



THE LAW SOCIETY
OF NEW SOUTH WALES

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30 October 2019

Building and Development Certifiers Regulation 2019
Better Regulation Division, Regulatory Policy
Locked Bag 2906
LISAROW NSW 2252

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

Dear Review Team,

Draft Building and Development Certifiers Regulation 2019

Thank you for the opportunity to make a submission in relation to the Draft Building and Development Certifiers Regulation 2019 ("Regulation") and the Regulatory Impact Statement for the Regulation. The Law Society's Property Law, Environmental Planning and Development, and Business Law Committees have contributed to this submission.

Our responses to the questions raised in the Regulatory Impact Statement are set out in the attached table.

Thank you for the opportunity to make this submission. If you have any questions please do not hesitate to contact Gabrielle Lea, Policy Lawyer, on (02) 9926 0375 or at gabrielle.lea@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President

Regulatory Impact Statement - Building and Development Certifiers Regulation 2019 – September 2019

Submission by the Law Society of NSW – October 2019

Page	QUESTIONS	COMMENTS
Appendix 5 – List of questions from the RIS		
18	1. Is the commencement date of 1 July 2020 for the proposed Regulation and the Act appropriate? Why or why not?	Yes, provided the Regulation is published in December 2019 as proposed.
18	2. Is the proposed 6 month transitional period appropriate? Why or why not?	Yes, this will allow current certifiers to obtain their new accreditation to comply with the new regime and to ensure that new certifiers are also duly accredited.
19	3. Do you support the Secretary having discretion to require an applicant to complete additional training? Why or why not?	Yes. The Schedules outline various requirements for certification and different tiers of certification depending on building type but there needs to be some flexibility.
19	4. Do you support a person (including an organisation) being able to apply to the Secretary for training to be recognised by the Secretary? Why or why not?	Yes, provided that the application process involves appropriate scrutiny to maintain appropriate standards of training.
20	5. Do you support the grounds for finding that a person is not a suitable person to carry out certification work? Why or why not?	Yes, the grounds are wide, with the usual Secretary's discretion. If someone has had registration either cancelled or suspended under other related building legislation, that is a highly relevant consideration to questions of suitability under this Regulation, to ensure standards are maintained.

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20	<p>6. Do you support the grounds focusing on accreditation to carry out regulated work and licences/registration under the <i>Architects Act 2003</i> and the <i>Home Building Act 1989</i> and similar schemes in other jurisdictions? Why or why not?</p>	<p>Yes, the standards in the <i>Architects Act 2003</i> and the <i>Home Building Act 1989</i> are similar.</p>
20	<p>7. Do you support the process for a certifier to apply for a variation of registration? Why or why not?</p>	<p>Yes. If a variation relates to an “upgrading” of types of buildings that a person can certify then the Secretary must be satisfied that the criteria are met.</p>
20	<p>8. Do you support the fee being the same as the fee for a new registration, subject to the Secretary being able to waive, refund or reduce the fee? Why or why not?</p>	<p>Yes. The variation would normally alter the type of buildings a person can certify and would therefore be deemed to be a new certification. The Secretary does have the discretion to waive, refund or reduce the fee.</p>

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21	<p>9. Are the requirements for professional indemnity insurance contracts and exclusions in the proposed Regulation appropriate? Why or why not?</p>	<ul style="list-style-type: none"> • We acknowledge the practical difficulties in the area of professional indemnity insurance at present, particularly in relation to combustible cladding. We note that work is continuing in this area and we will be monitoring further developments with interest. • We suggest consideration could be given to using the terminology of a professional indemnity “policy” rather than a professional indemnity “contract”. This reflects common usage and avoids any confusion with the contract between the certifier and the client. • In relation to clause 14, an insurer will provide a policy for the future and may also do so for the past i.e. with a retroactive date. Noting that not all insurers will necessarily offer insurance that indemnifies liability arising from known past circumstances, we suggest clause 14 could be amended to provide to the effect that indemnity must extend to all liability of the registered individual incurred at any time arising from acts or omissions after the inception date of the policy and, if available on reasonable commercial terms, all liability since the registered individual first became a registered certifier. • In our view the monetary limits in both clauses 18(1) and 18(2) are insufficient and should be increased. • An alternative to specifying limits would be to require “adequate” professional indemnity insurance, at least for clients under the <i>Home Building Act 1989</i>, with adequacy being determined after considering relevant factors specified by the Secretary (such as potential claims, revenue and number of clients). We note that a similar approach applies in relation to Australian financial services licensees. This approach would give flexibility between different certifier businesses and allow for insurance market conditions. • We suggest that in clause 18(6), the definition of maximum yearly limit should refer to either “claims made” or “claims made and notified” rather than “occurring”, consistent with clause 17(1). • In our view, from the perspective of consumer protection, further consideration needs to be given in relation to specifying a requirement for run-off cover.

