

# **LGNSW Submission on Review of the Building Professionals Act**

October 2015

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## 1. Introduction

Local Government NSW (LGNSW) is the peak body for councils in NSW. It represents all the 152 NSW general-purpose councils, the special-purpose county councils and the NSW Aboriginal Land Council.

In essence LGNSW is the ‘sword and shield’ of the NSW Local Government sector. LGNSW is a credible, professional organisation representing NSW councils and facilitating the development of an effective community-based system of Local Government in NSW. LGNSW represents the views of councils to NSW and Australian Governments; provides industrial relations and specialist services to councils; and promotes NSW councils to the community.

LGNSW has welcomed this important review, in particular because of its wider brief to look at the building regulation and certification system in its entirety. We are pleased to make a submission to Mr Lambert’s recently released *Independent Review of the Building Professionals Act Draft Report*.

We appreciate that this review commenced from an advanced position as it has the benefit of the research and findings of a number of related reviews of the building regulation and certification system. LGNSW understands that the Draft Report contains draft findings and recommendations that take into account the consultation feedback following a series of stakeholder meetings, public forums, on-line surveys and a discussion paper in the first round of consultation earlier this year, with a final report scheduled for completion by 31 October 2015. We also note that consulting firm ACIL Allen Consulting has been engaged to undertake a cost benefit analysis of the Review’s recommendations. LGNSW looks forward to contributing to this cost-benefit analysis, and recommends that councils be invited to contribute as well.

LGNSW and councils’ submissions and input to the Discussion Paper, stakeholder meetings and previous reviews already add to the vast pool of information on the issues for Local Government in the building and regulation system. An indicator of the importance of this issue to Local Government is that around one-third of all submissions to the Discussion Paper were from the Local Government sector. Building certification has been a constant and continuing concern to LGNSW and its predecessors for many years, and we are hopeful that this latest comprehensive review process will lead to some much-needed and lasting improvements. To this end, we acknowledge that Mr Lambert has wisely included some recommendations about staged implementation.

LGNSW has previously provided detailed comment on many aspects of the building certification process in its submission to the Discussion Paper in June 2015. This submission does not repeat the issues raised previously, except to emphasise some ongoing key concerns for Local Government. LGNSW offers comment in this submission on the ten ‘priority areas’ identified in the Draft Report (see Attachment 1) covering the following areas:

- Legislative Framework for Building Regulation
- Administration of Building Regulation and Certification
- Information Systems Strategy
- Accountability and Role of Certifiers
- Partnership Model between State and Local Government
- Best Practice Building regulation and Certification System
- Professionalisation of certifiers – accreditation, education, training etc
- Complaints Handling Process
- Sustainability of Professional Indemnity Insurance
- Resourcing and Funding

## 2. General Comments

LGNSW commends Mr Lambert for the detailed analysis and arguments presented to support his in-excess of 40 recommendations. The Draft Report captures the many issues which have been previously well-documented, and LGNSW remains optimistic that the review will lead to some real and meaningful improvements. Clearly, all stakeholders agree with the urgent need to change, and the specific areas to address; all those players are focused ultimately on achieving the same outcome: better quality buildings and a trusted and reliable building sector.

LGNSW welcomes the important recognition in the report that councils undertake the major part of the compliance function with respect to building regulation but are not adequately financially compensated for their activities. The report has highlighted as a priority the need for adequate funding of the State's building regulation and certification system, including a revised model for funding the building compliance function of councils.

It is also pleasing to see that Mr Lambert has included recommendations about implementation and steps to moving forward. LGNSW has been disappointed at the lack of any meaningful action by the NSW Government to date, following recommendations of numerous reviews of the building regulation system that date back more than a decade. We therefore urge the Government to move quickly to commit to and prioritise actions to progress these important recommendations. The State's economy is reliant on the building sector for growth, and as highlighted in the report "The consequences of inaction will not necessarily be apparent for some time but there is a significant level of risk in the system that will, at some time, manifest itself in a major negative event. In such circumstances the worst of all worlds is to have a regulatory system that is ineffective and has been acknowledged as such."<sup>1</sup>

LGNSW and councils have argued for more than a decade to have a stronger more effective regulatory regime for building certifiers, and in the absence of this rigour, they have sought to take steps to ensure quality and safe building outcomes and protect the public interest. LGNSW therefore makes no apology for the criticism from some sectors about the tendency of councils' to over-regulate parts of the building process; this reflects the lack of confidence councils have had for so long in the rigour of the regulatory regime. While Local Government accepts that private certifiers in the marketplace are here to stay, it expects this to operate within a much tighter regulatory regime.

Local Government's key issues with the building regulation and certification system in NSW have been well documented, and all sectors involved in the planning and building regulation process agree that change is needed. The importance of committing much needed resources and urgent attention to tighten regulation and enforcement of builders and certifiers and to move towards a best practice system overall, cannot be over-stated.

## 3. Comments on Broad Findings of the Review

LGNSW concurs with the broad findings which Mr Lambert has drawn together in section 17.1 of the Draft Report; these are evidently the result of thorough analysis and wide stakeholder consultation. The findings are unsurprising, as they are consistent with the issues raised in the Discussion Paper as well as in previous related reviews of the building regulation system.

