



Submission

NSW Discussion Paper response
Building Stronger Foundations

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Who we are

The Australian Institute of Building Surveyors (AIBS) is recognised nationally and internationally as the peak professional body representing building surveying practitioners in Australia.

Our Mission

AIBS is committed to ensuring a safer Australia through continuous improvement and development of the profession of Building Surveying. The overarching objective of the Institute can be best be summarised as follows:

To achieve the highest standard of professionalism through Professional Development, such as education pathways and training, and Advocacy in representing the profession and establishing standards.

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Preparation

This submission has been prepared in response to the *Building Stronger Foundations Discussion Paper* as released by the Department of Finance, Services and Innovation for comment on 26th June 2019.

Executive summary

A building surveyor is only one player in the process of compliance achievement. If all or any of the other players; the owner, developer, project manager, design practitioners, product and material suppliers and the building construction practitioners; do not properly perform their roles, the job of a building surveyor to deliver on the community's expectations becomes impossible. A regulatory system should do all it can to ensure there are as many people as possible in the process with a vested interest in compliance. The role of the building surveyor is limited by legislative provisions so that changes to legislation strengthening this role and the responsibility of other practitioners will add the most value giving the industry the ability to become more capable of delivering the standards that the community expects from its buildings.

In the view of AIBS, regulatory reform must be approached holistically. It should never be attempted in a piecemeal fashion. AIBS is concerned that the current discussion paper appears not to be taking a holistic approach to regulatory reform as it does not reference any overarching or guiding principle behind a holistic reform agenda. It is not clear what the overarching objective in this reform is or how it will fit within a wider reform agenda.

There are reform agendas available such as the national review and recommendations undertaken by Professor Peter Shergold and Bronwyn Weir on behalf of the Building Minister's Forum; and the Lambert report commissioned by the NSW Parliament in 2015. We note also the Campbell report from 2002 which also discussed the need for regulatory reform in NSW. The discussion paper simply fails to include points to explain how it relates to any of these including the 24 recommendation of Shergold and Weir in the BMF commissioned 'building confidence' report nor any of the reforms identified in the Lambert or Campbell reports.

AIBS is concerned that the proposed reforms may be based on a reform plan that has not been revealed publicly.

The AIBS Policy: *Building Regulatory Reform in Australia* sets out AIBS's views on the elements of a regulatory system essential to success. The discussion paper does not relate to or reference this policy either.

AIBS is concerned that there may be an absence of evidence confirming a need for the specific reforms identified in the discussion paper. Whilst the discussion paper identifies a range of reform options and explains how these might operate, it does not provide data or other evidence which confirms that there is a need for the specific reforms described.

Premier Berejiklian has said that self-certification has failed or as referenced in the recent statement 'self-regulation'. Having heard the Premier's pronouncement about self-certification, AIBS is confused by the apparent basis of the discussion paper which seems to propose an expansion of self-certification in NSW. Without data demonstrating the reason for the apparent failure of the current system, it is very difficult to understand how expanding self-certification will address the reasons for failure of this system.

In order to better understand the proposals outlined in the discussion paper, AIBS seeks to know how design professionals are to be able to satisfy themselves that a design will comply? Also, how would a difference of view about compliance between a building surveyor, in a statutory role, and a certifying design practitioner be resolved? Further, how will views within the community that design certificates are nothing more than self-certification be overcome, so that the community can be confident in the proposed system? And further still, what impact would the proposed changes have on the role of the statutory building surveyor in this scenario?

AIBS believes there are other options that could be considered that provide 'buy in' from the design sector. For example, it may be enough to require design practitioners to certify that they have provided enough information to allow compliance to be verified, be that by a statutory building surveyor or an auditor or some other entity that might need to do so in the future.

AIBS understands the need for reform in a range of areas. In NSW, AIBS believes there is a need to reform registration and licensing requirements so that a far wider range of practitioners critical to the quality of building outcomes are able to be effectively monitored in respect of their overall performance, and where necessary, managed.

AIBS believes there is an opportunity arising from establishing the Building Commissioner role, inclusive of a power to licence / register and audit all practitioners including auditing of inspectorial work by building surveyors. Such an authority would be highly influential in strengthening an appropriate culture within the industry as well as in providing an important public confidence feature to the system.

