

Design and Building Practitioners Regulation 2020 consultation

The Professional Standards Council of New South Wales welcomes the opportunity to make a submission to the NSW Government's consultation on the draft Design and Building Practitioners Regulation 2020. This submission is consistent with previous advice of the Professional Standards Councils collectively and in support of national consistency in the regulation of professions in the built environment.

The Professional Standards Council supports *Pathway 3* for registration of professional engineers

Pathway 3, with registration based on the operation of a professional standards scheme, provides additional surety to the citizens of New South Wales as schemes are well proved, state based, federally consistent, and publicly visible vehicles for professional accountability. The Council considers that practitioner registration aimed at ensuring critical work is completed by competent, qualified, skilled, experienced and insured people is most effective when it rests on occupational associations regulating their members and their professional standards within a scheme to protect the interests of consumers.

In providing for schemes, the *Professional Standards Act 1994* (NSW) has objects of consumer protection and improved occupational standards, which are also at the heart of the *Design and Building Practitioners Act 2002* (NSW).

The Council's submission responds to the following consultation questions:

12. Do you support a co-regulatory approach for the registration of engineers?

16. Would you be supportive of professional bodies developing a PSS for *Pathway 3* to be available?¹

The Council would also support *Pathway 3* being available to professional bodies as a co regulatory approach² for the registration of Design Practitioners, Principal Design Practitioners and Building Practitioners.

About the Professional Standards Council

The Council is an independent statutory body established to facilitate, approve and supervise the professional standards schemes of occupational associations. The Council administers the *Professional Standards Act 1994* (NSW). The objects of the Act include the improvement of occupational standards and the protection of consumers, achieved through a suite of mechanisms which aim to limit economic loss, manage occupational risk and encourage the development of the professional standards' regulatory capacity of occupational associations.

¹ NSW Department of Customer Service (November 2020) Regulatory Impact Statement, page 38. Retrieved from <https://www.haveyoursay.nsw.gov.au/design-building-practitioners-regulation>

² By reference to occupational associations, the *Professional Standards Act 1994* and the *Design and Building Practitioners Act 2020*. The NSW Treasury Government Guide to Better Regulation TPP 19-01 (January 2019), page 28, defines co-regulation as typically referring to the situation where an industry or professional body develops the regulatory arrangements in consultation with a government. While the industry administers its own arrangements, the government provides legislative backing to enable the arrangements to be enforced. Retrieved from <http://productivity.nsw.gov.au/better-regulation>

The Council has an overarching obligation to act in the public interest. Before approving a scheme, the Council must invite comments and submissions from the general public and interested stakeholders about the proposed scheme. The Council may conduct a public hearing into a proposed scheme to ascertain the public interest.

Schemes are in force for a maximum of five years during which the Council provides ongoing expertise and supervision in the operation of associations' professional standards regulation, ensuring that each association's professional risk management strategies, standards and accountability mechanisms are being enforced by the association on their members.

About professional standards schemes

A scheme is a disallowable legislative instrument pursuant to the *Professional Standards Act 1994* (NSW).

The public interest in schemes is assured by high levels of transparency and review. Once approved by the Council, a scheme is presented to the minister for authorisation and publication. Once authorised, the scheme may be disallowed by the legislature. There is a statutory right to challenge a scheme, for persons affected by the scheme. The Minister has the right to revoke the scheme.

A scheme may only be proposed and operated by an association as defined in the Act. An association must be comprised of members of a single occupational group and must represent the interests of the occupational group.

Professional standards schemes protect consumers

The Act seeks to protect consumers by striking a balance between:

- Placing a ceiling on the amount of civil liability to which an association member subject to the scheme may be exposed
- Ensuring sufficient compensation is available to consumers for the vast majority of claims where liability results in an award of damages
- Requiring associations operating schemes to continuously improve the standards of competence and conduct of their members, so that claims are reduced.³

As recognised in the Regulatory Impact Statement, a scheme attracts numerous benefits in the registration of practitioners, including upholding higher standards and consumer protection within the sector⁴.