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<sup>1</sup> Michael Lambert, *Independent review of the Building Professionals Act 2005 – Draft Report*, Aug 2015, p 19

Several findings<sup>2</sup> resonate with LGNSW, as they have been highlighted for more than a decade by LGNSW, its predecessors and councils as some of the many problem areas facing the building regulation system in NSW. These are discussed below.

a) Building Defects

*Finding:*

*4. ... the available evidence would indicate that there is a significant incidence of building defects in Australia, particularly in the residential building sector...*

Councils cite numerous cases where significant defects continue to occur during building construction. These impose significant remediation costs on individual landowners and regulatory costs on councils. Council officers endeavour to have the relevant private accredited certifier facilitate the remediation of the defective development, however these attempts are not often successful. Unfortunately for occupants/owners, defective developments may remain latent for a number of years before coming to the attention of council. Councils have reported that they have lodged a number of complaints against private accredited certifiers that were dismissed by the BPB merely because the general policy is to dismiss complaints where they relate to a matter that occurred more than three years before the making of the complaint. LGNSW raised the matter of defects in its submission to the Maltabarow Report in 2014<sup>3</sup>.

The issue of building defects is of great concern to Local Government, as the trend towards greater numbers of dwelling units takes the form of multi-storey apartments rather than stand-alone houses or other low to medium density forms. It is for these and many other reasons that LGNSW and many councils have consistently argued that the introduction of a tougher building regulation regime is essential if code based assessment and private certification are to be expanded.

b) Need for reform

*Finding:*

*5. There is a significant level of concern by industry and the community about the current state of play with building regulation and certification and a reasonable consensus about how it should be reformed...*

Local Government's key issues with the building regulation and certification system in NSW have been well documented in recent years, by both LGNSW's predecessors<sup>4</sup> and many NSW councils in their submissions on the planning system review. LGNSW agrees that all sectors involved in the planning and building inspection process agree that change is needed.

c) Fragmentation and under-resourcing of governance

*Finding:*

*6. ...building regulation and certification in NSW is handicapped by a highly fragmented, prescriptive and unclear legislative and regulatory framework compounded by a fragmented and under resourced building regulation function.*

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<sup>2</sup> Michael Lambert, *Independent Review of the Building Professionals Act 2005 – Draft Report*, August 2015, p 246

<sup>3</sup> LGNSW Submission to BPB Report on "Building Certification and Regulation – Serving a New Planning System for NSW", March 2014, p 8

<sup>4</sup> LGSA Submission to Planning Green Paper, September 2012 & LGSA Submission to Planning White Paper, June 2013

A continual frustration for Local Government has been the significant under-resourcing of regulatory functions in the building certification process, particularly the resourcing of the BPB. The evidence is clear that resourcing of the BPB has not been a priority for the NSW Government. LGNSW agrees that the legislative and regulatory requirements have become overly complex, fragmented and hence unclear and time consuming for industry. However the matter of proper resourcing must be addressed, if the other issues of fragmentation and complexity are to be effectively dealt with. This is further discussed under (h) below.

d) Roles and responsibilities

*Finding:*

*7. There is a lack of clarity about the role and responsibility of certifiers and of the appropriate relation between councils, as building and planning consent authorities, and certifiers...*

LGNSW has maintained for some time that many of the problems with building certification and regulation stem largely from the unclear roles and responsibilities of all players, but also from a lack of regulatory clout and oversight of the entire process by the BPB.

e) Conflict between the public interest and commercial drivers

*Finding:*

*8. An important issue...is the conflict between the accountability of certifiers for acting in the public interest and their commercial drivers for commercial success, including maintaining good relations with builders and owners/developers... While consideration was given to alternatives to private certification, it was concluded that the majority of certifiers are seeking to do the right thing in the right way and it is better to improve the accountability and transparency of the certification process.*

An ongoing point of tension (and one which was highlighted in the Maltabarow Report<sup>5</sup>) is the inherent conflict between the obligations of the certifier to the property owner (i.e. their client/customer), and their legal obligations in their capacity as a 'public officer'. Local Government maintains the view that the certifier (whether they are a council or private certifier) is a public officer and needs to act in a manner that reflects community standards. The potential conflict of interest brought about by the inherent conflict between meeting the needs of the client and satisfying wider community and public expectations will remain an ongoing point of tension that requires a practical and well-considered policy and regulatory response.

f) Fire safety and water-proofing

*Finding:*

*9. A major deficiency in the current building regulation and certification system is the approach to the regulation of the design, installation, commissioning and maintenance of fire safety system and the handling of water proofing which both need urgent reform.*

These are two key areas of concern to councils and others in the building industry arising from the need for more effective building compliance and accreditation. The experience of many councils is that defective privately certified development may only come to a council's attention as a result of either Fire & Rescue NSW or an owner/neighbour complaint. Local Government therefore supports changes which propose a system for certification that places greater responsibility on contractors, installers and building practitioners (with appropriate

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<sup>5</sup> George Maltabarow, "Building Certification and Regulation – Serving a New Planning System for NSW", May 2013, pp 11, 19, 31

accreditation of individuals certifying fire safety systems) to ensure that fire safety systems and other key building components are compliant.

g) Governance reform: legislation and administration

*Findings:*

12. *The building regulation function, which is currently divided into various areas in DPE and in Fair Trading, should be consolidated into one government agency. This agency must operate independently of either DPE or Fair Trading, though maintaining close linkages to both organisations...*

13. *The current licensing of building practitioners undertaken by Fair Trading and the accreditation of certifiers, undertaken by the BPB should be combined in one statutory body in order to create a consistent approach to occupation licensing and accreditation across the building sector. The BPB is the obvious entity to undertake this role.*