Licensing and registration of all practitioners is necessary to ensure appropriate outcomes are achieved in all but rare instances so that limiting a need to become licensed or registered to matters unrelated to the involvement in the industry such as only to those responsible for making declarations about compliance is inferior and not supported.

Providing the role is properly structured, empowered and has the capacity to deliver clarity of purpose and is interactive across the industry, AIBS welcomes the establishment of a Building Commissioner role.

AIBS also welcomes the opportunity presented by the discussion paper but believes full and frank dialogue on the issues faced by the building and construction industry and indeed the community is required to achieve an understanding of how to deliver safe, compliant and reliable buildings worthy of the substantial investments made by individual owners in them.

Discussion

In response to the key reform areas identified in the discussion paper, AIBS makes the following observations.

In section 2.1, the first of four key reform proposals is described; being a proposal for imposing responsibility on design professionals for producing compliant design documentation. AIBS is unable to comment on the merits of this proposal, particularly in respect of the problem that it is intended to address, as there isn't sufficient information in the discussion paper to demonstrate the scope or extent of the issue.

We note that where the reforms oblige a declaration to be made by design professionals. The paper doesn't address the current role played by building surveyors and the value added to the process by the building surveyor's assessment of design documentation. This includes an essential review of the coordination of the various design documents which, in addition to verification of conformity of the design information, can also ensure design compatibility and integration. The fragmented nature of current design management and the specialised nature of design often provides poorly controlled design outcomes, particularly with design and construct type delivery methods.

It is also easy to see a situation where a quarrel could arise where a declaration has been made that compliance has been achieved, which is subsequently not accepted by a building surveyor who believes that compliance has not been achieved. The core knowledge of the building surveyor will always exceed the complementary knowledge of the designer about compliance matters.

The proposed reform is not consistent with recommendation 1 of the Shergold & Weir Building Confidence (BC) report. As per the recent BMF agreement the BC report is to be implemented consistently across each jurisdiction.

It is important that recognition is given of design documentation as a communication tool. Compliance information is only part of the information that must be communicated via design documentation and there are in fact several audiences for design documentation, pre, during and post construction. Design is difficult and requires specialist skills, often requiring designers to concentrate their knowledge of technical requirements to only those areas of design in which they specialise. It is unreasonable then to expect that all design professionals will have sufficient knowledge of technical requirements beyond their discipline to make declarations of complete compliance.

Any requirement that compels design compliance within documentation will drive designers to engage consultant building surveyors to provide compliance advice. If a designer must declare compliance is achieved, would they employ a building surveyor to advise them of this before making such a declaration?

The second part of the recommendation relates to performance and should be adequately addressed in a nationally consistent fashion through the proposed mandating of a performance approach within the National Construction Code for the 2022 edition. AIBS supports NSW participating in achieving a national approach to this matter.

The third part of this recommendation relates to construction compliance verification and is crucial. There are already jurisdictions in Australia where there is an obligation on the builder to make a declaration that all they have done, conforms. In one jurisdiction, the declaration is that the work conforms with the contract documentation which is paired with a declaration from the owner that the contract documentation conforms with approval documentation so that the relevant authority can be satisfied that compliant construction has been assured.

This declaration is never taken to mean that there is no need for inspections to be undertaken. At the end of the day, there is significant risk that a builder will sign such a declaration because they cannot be paid until they do. What is most important in such a regime is that there are consequences for providing declarations of compliant construction where the work is subsequently found not to comply in some respect.

The other important point to note here is that by requiring a builder to declare conformity with contract documents, issues related to building quality in addition to issues related to building compliance are clearly the responsibility of the builder.

AIBS may be in a position to support the measures in key reform one once the wider reform agenda has been disclosed and once a fuller understanding of the reasons for the proposed reforms has been provided.

AIBS would like to see NSW participating in a process aimed at achieving a national approach to this area of reform.

Key reform two relates to the extent to which persons involved in the design and construction process must be licensed or registered. AIBS wonders how many people involved in the process will not be required to be licensed or registered if they are not obliged to provide a certificate for their work? By linking the need to be licensed or registered only to persons making a declaration, there will remain a large pool of practitioners without registration participating in the industry.