The consumer safeguards incorporated in schemes include: first, a threshold up to which all claims will be met in full; second, limitation of liability will not apply in relation to claims for death or personal injury or in relation to conduct involving a breach of trust, fraud or dishonesty; third, there must be full disclosure of any limit of liability; fourth, schemes for limited liability must include compulsory professional indemnity insurance; fifth, the

³ Professional Standards Councils, *Professional Standards Councils Annual Report 2020*, page 24. Retrieved from <https://www.psc.gov.au/news-and-publications/annual-reports>

⁴ NSW Department of Customer Service (November 2020) Regulatory Impact Statement, page 37. Retrieved from <https://www.haveyoursay.nsw.gov.au/design-building-practitioners-regulation>

introduction of risk reduction and risk management strategies; and sixth, there must be a system to allow for proper redress of consumer complaints⁵.

In this way, an approved scheme operates to support associations and their efforts to assist their members to make the critical connection between their competence, conduct and consumer protection.

The Act requires an association's collection and analysis of complaints and claims data (typically together with environmental scans and other sources of industry intelligence) to identify and minimise the risks their members encounter in providing professional services to their clients. This enables the association to proactively help their members to counter those risks in their own practice and across the profession. In this way, the adoption of *"...appropriate risk management systems, and proper complaints and disciplinary procedures for consumer complaints... can mesh with the professional association's encouragement of ongoing improvement.... Rather than compartmentalising disciplinary or risk management processes, they can provide wider insights which can help target areas for change. The overall result is to encourage heightened standards of competence, conflicts of interest, breach of ethical standards and standards of honesty"*⁶.

Flexibility of schemes

A scheme may be pleaded by a person to whom the scheme applies in court proceedings so as to limit the amount of compensation awarded to a consumer, but only where the person has access to professional indemnity insurance consistent with the requirements of the scheme. Through this mechanism, consumers can be confident that compensation is available.

A scheme can specify one or more limitations of liability, not less than \$500,000 under the legislation. The proposed liability limitations must be supported by an actuarial analysis of the claims made against members of the association over a ten year period. The association must also contemplate the proposed limitation of liability in the context of the lifespan of the scheme (16 years) to mitigate any potential future risks to consumers.

The construction of schemes is flexible enough to accommodate the structure and organisation of an occupation. For example, they may include different limitations of liability for different types of work, classes of members, and types of clients, so long as they can be adequately defined in the scheme. The limitations of liability are designed to be high enough to fully meet almost all claims, and to provide confidence that insurance or assets will be available if damages need to be paid. A member must have access to professional indemnity insurance that would compensate a client to the level of the limitation of liability after costs. In this manner, a limitation of liability provides the consumer with a higher degree of assurance compared to a requirement to hold a professional indemnity insurance policy to an arbitrary specified amount, or where the service provider is uninsured or contractually shifting risk to the consumer or other service providers.

A scheme may also allow an association to specify a higher maximum amount of liability in relation to persons to whom the scheme applies, in accordance with an application from the person and duly considered by the association, for all cases, or in any specified case or class of case. For example, a member of an association may wish to engage in project (or

⁵ NSW, *Parliamentary Debates*, Legislative Council, 14 September 1994 (J P Hannaford, Attorney General, Minister for Justice and Vice President of the Executive Council) Professional Standards Bill second reading speech

⁶ Dimity Kingsford Smith, Wee-An Tan and Deen Sanders, *Professions and Risk*, Professional Standards Councils Research Library. Retrieved from <https://www.psc.gov.au/research-library/professions-and-risk>

contract) work which has higher insurance requirements than the limitation of liability found in the scheme. It is not permissible for a scheme to specify unlimited liability for any class of member or type of work.

These features of schemes may make them particularly appropriate to associations in the building and construction industry.

Scheme development and approval timeframe

Establishing a scheme requires a significant step up in an association's professional standards and regulatory capacity. The Council's experience is that, from an association's submission of a complete application for a scheme, to the scheme being approved and coming into force after gazettal, takes approximately 12 months. However, the Council notes that this timeframe is dependent on the scale of the association, the association's regulatory experience, capacity and capability, and its existing systems for occupational risk management.

Pathway 2 includes requirements that are necessary elements in an association's development of regulatory capacity. Associations that are 'recognised engineering bodies' in *Pathway 2* and are capable of developing standards and systems to operate a scheme, will be able to take a stepped approach, over time, towards *Pathway 3* and full participation in the co regulation of the occupation and the additional benefits offered by a scheme.