LGNSW agrees with these findings and is pleased to see these governance issues highlighted in the Draft Report. In recent years Local Government has become increasingly frustrated with the under-resourcing of the BPB and fragmentation of the building regulation function between different agencies, which have not helped maintain a rigorous building certification system. If the BPB is to undertake the role of a combined new entity, it will require appropriate resourcing.

h) Performance of the BPB

Mr Lambert has made a number of findings about the performance of the BPB which accord with issues raised by LGNSW in previous submissions. The single biggest issue for Local Government with the BPB is its lack of 'teeth' in relation to matters of compliance and enforcement. Our member councils report a number of issues relating to the performance of the BPB and the overall regulatory framework, including a lack of clear policing of certifiers; insufficient penalties; poor disciplinary action; ineffective audits; and problems and delays with the complaints process. LGNSW is therefore pleased to see these issues addressed in the Draft Report.

However, LGNSW is concerned that resolution of these issues is likely to be held up in a drawn-out process of legislative review and redrafting, and creating new administrative structures. Based on the track record to date for reform of planning and building, this could take up to one or two years or more. We therefore urge the NSW Government to give priority to some non-legislative actions that can be implemented more quickly that will lead to vigorous and proactive auditing and policing of certifiers, higher penalties, a simpler and unimpeded complaints process, responsive disciplinary action, and an ongoing program of effective audits of certifiers. This would clearly require much greater resourcing of the BPB in the interim period than we have seen to date. Proposer resourcing, and attention on the many recommendations in the Draft Report relating to the BPB's activities would be the beginnings of a much needed change to the current operations of the BPB.

i) The way forward – implementation

*Finding:*

15. *There is a strong case for reform of the building regulation and certification system based on actions in 10 priority areas...*

Refer to section 4 of this submission for specific commentary on the 10 priority areas.

*Finding:*

16. *The implementation of the reforms is a major exercise whose success is dependent on a number of critical success factors:*

*– Reform champion at both the ministerial level and the organisational level capable of driving the reform and with full understanding of the outcomes to be achieved*

- *Clear understanding of building regulation from both a policy and operations perspective and of the linkages to planning.*
- *Achieving full stakeholder engagement and support.*

LGNSW endorses the finding that a “reform champion” is needed at both ministerial and organisational level to drive the reform, and that “there will be a need for a fully resourced and dedicated project team to be established to drive the reforms”<sup>6</sup>. LGNSW offers its full support and looks forward to working with these leaders to achieve genuine improvements to the current building regulation regime.

## 4. Comments on the Ten Priority Areas

### 4.1 Legislative Framework for Building Regulation

LGNSW and councils agree that the building control provisions of the *Environmental Planning and Assessment Act* (EP&A Act) are fragmented, difficult to navigate and to understand, and the current codes and regulation are overly complex and need to be simplified.

With regard to specific amendments proposed to the BP Act<sup>7</sup>, LGNSW supports the proposed addition of three new provisions as follows:

- Statement of objectives – Including an objects statement as proposed<sup>8</sup> serves to highlight/focus that the ultimate intent of building regulation is to ensure good building outcomes that meet objectives of safety health, amenity and sustainable building design and performance
- Reference to a statement of the role and functions of certifiers
- Coverage of the licensing of all building professionals currently covered in the Home Building Act – this is consistent with continual calls from all sectors to consolidate the licensing of all building professionals under a single agency.

LGNSW also supports the proposal to amend provisions relating to compensation so that compensation may be paid to not only the “complainant” (which in many cases is the council) but to anyone who has suffered loss as a result of a certifier’s actions.

The future legislative structure is definitely an area that requires further deliberation, with all options and their consequences requiring full consideration and wide consultation to ensure the fairest and most workable outcome. LGNSW requests that the Local Government sector be given the opportunity to participate in the development of the new proposed Building Act.

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<sup>6</sup> Michael Lambert, Independent Review of the Building Professionals Act 2005 – Draft Report, August 2015, p. 250

<sup>7</sup> Refer section 11.3.2, *Independent review of the Building Professionals Act 2005 – Draft Report*, August 2015

<sup>8</sup> “To establish and maintain licensing and accreditation schemes for all building professionals requiring licensing or accreditation directed at contributing to the safety, health, amenity and sustainability of the design and performance of buildings through ensuring that the appropriate level of skills, experience and expertise are applied in the industry” (*Independent review of the Building Professionals Act 2005 – Draft Report*, August 2015, p 153)

## 4.2 Administration of Building Regulation and Certification

LGNSW supports consolidating administration of building industry responsibilities within a proposed Office of Building Regulation. This single accreditation and licensing body should have responsibility for:

- the accreditation and licensing of all key personnel involved in the building process including tradesmen, designers and other professionals to ensure greater community confidence in the certification process.
- the investigation, prosecution and auditing of accredited and licensed personnel and infringements be displayed on their website to provide consumers with a more informed choice.

LGNSW also endorses the proposal for a Minister for Building Regulation. Given the Government's reliance on the housing and building industry for growing the NSW economy, it is fundamental that a senior Minister be tasked with overseeing the job of fixing the building regulation system.

In addition, the newly consolidated agency must be properly resourced to deliver the specific responsibilities within its remit. The current under-resourcing of the regulatory regime must not be allowed to continue. There must be a commitment from the NSW Government to sufficiently and effectively resource any new or consolidated agency overseeing building industry activities. Without such priority and focus, it is more likely that the move to a single agency will be no guarantee of success.

