting that, in addition to breaches of the Architects Code of Professional Conduct, architects may also be sanctioned under Part 4 of the *Architects Act* for professional misconduct and unsatisfactory professional conduct for, inter alia, 'conduct ...that demonstrates incompetence, or a lack of adequate knowledge, skill, judgment or care' or 'improper or unethical conduct ...in the course of the practice of architecture' (*Architects Act* s32).

12. Schedule 5 – Penalty notice offences

The Board notes that a number of the proposed penalty notice offences under the Act and Draft Regulations may overlap with existing penalty notice offences under the *Architects Act* and Architects Regulation. For example, if a person who is not an architect seeks to register themselves under the 'design practitioner—architectural' class, they will be breaching both s 10 of the Act and Pt 2 of the *Architects Act*.

For this reason, further consultation is suggested with the Board to ensure that the interaction of the two penalty notice regimes does not result in uncertainty or excessive overall penalties.

13. Schedule 6 – Forms

Design Compliance Declaration

14. General feedback

Any other comments you would like to make on the Draft Regulation.

All those in the design practitioner—architectural class will have existing registration numbers under the *Architects Act*.

The Board is of the view that the duplication of registration numbers will create confusion and uncertainty among architects and consumers, which in turn may lead to administrative delays and errors.

Proposed Continuing Professional Development Guidelines (CPD Guidelines)

Please use this section to provide feedback on the proposed CPD Guidelines. There are two Guidelines we are seeking feedback on:

1. *CPD Guidelines for prescribed practitioners (design practitioners, principal design practitioners and building practitioners) and,*
2. *CPD Guidelines for professional engineers.*

CPD Guideline for prescribed practitioners

1. **Do you consider that requiring practitioners to undertake three hours of CPD activity is appropriate? Why or why not?**

The Board supports this, provided that the CPD can be counted toward an architect's 10 hours of compulsory Formal CPD under the *Architects Act* (see also response at Question 32 of the RIS above).

2. **Do you support that CPD activities must be from the approved platforms? If not, please explain why.**

The Board supports CPD activities from the approved platforms but suggests that these should not be generic but be tailored to the specific needs of professional groups, such as architects.

3. **Do you support the guidelines prioritising technical CPD activity (i.e., improving knowledge and understanding of the National Construction Code and Building Code of Australia) over other CPD activities? If not, please explain why.**

The Board supports prioritisation of these topics (see also response at Question 33 of the RIS above).

4. **The Department is working with industry to develop courses that would assist practitioners. What courses or topic areas should be developed and available on the Construct NSW Learning Management System? We are particularly interested in providing courses that cover gaps in current learning content.**

See response at Question 33 of the RIS above.

5. **Are there any other general comments you would like to make on the Continuing Professional Development Guidelines for prescribed practitioners?**

CPD Guidelines for professional engineers

1. Do you support the proposed CPD structure and allocation of points? Why/why not? Please make any suggestions for amendments and explain why they are necessary.
2. Do you support the mandatory CPD topic areas? Why/why not? Please make any suggestions for amendments and explain why they are necessary.
3. Are there any activities that should be included/not included as:
 - a) Formal education and training activities?
 - b) Informal education and training activities?
4. Structured training courses available from Construct NSW Learning System and from the Australian Building Codes Board are proposed to count for 2 CPD points. Do you support this approach?
5. The Department is working with industry to develop courses that would assist professional engineers. What courses or topic areas should be developed and available on the Construct NSW Learning Management System? We are particularly interested in providing courses that cover gaps in current learning content.
6. Are there any other general comments you would like to make on the Continuing Professional Development Guidelines for Professional Engineers?