Registration based on professional standards schemes in *Pathway 3*

Pathway 3 introduces a co regulatory arrangement that empowers associations to ensure practitioners are responsible for their work and collectively play a part in improving public confidence in the building industry.

Associations may deliver benefits associated with bringing public interest dimensions into a 'tripartite' regulatory arrangement, shared between government, associations and their members so as to overcome the limitations of regulation as a transaction between the state and business on the one hand and industry regulation on the other. Professional associations through their experience and expertise are also well placed "...*not only to pick problems and fix them but also to pick strengths and expand them. For example, industry leaders take self regulation up through new ceilings and then drag laggards up toward their standards.*"⁷

Association annual reporting to the Professional Standards Council

Associations are required to report annually to the Council on the effectiveness of their professional risk management strategies. Associations' annual reports are incorporated into the Councils' combined Annual Report to the responsible ministers in all jurisdictions and most parliaments. In this way, the associations report the effectiveness of professional standards schemes to the government, law makers, and the public.

Throughout the life of the scheme, an association will monitor and report on their: education programs, consumer complaints handling, member discipline systems, the cost, quality and availability of professional indemnity insurance policies, and the quality assurance system or audit of their members. The collection of comprehensive data from the members about claims against members, and consumer complaints, is a rich

⁷ John Braithwaite, *Responsive Regulation*. Retrieved from <http://johnbraithwaite.com/responsive-regulation/>

source to inform strategies to improve occupational standards and reduce the risk that consumers will suffer loss.

The Council draws on, and aggregate, associations experience and share the lessons and developments across the national professional standards system to:

- foster and embed an environment for discussion, collaboration and regulatory innovation, encouraging continuous improvement of professional standards
- share learnings across industry sectors on good practice risk management/responses
- identify linkages and opportunities for associations to work collaboratively within and across professions in their solutions which respond to conduct, competence and consumer risks
- provide modern and relevant research and advice to associations about their professional integrity systems and risk management.

A scheme recognises the expertise of associations in setting and enforcing professional standards for their members. But more than providing a competency ticket, a scheme enables associations to benefit from the Council's expertise in the disciplines of consumer protection and regulation⁸, providing a coherent environment for advancing professional standards.

Professional standards community of practice

There are currently 17 associations that operate schemes. The schemes include more than 82,000 members who provide services to millions of Australian individuals and businesses.

Associations operating schemes become part of a regulatory community with the shared purpose of improving occupational standards and protecting consumers. The experience of the associations is shared in forums and informal meetings and combines with the Council's function and longstanding experience of providing advice, assistance and encouragement to associations as they go about improving their professional standards regulation over the life of the scheme.

The Council's regulatory agency, the Professional Standards Authority, provides advice on a day to day basis to assist associations to develop their professional standards regulatory capacity.

Draft Regulation

The Authority has reviewed the draft Regulation and advises that there are several clauses where the alignment between the Regulation and the Professional Standards Act could be improved. These are detailed in **Attachment A**. The Authority would be pleased to discuss or expand on these matters, and to assist in any drafting amendments as the Regulation is finalised.

Conclusion

The Council acknowledges the role of associations in supporting competence for their members, including through continuing professional development. A professional standards scheme requires an association also to ensure the professional standards of its member are upheld with an aim of accepting their role in consumer protection and continuously improving standards in this critical aspect of professionalism. A professional standards scheme requires an association to demonstrate its capacity and capability to

⁸ See for example, *Professional Standards Act 1994* (NSW), section 43.

operate, in addition to the elements of *Pathway 2*, robust quality management and professional risk management, a member discipline system to improve members' professionalism, and a consumer complaints resolution system to improve occupational standards.

The Council agrees with the Regulatory Impact Statement that a professional standards scheme '...improves consumer protection...' ⁹ through the association requiring '...all members to maintain best practice standards.' ¹⁰ The Council also strongly supports the Government's encouragement for '... *engineering bodies to commence developing a PSS (professional standards scheme) as a way of streamlining the registration process and improve professional standards and practices across the sector **to deliver increased consumer confidence***' (our emphasis).

More information is available at the Professional Standards Councils website
<https://www.psc.gov.au/>

Yours sincerely

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on behalf of the Professional Standards Council of NSW

11 January 2021

⁹ NSW Department of Customer Service (November 2020) Regulatory Impact Statement, page 37. Retrieved from <https://www.haveyoursay.nsw.gov.au/design-building-practitioners-regulation>

¹⁰ Ibid.