## 4.3 Information Systems Strategy

LGNSW supports the recommendation for the NSW Government to a commit to developing and implementing an e-Building strategy, seeking to achieve digitalised and standardised building information. It is recognised that full implementation of such an information strategy will take a considerable period and would need to be a joint exercise of the Office of Building Regulation, together with BPB, Local Government and the associations of certifiers, working with e-Business Branch of DPE.

The necessary move to standardisation in approach to both IT hardware and software across Local Government and the creation of compatible systems and approaches will be a huge challenge for this project, and will require a significant funding commitment. Local Government recognises the benefits of having a standard format for development application (DA) forms and construction certificates (CCs), complying development certificates (CDCs) and occupation certificates (OCs), as proposed in the Draft Report. Councils take different approaches for their DA and other forms, which have evolved to suit the particular nature of development in their areas. LGNSW therefore agrees with the proposal to establish a working party with key players, including councils, to develop the Information Systems Strategy.

Councils are already facing substantial change on a number of fronts and this project, while worthwhile in the longer term, may encounter significant hurdles in the wake of the many other reforms in the Local Government sector.

## 4.4 Accountability and Role of Certifiers

As mentioned in section 3 of this submission, the critical issues of accountability, private certifiers' role as 'public officials', and the conflict of interest allowing buildings to be approved, certified and occupied under certificates issued by the certifiers paid by builders/developers all

constitute ongoing concern for Local Government. LGNSW therefore supports any effective measures to address these key issues.

The suite of proposals in the Draft Report to “enhance the accountability of certifiers to act in the public interest”<sup>9</sup> will go some way towards improving the current situation, but will need a dedicated and focused implementation team. LGNSW therefore broadly supports the proposals discussed in section 13 of the Draft Report.

Commentary on selected recommendations from section 17.2 of the Draft Report in relation to the accountability and role of certifiers is included below.

- *establishing and maintaining a practice guide to create a benchmark for the process that should be followed by certifiers, with the guide given legal effect.*  
Comment: A great deal of reliance is being placed on the Practice Guide to achieve significant improvements in many areas of building certification. To attain these outcomes the Practice Guide must have legal recognition, be well resourced, well communicated and regularly reviewed and updated with new material and examples of good practice as they come to light through proactive auditing, training and the like.
- *creating a program of proactive investigations and audits of certifiers and certification as practiced in the building sector, linked to the education and training program.*  
Comment: The lack of proactive auditing by the BPB to date has been a major criticism from Local Government. LGNSW strongly supports this proposal, however a serious injection of resources will be needed to change the status quo.
- *providing greater clarity to the community about the role and responsibility of certifiers, to reduce or eliminate misconceptions about the role of the certifier...*  
Comment: Councils repeatedly report that there is a general lack of understanding of the role of the certifier, and are often called on by proponents to help resolve issues with a private certifier when things go wrong, rather than seeking help and advice from the BPB. LGNSW therefore supports any initiatives to improve consumer awareness - this is something that can be done immediately, rather than being held up by legislative and administrative reforms. However it is unclear from the Draft Report which agency would be responsible for doing this work.
- *utilising the partnership arrangement between councils, certifiers and the State to assess and monitor the working relation between private certifiers and councils.*  
Comment: See comments in section 4.5 below.
- *restructure the written contract between certifiers and the beneficiaries of developments as a letter of engagement between the certifier and the beneficiary of the development...*  
Comment: Local Government welcomes proposals to restructure the written contract between owners and certifiers. In their current form, these are considered impractical by both council and private certifiers. We acknowledge that there is nevertheless a need for some form of written agreement between certifiers and owners to clarify responsibilities and accountabilities and secure sound regulatory outcomes. A simple agreement which identifies the respective rights and responsibilities of each stakeholder should be sufficient.

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<sup>9</sup> Michael Lambert, Independent Review of the Building Professionals Act 2005 – Draft Report, August 2015, p. 252-253

LGNSW notes also the following recommendation in the Draft Report, which is to initiate wider consultation on the draft practice guide for certifiers and a draft protocol for the relationship between certifiers and councils:

*As an initial stage in the reform process, and subject to Government approval of the legislative and regulatory changes contemplated, the practice guide for certifiers developed by the BPB Reference Group together with the proposed protocol governing the relationship between certifiers and councils being subject to industry consultation and early implementation and subsequently updated as additional building regulation and certification reforms are adopted.<sup>10</sup>*

LGNSW is aware that two reference groups were established to i) develop a practice guide for certifiers, and ii) create a framework and approach for better cooperation between certifiers and councils. LGNSW and selected councils have been involved in the latter. While the reference groups enabled some degree of council and industry input to these drafts, they will need to be tested amongst a wider audience. LGNSW therefore supports the proposal to consult more widely with industry and Local Government, however it will be important during this consultation to clearly outline where these documents sit within the wider context of building reform proposals.

#### **4.5 Partnership Model between State and Local Government**

The Draft Report quotes LGNSW as “rejecting” the concept of a partnership model similar to the Food Regulation Partnership (FRP) for certification and building regulation enforcement<sup>11</sup>. LGNSW made this initial observation on the basis that in the realm of certification and building regulation enforcement, State Government and Local Government do not share these responsibilities in the same way as they are shared with the NSW Food Authority.