Will the requirement to provide a certificate apply only to individual practitioners or could it apply to a team or collective of design practitioners? How will a practitioner fare if they are required to provide a certificate for one job and in the next they are not because they are part of a team or similar?

AIBS believes that it is necessary that all practitioners be registered or licensed for their role before they can participate in the industry. In this way, it will become possible to track who has done which elements of work in all projects making poor workmanship traceable to the individual practitioner who can then be subjected to audit, reformatory or disciplinary actions.

AIBS is unable to support the approach adopted in key reform two.

In key reform three, AIBS understands that it is proposed to address a lack of legal relationship between the eventual owners of individual allotments within a completed building, and the design professionals and building practitioners involved in the design and construction of the total building.

There is a significant disparity in the level of knowledge between the eventual owners and the role of those involved in the design and construction of the building so that there is a high potential for moral hazard conditions to arise. There needs to be powerful oversight of this relationship, as provided by the building surveyor, to even out the playing field, so that the eventual owner is not ever placed at a disadvantage due to their lack of knowledge.

The government cannot create common law. It makes statute law. It is therefore hard to understand what is intended by the way the reform approach is phrased. AIBS believes it is possible and appropriate that a statutory duty is established so that design and construction practitioners are accountable for their work and that the eventual owners of the buildings they have worked on can exercise rights against that accountability.

AIBS believes that, subject to the provision of further evidence of the need for the reform and the suitability of the reform approach, it may be able to support the establishment of a legal relationship via a statutory duty on building design and construction practitioners in respect of eventual owners of the buildings they work on.

The reform to introduce a Building Commissioner is the fourth key reform. AIBS supports in principle the creation of the position of Building Commissioner. The position will need to encompass powers and therefore obligations that currently do not adequately exist to ensure that real change will be affected by the creation of this position.

Currently, audit powers exist but it is unclear the circumstances and extent to which they are exercised, and the consumer protection outcomes derived from actions taken. There is no public reporting of the activities of the Building Professionals Board (BPB). Only the disciplinary actions taken are reported publicly.

AIBS looks forward to the Building Commissioner providing a means of motivating the compliance measures and enforcement actions of the licensing and registration bodies. Additionally, there should be a mechanism to ensure that the auditing actions of the licensing and registration authorities are taken in the public interest.

AIBS welcomes the establishment of the role of Building Commissioner and urges the government to ensure that the building commissioner's powers address the need to take action in the public interest.

In relation to appendix 4; AIBS notes that the government has indicated that it has made significant progress or has already addressed the majority of the Shergold and Weir recommendations. Our view is that there is a need for clearer additional reform.

2.2 Complementary reforms to the building and construction sector

Reforms within the Environmental Planning and Assessment Act 1979, which combined legislation related to planning and building assessment, creates a real risk of diminishment of the importance of building controls. AIBS firmly believes that it is necessary for building regulatory administration to be conducted by a department which reports to a Building Minister, and that both are distinct from any planning administration or ministry. Consolidation of the portfolio and agency responsibilities for building regulation must ensure that there is no diminishment of the importance of these functions within government.

2.3 Implementation of the reforms

AIBS believes that reform is needed urgently to address the issues which are leading to the reluctance of participation from the insurance industry in the professional indemnity insurance market for building practitioners. An initial phase of regulatory reforms aimed at addressing immediate

needs in this respect should be prioritised with further reforms slated to be identified in concert with a newly appointed Building Commissioner so that this role can become suitably effectual in developing an appropriate shift in the culture of the construction industry.

A range of issues with the points made in the discussion paper have been identified which give rise to the concerns expressed in the executive summary above, and AIBS is willing to collaborate with government in a forum where best use of the available knowledge can be made.

What follows is AIBS's response to the specific questions raised within the discussion paper. Whilst these responses lack detailed explanation, we are happy to provide more information in support of our position if required.

AIBS responds as follows:

1. What kinds of plans should be signed off and declared by a statutory declaration?

AIBS believes there are no kinds of plans where this would be appropriate. AIBS is unsure how self-certification of design documents would provide greater consumer protection. Documentation, prepared by appropriate categories of registered practitioners should demonstrate that the proposed construction will conform.