Attachment A

Feedback on Design and Building Practitioners Regulation 2020 (NSW)

Purpose:

The Council provide the following additional feedback directly related to the drafting of the Design and Building Practitioners Regulation 2020 (NSW), for the purpose of alignment with the *Professional Standards Act 1994 (NSW)*.

The approach taken is to format the draft regulation in a box and provide comments below the box. Also, relevant sections of the Act are formatted in a box.

37 Transition of certain recognised or registered professional engineers

(1) If a professional body of engineers that operates with a professional standards scheme no longer **provides for the recognition or registration of professional engineers in accordance with the requirements of the scheme**, a professional engineer who was recognised or registered by the body is taken to continue to be registered under the Act (a prescribed engineer).

(2) A prescribed engineer must continue to comply with the insurance and continuing professional development requirements that were imposed by the body, as if the body was continuing to operate **in accordance** with the professional standards scheme, until the date on which the prescribed engineer's registration is due to expire or be renewed.

Comments:

Regulation 37(1) appears to refer to a situation where a scheme is no longer in force or has been amended in such a way as to exclude previously registered or recognised professional engineers. Both interpretations appear open. Regulation 37(2) appears to imply that r 37(1) refers to a situation where the scheme is no longer in force.

It is possible for a number of reasons, for a scheme to no longer be in force having been in force, or recognising or registering professional engineers, including expiry, revocation, scheme amendment by the association, Minister or Council, amendment of the constitution and membership rules by the association, disallowance by either house of parliament, voided by the Supreme Court.

Regulation 37(2): The parenthetic words 'in accordance' appear to be unnecessary, or open to ambiguity, and may be deleted.

Division 3 Insurance for professional engineers

...

60 Approved arrangements for professional engineers

For the purposes of section 33(2)(b) of the Act, a registered professional engineer is part of an approved arrangement if

(a) for a professional engineer who is a member of a professional body of engineers that operates with a professional standards scheme the professional engineer satisfies the insurance requirements imposed by the body in accordance with the professional standards scheme, or

(b) for a professional engineer who is recognised or registered by a recognised engineering body the professional engineer satisfies the insurance requirements imposed by the body under the body's recognition or registration scheme.

Comments:

Professional Standards Act 1994 (NSW) s 27, provides for occupational associations to determine a standard in relation to insurance policies, viz:

27 Insurance to be of requisite standard

For the purposes of a scheme, an insurance policy must be a policy, or a policy of a kind, which complies with standards determined by the occupational association whose members may be insured under such a policy, or a policy of such a kind.

However, the *Professional Standards Act 1994* (NSW) s 5, does not apply to some types of occupational liability, viz:

5 Occupational liability to which Act does not apply

(1) This Act does not apply to liability for damages arising from any of the following:

- (a) the death of or personal injury to a person,
- (b) (Repealed)
- (c) a breach of trust,
- (d) fraud or dishonesty.

(2) This Act does not apply to liability which may be the subject of proceedings under Part 13 or 14 of the *Real Property Act 1900*.

(3) Subsection (1) (a) does not operate to exclude from the operation of this Act liability for damages arising out of any negligence or other fault of an Australian legal practitioner in acting for a client in a personal injury claim.

Accordingly, when considering draft regs 60(a) and 60(b), an insurance standard determined by an occupational association for a scheme in accordance with PS Act s 27, would exclude the types of occupational liability referred to in s 5 above, and may, to that extent, be less than the comprehensive insurance requirements in these draft regulations and the DAB Act 2020, which may create inconsistencies with the insurance requirements, and outcomes for consumers, between persons complying with reg 60(a) or reg 60(b).

Dictionary

...

professional standards scheme means a scheme approved by the Professional Standards Council within the meaning of the *Professional Standards Act 1994*.

Comments:

We suggest an amendment to the dictionary by adding the words 'and in force,' between 'Council' and 'within'.

Explanation:

Following the Council's approval of a scheme, the scheme does not come into force until it is authorised by the Minister, including a commencement date and expiry date of the

scheme, in accordance with s 13 of the *Professional Standards Act 1994* (NSW). Similarly, following the Council's approval, a scheme may be voided by the Supreme Court, or disallowed by either House of Parliament.

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