Nevertheless, LGNSW does not dispute that there would be many potential benefits if some of the key features of the FRP could be applied to the relationship between State and Local Governments in the area of building regulation. Important features of the FRP are the 2-way flow of information and that the inclusion of indicative inspection fees and administration charges and protocols for charging fees. In a recent submission to IPART<sup>12</sup>, LGNSW identified both the FRP and the Model Asbestos Policy Project<sup>13</sup> as good examples of positive working relationships between the State Government and councils. Both these relationships offer features that could be applicable and beneficial to the building regulation activities of State and Local Government.

While the concept and features of a partnership model such as the FRP are supported by LGNSW, its success will be reliant on having in place a strong and well-resourced single State agency with responsibility for building regulation. This also requires the backing of a high level Minister for Building Regulation as mentioned previously in this submission.

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<sup>10</sup> Michael Lambert, Independent Review of the Building Professionals Act 2005 – Draft Report, August 2015, p. 253

<sup>11</sup> Michael Lambert, *Independent Review of the Building Professionals Act 2005 – Draft Report*, August 2015, p. 135

<sup>12</sup> *LGNSW Submission to IPART – Review of Reporting and Compliance Burdens on Local Government*, August 2015, p. 17

<sup>13</sup> <http://www.lgnsw.org.au/policy/asbestos-model-policy>

## 4.6 Best Practice Building Regulation and Certification System

LGNSW welcomes the proposed reform elements to tighten building regulation and achieve best practice, as summarised under point 6 of the Recommendations in 17.2 of the Draft Report<sup>14</sup>. These are generally consistent with the proposed provisions for building reform in the White Paper, which LGNSW and councils consistently endorsed throughout the review of the planning system.

LGNSW's previous submission to the Discussion Paper contains detailed comment on the various proposals to improve the building certification process which are not repeated here. LGNSW emphasises the following key points from our previous submission:

- Councils do not support the proposal that the DA process is limited to a more conceptual approval. This would shift more discretion to the building certifier who does not have the qualifications or expertise to determine planning issues
- LGNSW disputes the claim that councils' DA consent conditions contain excessive, restrictive or unnecessary detail
- There is definitely scope in some cases for more standardised formats with DA conditions to be more clearly conceived and written. To be effective and workable, developing standardised conditions would require a rigorous review process with active input from council practitioners.
- LGNSW agrees there is a need for better guidelines around the meaning of 'not inconsistent', and would only support a change to this provision if a robust alternative can be found.
- Unauthorised work is one of the most significant concerns for Local Government in the building process.
- There is a misconception of the role of a building certificate - it is not an approval but an undertaking that the council will not require demolition of unauthorised work for seven years.
- LGNSW would definitely support the introduction of suitable sanctions in the form of fines of a size that would effectively discourage unauthorised work. Builders must be made more accountable and penalties must be increased. The system must be changed so that owners are forced to have to rectify non-conforming work.
- LGNSW supports the idea of a 'development completion certificate' (DCC) or similar, that would certify that all the consent conditions have been met. However, consultation with key industry groups will be needed to address the questions of the most effective mechanism(s) that could be used to trigger a property owner to seek to obtain a DCC.
- LGNSW and councils welcome the proposal for the creation and maintenance of a building manual.

For detailed commentary on the processes within the building system, please refer to LGNSW's previous submission to the Discussion Paper<sup>15</sup>.

With regard to subdivision certificates, LGNSW seeks assurance that any changes to the current arrangements for private certifiers to issue subdivision certificates will not compromise councils' legitimate concerns to protect the quality of the infrastructure they inherit. If the proposed changes are made<sup>16</sup>, some check-and-balance mechanisms must be included to give councils confidence about the standard of infrastructure that is being handed over to them for future ownership and maintenance.

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<sup>14</sup> Michael Lambert, *Independent Review of the Building Professionals Act 2005 – Draft Report*, August 2015, pp. 253-254

<sup>15</sup> *LGNSW Submission to Review of Building Professionals Act – Discussion Paper*, June 2015, pp. 6-8

<sup>16</sup> Michael Lambert, *Independent Review of the Building Professionals Act 2005 – Draft Report*, August 2015, p. 211

Councils' building and planning practitioners are best placed to comment on the practical and technical implications of the recommendations for a "best practice" building regulation and certification system. LGNSW therefore defers to councils' individual submissions for their specific and detailed comments on the discussion and recommendations contained in section 14 of the Draft Report.

#### **4.7 Professionalisation of certifiers – accreditation, education, training etc.**

Our members' concerns that there will be a massive shortage of building surveyors/certifiers in the industry in the next five to ten years was detailed in LGNSW's previous submission to the Discussion Paper, and does not need to be repeated here. The Draft Report offers a range of measures (in the areas of accreditation, education, training and support) to improve the future prospects of certifiers as a profession<sup>17</sup>.

The experience, qualifications and numbers of council building certifiers varies enormously, depending on the location of the council (metropolitan, regional or rural), the nature of development in the local area, and the business model adopted for the certification services within the council. As the industry continues to evolve, the number of building surveyors working within councils is expected to decline. Councils will need experienced building surveyors to investigate and regulate unauthorised building works or to initiate action where a private certifier has not taken the required action to rectify issues. Action must be taken to limit the decline of appropriately qualified and experienced building surveyors within Local Government, so that councils can continue this important regulation and compliance function.

LGNSW therefore supports the intent of the proposals outlined in the Draft Report to stem the potential decline of certifiers by a combination of accreditation, education, training and support. We defer to the expertise of certifiers in our member councils to offer detailed comment on the practicality and critical success factors for these recommendations.