2. Could plans be statutorily declared at the CC/CDC stages? If not, why not?

No; for the reasons stated above. There is a current expectation that plans approved at the CC/CDC stage are the documents used for construction.

AIBS seeks to understand the value in requiring design practitioners to issue certificates of technical compliance at any stage of the process. It could and likely will lead to a litany of design practitioners being accused and found to have erred in issuing design certificates or to have done so deliberately, disputation between building surveyors and design practitioners and confusion for the consumer. The extent to which buy in by design practitioners benefits in delivering compliant designs is not clear.

3. To what extent should changes to plans be submitted to the regulator?

The regulator is not defined in the context of this question. There are a number of bodies that this question could relate to and a response would differ depending on the body.

AIBS has called for documentation related to building work to be held within a central repository which would include all amendments to approvals.

4. Should a statutory declaration accompany all variations to plans or only major variations?

Refer to response in question 1 above. A proper process of review by a building surveyor of all variations is appropriate and necessary to ensure that seemingly immaterial changes do not become sources of risk of considerable harm.

5. Are there any obstacles that would prevent a person from submitting a statutory declaration for variations? If so, what are those obstacles?

Refer to response to question 1 above.

Would signing a statutory declaration that declares compliance for something that actually doesn't comply create an offence for issuing a false declaration which is in the criminal jurisdiction? It is not clear which authority would have responsibility for prosecuting practitioners where they are found to have given a false statement. Is there an authority that is authorised, resourced and would be willing to do this work?

6. What other options could be workable if there are variations to plans?

Regulation of the turnaround times that must be achieved by authorities involved in the process will improve response rates and minimise the impact of the process on progress of construction work where a variation has become necessary.

7. How could the modifications process be made simpler and more robust?

AIBS is unsure how this question relates to the overall reform objectives. We are happy to enter further dialogue on this point.

8. How should plans be provided to, or accessed by, the Building Commissioner?

Electronically. AIBS has called for documentation related to building work to be held within a central repository which would include all amendments to approvals. The Building Commissioner should be able to access all details of all applications within the same source of truth about each project.

9. What types of documents should 'building designers' provide to the Building Commissioner?

Information pertaining to a matter over which a practitioner's conduct might be audited and that would not normally be part of the approval documentation held within a central repository, and may need to be provided direct to the Building Commissioner on an as needs basis.

10. In what circumstances would it be difficult to document performance solutions and their compliance with the BCA?

Documentation of performance solutions is difficult only in circumstances where the applicant and any person they have employed to provide design documentation are inexperienced or lack necessary education related to the documentation of performance solutions. There are no forms of development where documentation of a performance solution would be onerous, provided that the building surveyor retains the ability to determine what constitutes appropriate documentation of performance.

11. Would a performance solution report be valuable as part of this process? If not, why not?

If it matches the Performance Based Design Brief and Performance Based Design Report criteria for the NCC BCA, a performance solution report would be valuable.

12. Are there any other methods of documenting performance solutions and their compliance that should be considered?

The International Fire Engineering Guidelines 2005 sets out a process that AIBS understands continues to be consistent with worlds best practice and is the basis of the proposed NCC BCA provisions.

13. What would the process for declaring that a building complies with its plans look like?

There are examples nationally where builders are obliged to make declarations about their work. AIBS believes that it is appropriate that NSW participates in development of a national approach to this area of reform.

14. What kind of role should builders play in declaring final building work?

See response to question 13 above.

15. Which builders involved in building work should be responsible for signing off on buildings?

The AIBS position related to this principle is that all practitioners should be registered or licensed and held to account for their work and subject to an auditing scheme.

16. Are there any circumstances which would make it difficult for builders to declare that buildings are constructed in accordance with their plans? If so, what are those circumstances?

Yes. The points made by Shergold and Weir related to the implementation of recommendation 1 of their Building Confidence report identifies that complex fire engineering systems make it likely that it is unreasonable to oblige builders to take responsibility for that work. They identify therefore a need for specialist fire safety systems to be addressed separately and made a separate recommendation about this, being recommendation 19.