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23	10. Do you support the proposed prescribed conflicts of interest in clause 24? Why or why not?	<ul style="list-style-type: none"> • Yes, we expect the rationale is to keep the “building” side and “certifying” side at arms-length. In our view, the certifier should be able to identify why the building cannot be certified or what codes are breached. • We consider that the description of possible conflicts is satisfactory. However, for the avoidance of doubt, we suggest that the words “prepare or” should be added to clause 24(a)(i) after “how to” in the first line.
23	11. Are there any additional scenarios in which a registered certifier should be considered to have a conflict of interest? If so, please explain.	No, we consider that the list of conflicts is adequate.
23	12. Do you support the proposed exempt conflicts of interest in clause 25? Why or why not?	Yes, we agree that the extent of exemptions from possible conflicts should be limited and tightly defined. The proposed exemptions appear to address some of the practical issues identified by the Regulatory Impact Statement.
23	13. Are there any additional scenarios that should be prescribed so that a registered certifier is taken to not have a conflict of interest? If so, please explain.	No.

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24	<p>14. Do you support the list of particulars in clause 28 that must be included in a contract for certification work? Why or why not? Are there any additional particulars that should be included?</p>	<ul style="list-style-type: none"> • We agree that the particulars of the work to be carried out under a contract for certification work should be clearly stated in the contract. This is clearly in the public interest, given that a statutory function is to be carried out. An accurate description of the duties of a certifier for the class of work being certified is also of assistance to the certifier. • Anecdotally, we understand that one of the greatest causes of disputation between certifiers and their clients is a poor understanding by the client of the extent of the statutory obligations of the certifier. It is clear from recent very public examples of failure of building work that the public is, at this time, very ill-informed as to the extent of the certifier's obligations. We support reforms which focus on reducing such misunderstandings, such as the provision of an information sheet. We note the importance of an acknowledgment by the client of the extent of the certifier's obligations. If there is not to be prescribed language as to the obligations, then the correctness of the material in the information sheet is key.
24	<p>15. Do you support the details of when fees and charges are payable in certain circumstances in clause 29? Why or why not?</p>	<p>Yes, we consider that all contracts should, as a matter of good practice, set out all the commercial arrangements to put these matters beyond dispute.</p>
24	<p>16. Do you support the requirement for a declaration by the person having the benefit of the development to be included in the contract and the content of the declaration?</p>	<p>Yes. We note that the contract is unusual in that the work to be performed is to carry out a statutory function and whether or not that is to the advantage of the person "having the benefit of the development". On the other hand, that person requires the services of a certifier and should be required to agree to both the commercial terms and a concise statement or understanding of the work to be performed and the limitations of the obligation of the certifier by reason of which, on occasion, the certifier may act contrary to the interest of the person having the benefit of the development. It is unfair to both parties if this position is not made clear to both certifier and client.</p>

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24	17. Do you support the requirement for the contract to be accompanied by an information sheet and the contents of the information sheet?	We consider this to be essential if the contract is not to prescribe terms that properly reflect the statutory functions which the certifier is required to perform.
26	18. Is the criteria for the Secretary to determine the suitability of a person or director to be an accreditation authority appropriate? Why or why not? What other criteria should be considered?	Yes, given that the criteria in clause 32(1) are not exhaustive and refer to the usual types of disqualifying circumstances. We note that if other relevant matters emerge in the course of an application for accreditation, the Secretary can have regard to those other matters even though they are not specifically referred to in the Regulation.
26	19. Is the 60 business day timeframe for a deemed refusal an appropriate timeframe?	We regard this as a reasonable time for the Secretary to finalise a determination, in the absence of which, appeal rights should become exercisable.
26	20. Do you support the matters that an accreditation scheme must provide for in clauses 38 to 45? Why or why not? What other matters should be considered?	<ul style="list-style-type: none"> • Yes, we generally support the proposed required functionality of any accreditation scheme. Although there is a statutory regime for consideration of misconduct by certifiers, we consider that there may be merit in a requirement that accreditation authorities be required to have a scheme for mediation of disputes between clients and certifiers. This may serve to reduce the number of complaints. • In due course we would be pleased to be given the opportunity to review the accreditation scheme approval guidelines.
27	21. Are the record keeping requirements appropriate for registered certifiers, local councils and accreditation authorities? Why or why not?	Generally yes, although we suggest that in relation to strata certificates, there should be a similar requirement to keep a copy of a certificate or other document that the certifier/council has relied on for the purpose of issuing the certificate.