#### **4.8 Complaints Handling Process and Disciplinary Actions**

LGNSW and councils have maintained for some time that the BPB's complaints handling procedures are inadequate and Mr Lambert has reached the same conclusion:

*Due to inadequate and uncertain funding, BPB has not been able to undertake its full role, with inadequate resources applied to handling complaints, education and training, a lack of an audit function and inadequate support for certifiers in undertaking their role. The time taken to address complaints is excessively long as is the number of outstanding complaints.*<sup>18</sup>

LGNSW therefore supports proposals in the Draft Report to specifically improve the complaints handling process. However, this will require dedicated resources and is an area of improvement that can and should be addressed immediately, ahead of the more significant legislative and administrative proposed changes.

LGNSW also welcomes proposals in the Draft Report to "broaden the range of penalties that can be imposed, covering not just certifiers but all building professionals"<sup>19</sup>. However, these

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<sup>17</sup> Michael Lambert, *Independent Review of the Building Professionals Act 2005 – Draft Report*, August 2015, pp. 255-256

<sup>18</sup> Michael Lambert, *Independent Review of the Building Professionals Act 2005 – Draft Report*, August 2015, p. 101

<sup>19</sup> *Ibid.*, p. 225

should go further than simply making greater use of penalty infringement notices (PINs) and introducing a system of demerit points in combination with proactive audits and investigations. Consistent with the principle of “placing proper accountability on those responsible for building work”<sup>20</sup>, LGNSW would like to see provisions that force certifiers and other building professionals who do the wrong thing, to take responsibility for their actions or inaction by being required to compensate the victims for any loss or damage suffered as a result.

The minor amendment to the legislation, as proposed in the Draft Report<sup>21</sup>, to allow the BPB and NSW Civil and Administrative Tribunal (NCAT) to order compensation not only to the ‘complainant’ “but also to anyone who has suffered loss as a result of the certifier’s actions”<sup>22</sup> does not go far enough, in that it only applies to certifiers rather than to all building industry professionals, and contains conservative limits on the scope of compensation that can be paid. The economic burden on unsuspecting purchasers as a consequence of having to rectify defective, incomplete or unauthorised/illegal building work is one of many areas of increasing frustration to Local Government, as stated earlier in this submission<sup>23</sup>. As recognised throughout the Draft Report, this is particularly relevant in the case of purchasers of strata and community title buildings, who are not present at the time of design, construction and completion. LGNSW therefore maintains that provisions for appropriately apportioned compensation payments should be further considered as another meaningful deterrent to building industry professionals who are found to have deliberately done the wrong thing.

#### **4.9 Sustainability of Professional Indemnity Insurance**

LGNSW welcomes proposals to ensure that the principal contractor and other professionals involved in the design and construction of a building are accountable for their work and hold professional indemnity and run off insurance accordingly. One of the core issues has been that the only person in the whole development process that is being held accountable and is required to hold insurance is the accredited certifier (including council). A certifier cannot reasonably take on responsibilities and liabilities of the whole design and construction team and each and every contractor. It has been an ongoing concern, and one that was documented by the BPB more than four years ago<sup>24</sup> that “one of the emerging trends associated with defects in buildings is that some accredited certifiers, as the only holders of mandatory professional indemnity insurance, are reportedly being pursued in legal claims for building work”.

#### **4.10 Resourcing and Funding**

LGNSW welcomes the acknowledgment in the Draft Report that councils are not adequately compensated for their activities yet they undertake the major part of the compliance function with respect to building regulation<sup>25</sup>. We are pleased to see proposals to address the cost recovery issues facing councils as a result of their important compliance role in the building regulation sector. A review of DA and CDC fees is considered necessary to ensure that Local Government can recover all costs associated with assessing and processing development applications, as well as the cost of the associated compliance activities relating to DAs and CDCs.

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<sup>20</sup> Ibid., p. 16

<sup>21</sup> Refer to Table 11.2 p. 155

<sup>22</sup> Ibid., p. 155

<sup>23</sup> Refer to section 3 a) Building Defects

<sup>24</sup> *BPB Submission to NSW Planning System Review*, November 2011, p. 11

<sup>25</sup> Michael Lambert, *Independent Review of the Building Professionals Act 2005 – Draft Report*, August 2015, Section 16

The Draft Report canvasses several possible funding sources for further consideration. However, any new funding arrangements must be assessed against existing levies on the community, such as those charged in the form of the Planning Reform Fund. Some of our members have questioned how the funds collected by the Department of Planning from councils across the whole state each year have been and continue to be used for planning reform projects both locally and state-wide. The Draft Report points out that “there is a lack of transparency and accountability with respect to the use to which the funds raised by the levy are applied which should be addressed.”<sup>26</sup> LGNSW recommends that before any additional levies are introduced on developments, the Planning Reform Fund be evaluated as a potential source of funds to contribute to the building compliance function.

## 5. Implementation

LGNSW is pleased to see the Draft Report includes specific recommendations about implementation, including a recommendation that a new Minister for Building Regulation be given ministerial responsibility and authority to drive the reforms<sup>27</sup>. There are many issues with building certification and regulation that have persisted for too long and the creation of a Minister for Building Regulation would definitely go some way towards giving greater primacy to these issues by the NSW Government. LGNSW urges the Government to move quickly to commit to and prioritise actions to progress these important recommendations.