AIBS believes that where a project involves work that is outside of the technical capability of a builder to properly supervise that work, the builder should not be permitted to engage in that work.

In this way, the concerns expressed in the Building Confidence report as described above should not arise. At all times, a builder must be accountable for the work they undertake or manage. The involvement of an expert in fire safety during the construction process would be to give further assurances to the client about the builder's level of conformity and may also assist the building surveyor to properly evaluate the suitability of the building for occupation at the completion of the work.

17. Are existing licensing regimes appropriate to be accepted as registration for some builders and building designers, such as architects, for the new scheme?

The existing licensing and registration scheme verify qualifications and capability at entry, but little if any attention is paid to ongoing capability at each renewal period. There is no driver within the licensing and registration process for most practitioners to ensure that they are maintaining their knowledge and skills.

AIBS believes therefore that without further changes being made to the existing licensing and registration processes, these alone would not be suitable for the purposes of identification of persons competent to practice within the industry.

18. What occupations or specific activities are involved in 'building design' and should be in scope for the registration scheme?

Practitioners providing any form of design input including project managers, engineers, architects, fire engineers, geotechnical engineers, energy assessors, designers, soil classifiers and draftspersons have been identified by AIBS as practitioners that should be registered or licensed as a pre-requisite to participation in the industry.

19. What should be the minimum requirements for a registration scheme?

In addition to the points raised in the discussion paper, any registration scheme applied to design practitioners should ensure design qualifications cover basic concepts of design as a communication tool, specialised technical knowledge relevant to the relevant design discipline and the legislative environment within which they must operate.

20. What form of insurance should be mandatory for 'building designers'? Why?

Professional Indemnity Insurance, indemnifying for claims arising related to design practice.

21. What kinds of minimum requirements should be prescribed for the insurance policy (for example, value, length of cover, etc.)?

Insurance cover should at least be for a period not less than the statutory period of liability arising for any other professional involved in the work and be reflective of the actuarial context of the practice involved, or otherwise as may be prescribed in relation to insurance requirements for building surveyors. AIBS believes it is important that there are no differences in the cover available amongst all practitioners so that claims made appropriately reflect the likely responsibility for the loss rather than a strategy to obtain the optimal result for the client from those with the best cover.

22. What skills should be mandatory for 'building designers'?

Qualification in another field within the building and construction industry should not provide an as of right pathway for practice or registration for building design practice. Design is an important means of communication which must be properly understood by design practitioners in order that appropriate documentation is produced.

23. Should specific qualification(s) be required?

Yes.

24. Should there be other pre-requisites for registration?

AIBS notes that various jurisdictions have established benchmarks for registration of many design practitioner categories. It would be useful if there was a nationally consistent approach to demonstration of competency with pre-requisites for registration applied consistently also.

25. What powers should be provided to the regulator to support and enforce compliance by registered 'building designers'?

A full suite of powers commensurate with those available in respect of the BPB's ability to investigate and audit the conduct of building surveyors should also apply to all registered and licensed practitioners, design or construction.

26. Which categories of building practitioners should owe a duty of care?

All practitioners required to be registered or licensed to participate in the industry should owe a duty of care to the community.

27. What should be the scope of the duty of care? Should it apply to all or certain types of work? If so, which work?

AIBS believes that all work, design and construction, irrespective of value should carry with it a duty of care to eventual consumers.

28. How will the duty of care operate across the contract chain?

Any person who has performed any work on any part of a building will be accountable to the registration authority for their performance of that work, and be subject to a duty of care, irrespective of their contractual relationships for the project.

29. What types of consumers should be owed a duty of care?

Any building owner, initial or subsequent within a nationally consistent defects liability period post completion of construction should enjoy a duty of care from all practitioners involved.

30. On what basis should a particular consumer be afforded the protection?

At least on the basis that technical and regulatory compliance has not been achieved.

AIBS notes that to make it any other way, there will be a portion of the practitioners in the market who would not be subject to sanction for poor work.

In closing

AIBS is committed to working with government, industry and key stakeholders to continually improve the building regulatory system throughout Australia.

We look forward to an opportunity to provide further information that may assist.