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27	22. Do you support the penalty that applies for a breach of the record keeping requirements?	Yes.
27	23. Should a penalty apply for the failure to keep records? Why or why not?	Yes, these records should be kept. They may be important in determining the cause of any defective work at a later time.
27	24. Is 10 years an appropriate minimum timeframes that records should be kept by registered certifiers, local councils and accreditation authorities? Why or why not?	<p>No, although we anticipate that this is to mirror the 10 year limitation period for defective building or subdivision work in the <i>Environmental Planning and Assessment Act 1979</i> (“EPA Act”) under s6.20(1). In our view, the period should be longer for the records of a registered certifier and a local Council because:</p> <ul style="list-style-type: none"> • The 10 year period under the EPA Act runs from the completion of the work and the certification of the work may have occurred earlier than that. • The records should be able to be retained in electronic format in which case the cost of retaining them for a long period is minimal. • The fact the records are retained is an added incentive to make sure work is done properly. <p>In our view, a period of 15 years would be more appropriate except for the records of accreditation authorities where 10 years is sufficient.</p>
28	25. Do you support the class of certification work prescribed which requires the council to ensure that anyone who performs the work on their behalf is appropriately registered? Why or why not?	Yes, although we query the exclusion in clause 59(a) of certification work under the <i>Strata Schemes Development Act 2015</i> .

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28	26. Do you support councils being required to notify the Secretary of the dates that registered certifiers commence and cease being employed by them for certification work on their behalf? Why or why not?	Yes.
28	27. Do you support the exemption for registered certifiers employed by councils applying in relation to the payment of a penalty as a form of disciplinary action? Why or why not?	Yes. We note that the Secretary still has the power to cancel the certifier's registration.
29	28. Do you support the expanded definition of certification work? Why or why not?	Yes, in our view clause 62 is appropriate having regard to the skills required to perform the certification work.
29	29. Do you support the authorisation of registered certifiers in the class of engineer – electrical and engineer – hydraulic (building) to carry out regulated work? Why or why not?	We defer to the expertise of other stakeholders.
29	30. Do you support the particulars in clause 64 that must be included in the register of registrations and approvals? Why or why not? What other particulars should be considered?	Yes, the list of particulars in clause 63 is comprehensive and includes sufficient information to make an assessment about the certifier. The register will also encourage compliant behaviour.
29	31. Do you support the Secretary having the ability to waive, refund or reduce the payment of fees? Why or why not?	Yes. This is an appropriate issue on which to exercise discretion.

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31	32. Do you support the proposed classes of registration certifiers, including the way they have been streamlined? Why or why not?	We defer to the expertise of other stakeholders.
31	33. Do you support what each proposed class of registration is authorised to do? Why or why not?	We defer to the expertise of other stakeholders.
32	34. Do you support the proposed duties in the code of conduct? Why or why not? What other duties should be considered?	<ul style="list-style-type: none"> • Yes we support the proposed duties in the code of conduct. The code enables penalties to be imposed where a certifier breaches his or her duties and will act as a deterrent from breaching such duties. We suggest that compliance be monitored to ensure that the penalty amounts are sufficient. • Consideration could be given to adding a further duty to ensure that nothing is done by the certifier to cause any insurances to be voided or to cause the insurer not to be indemnified.
33	35. Are the proposed qualifications and experience appropriate? Why or why not?	We defer to the expertise of other stakeholders.
34	36. Do you support the skills and knowledge requirements in the proposed Regulation? Why or why not?	We query the lengths of experience required. We consider there should not be any period of experience of less than three years to enable certification.
34	37. Do you support the continuing professional development requirements in the proposed Regulation? Why or why not?	Yes. Presumably they are unchanged as they are satisfactory. If the case is otherwise they should be reviewed.

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35	38. Do you support the proposed fees? Why or why not?	No, we think many are too low. For example we query whether (currently) \$253.00 is sufficient to reflect the importance of holding certification to carry out work on behalf of councils. The application fee should not just seek to cover administrative costs but be reflective of the important nature of the certification.
36	39. Are the proposed penalty notice offences and amounts fair and reasonable?	No, generally we consider they are too low to act as a deterrent and should be higher. The differing maximum amounts also do not seem commensurate with the seriousness of the breach and there are some anomalies in our view. We suggest for example, failing to report certain conduct under s 39 of the <i>Building and Development Certifiers Act 2018</i> is not twice as serious as performing work without certification under s 5 of the Act.
36	40. Are there any additional penalty notice offences that should be prescribed?	No.