The fact that the BPB is currently not well enough resourced to perform its regulatory functions and responsibilities has been pointed out in both the Maltabarow Report and in Mr Lambert’s Draft Report, LGNSW emphasises that resourcing and priorities of the BPB must be refocused and boosted as an urgent priority, as an interim measure ahead of any major legislative and administrative restructures.

## 6. Conclusion

The proposed reforms seek to address numerous aspects of the building regulation and certification process with a view to improving the quality and safety of buildings. Local Government welcomes all measures that will improve the quality of buildings and help reduce the amount of defective work that councils have to deal with post-development.

It is clear from all the reports to date and the current round of consultations, that urgent change is needed, and there is broad support within the Local Government sector and industry for the changes being proposed. However, for anything to change requires a genuine commitment from the NSW Government, by nominating a new Minister for Building Regulation and directing funding and resources to drive the reforms.

The imperative to fix the current system is underpinned by a number of factors, but Mr Lambert has alluded to one of the key incentives, being that:

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<sup>26</sup> Michael Lambert, *Independent Review of the Building Professionals Act 2005 – Draft Report*, August 2015, p. 241

<sup>27</sup> Michael Lambert, *Independent Review of the Building Professionals Act 2005 – Draft Report*, Aug 2015, p 258

*...there is a significant level of risk in the system that will, at some time, manifest itself in a major negative event. In such circumstances the worst of all worlds is to have a regulatory system that is ineffective and has been acknowledged as such.<sup>28</sup>*

LGNSW and councils are firmly of the view that good planning outcomes, building safety and consumer satisfaction will be compromised if the issues with building regulation and certification are not addressed.

Local Government has participated to date as part of the BPB's reference groups, and Local Government expertise must continue to be sought during the development of any further policies, guidelines, regulations and detailed implementation of aspects of these reforms.

LGNSW and all councils call for the NSW Government to commit to changes that will implement an effective and efficient building certification system in NSW, which facilitates construction of approved development and compliance with relevant consents and building regulations. Local Government wants to see a system which ensures that all parties are responsible and accountable for their actions, and the community and public interest is at the forefront.

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<sup>28</sup> Michael Lambert, *Independent Review of the Building Professionals Act 2005 – Draft Report*, Aug 2015, p 19

## ATTACHMENT 1

### Extract from Draft Report, Section 17.2 Recommendations

	A Reforms
10 Priority areas	Recommendations
<p><b>1. Create a principles based legislative framework for building regulation</b></p>	<p>1.1 The Government makes an upfront public commitment to achieving and maintaining best practice building regulation and certification in NSW to improve the safety, health, amenity and sustainability of the design and performance of buildings and to this end engage the community and industry in consultation on the basis of the reforms.</p> <p>1.2 Establishment of a revised legislative basis for building regulation and certification in a separate Building Act, incorporating relevant provisions of the Home Building Act and the building regulation provisions of the EP&amp;A Act in a principles based, plain English form with a clear statement of objectives and with the details to be incorporated in more flexible instruments including regulations and codes.</p> <p>1.3 In the event that it is decided not to create a separate Building Act, that the current building regulation provisions in the EP&amp;A Act are consolidated in one part of the Act and rewritten in a principles based form, with supporting regulations and codes.</p> <p>1.4 Rewrite the Complying Development SEPPs in close consultation with the building regulator and industry in a form comprehensible to the industry and for all future changes to or extensions of Complying Development policy to be fully coordinated between DPE and the proposed Office of Building Regulation, and with full consultation with BRAC.</p> <p>1.5 Maintaining the Building Professionals Act as a separate Act, amended to incorporate a statement of objectives and provide greater flexibility in terms of the changes set out in Table 11.2 of this report, including the handling of licensing and accreditation in the one organisation for the entire building sector</p>
<p><b>2. Strengthen the administration of building regulation and certification</b></p>	<p>2.1 Consolidation of the responsibility for the licensing of building practitioners and the accreditation of certifiers in a single statutory authority, with a suitably representative board in order to create an integrated approach to licensing and accreditation in the building sector, while recognising the regulatory role of certifiers and hence the need for additional requirements for accreditation and support.</p> <p>2.2 Consolidate in an Office of Building Regulation the building regulation and certification functions currently undertaken separately within DPE (namely BPU, BASIX and the administration of complying development policy); the non-licensing policy and regulatory functions, excluding consumer protection, in Home Building Services; and any policy functions currently within BPB.</p> <p>2.3 Location of the Office of Building Regulation and BPB in one portfolio, either the Finance, Services and Innovation portfolio or the Planning portfolio, reporting to a Minister for Building Regulation, with suitable mechanisms established for a close working relation with local government, Fair Trading and DPE.</p> <p>2.4 The Minister for Building Regulation appoints the Building Regulations Advisory Council which includes representatives from all the key industry bodies to advise the government on improving building regulation and the quality of the building product.</p>

<p><b>3. Implement an information systems strategy for the building regulation and certification system</b></p>	<p>3.1 A commitment be made to developing and implementing an e-Building strategy as a joint project involving the Office of Building Regulation, BPB and local government, with full consultation with the building industry and the e Building Branch of DPE, seeking to achieve digitalised and standardised building information that is accessible and transparent and capable of generating performance and outcomes information.</p>
<p><b>4. Enhance the accountability and clarify the role of certifiers</b></p>	<p>4.1 Enhance the accountability of certifiers to act in the public interest by:</p> <ul style="list-style-type: none"> <li>- establishing and maintaining a practice guide to create a benchmark for the process that should be followed by certifiers, with the guide given legal effect</li> <li>- creating a program of proactive investigations and audits of certifiers and certification as practiced in the building sector, linked to the education and training program</li> <li>- providing greater clarity to the community about the role and responsibility of certifiers, to reduce or eliminate misconceptions about the role of the certifier, including each building contract provided to an owner being accompanied by a leaflet which sets out the role and responsibilities of a building certifier and compares and contrasts this with the roles and responsibilities of a builder</li> <li>- utilising the partnership arrangement between councils, certifiers and the State to assess and monitor the working relation between private certifiers and councils</li> <li>- restructure the written contract between certifiers and the beneficiaries of developments as a letter of engagement between the certifier and the beneficiary of the development making clear the regulatory role and responsibility of the certifier and the obligations of the owner/developer, with execution of the letter of engagement to be enforced</li> </ul> <p>4.2 As an initial stage in the reform process, and subject to Government approval of the legislative and regulatory changes contemplated, the practice guide for certifiers developed by the BPB Reference Group together with the proposed protocol governing the relationship between certifiers and councils being subject to industry consultation and early implementation and subsequently updated as additional building regulation and certification reforms are adopted.</p>
<p><b>5. Establish a partnership model between the State and Local Government in respect to building regulation and certification</b></p>	<p>5.1 Establishment of a partnership agreement involving local government, the Office of Building Regulation and the BPB, with consultation with AAC and AIBS, to establish and oversight the operation of a protocol for the respective roles, responsibilities and relationships between private certifiers and councils as building consent and compliance authorities.</p> <p>5.2 The first priority to be addressed under the partnership model is to be the development of the building information system, as well as oversight of the operation of the protocol for the roles and responsibilities for councils relative to private certifiers in respect to compliance and enforcement.</p>
<p><b>6. Achieve and maintain a best practice building regulation and certification system</b></p>	<p>6.1 Proceeding on the basis of an integrated and holistic approach to building regulation and certification covering the design and approval, building construction, completion and maintenance stages, with the proposals set out in Chapter 14 to of this report, augmented as appropriate, to form the basis for public consultation with the release of a discussion paper, before a final approval by government.</p> <p>6.2 The key elements of a reform package for building regulation and certification would include the following: [refer to table on p 253-254]</p> <p>6.3 The certification of fire safety systems and waterproofing be accorded a high priority and act as a demonstration case owing to the issues of public safety in respect to fire safety and the level of complaint and</p>

	<p>concern regarding waterproofing.</p> <p>6.4 Reform of the regulation of the fire safety systems for commercial buildings to involve the following approach:</p> <ul style="list-style-type: none"> <li>- Accreditation of suitably qualified and experienced persons for the design of fire safety systems, their installation, commissioning and maintenance and that these same professionals be required to certify their work, preferably drawing upon the existing accreditation schemes developed by the relevant professional associations.</li> <li>- Replace fire safety schedules with a building safety schedule with a broader, revised approach to documenting safety systems in buildings involving: <ul style="list-style-type: none"> <li>o having a broader scope to cover all important safety features of the building, including but not limited to fire safety systems</li> <li>o initial preparation of the building safety schedule at the time of the issue of the CC or CDC but for the schedule to be updated as the project progresses and finalised at the end of the project, being consolidated into a single building safety schedule where there are multiple CCs/CDCs</li> <li>o the final building safety schedule being incorporated into and maintained in the Building Manual.</li> </ul> </li> <li>- Incorporate the <i>International Fire Engineering Guidelines</i> or an alternative equivalent requirement as a mandatory referenced document for the purposes of pursuing an alternative solution for fire safety systems and for the certifier to declare that this document has been followed, or to detail in what aspects it has been deviated from and for what reason.</li> <li>- Provide FRNSW with access through the local government portal, with transitional access arrangements to be provided in the mean time for all Fire Engineering Briefs and Fire Engineering Reports of alternative fire safety solutions that affect a performance standard related to fire and, in particular, where fire brigade intervention is explicitly mentioned.</li> <li>- Amend the EP&amp;A Regulation to remove the requirement for FRNSW to produce an initial (Clause 144) and final (Clause 152) fire safety report, with the prime reliance placed on the accreditation requirements for fire safety certification.</li> <li>- Provide FRNSW with the power to issue penalty infringement notices for noncompliant fire safety systems.</li> </ul> <p>6.5 A commitment be made for NSW to work with the Commonwealth to seek to integrate BASIX with the sustainability requirements in the NCC, thus achieving a consistent national approach to building sustainability across all categories of buildings.</p> <p>6.6 The NSW Government raise with the Building Ministers' Forum the desirability of achieving a nationally consistent approach to clarification of matters relating to the interpretation of the Australian Standards and the NCC.</p> <p>6.7 The NSW Government formally raise with the Commonwealth Government the proposal of Australian Standards making its information on Standards available free of charge to industry in general.</p> <p>6.8 The Office of Building Regulation work with ABCB to develop a Standard for engineering design requirements for subdivisions as part of the NCC.</p>
<p><b>7. Enhance the professionalization of certifiers through accreditation, education, training and support for certifiers</b></p>	<p>7.1 Improve the certifier accreditation scheme by:</p> <ul style="list-style-type: none"> <li>- Extending the range of professional and academic qualifications that can be considered for building certifiers by identifying what professional qualifications have a reasonable mapping with the knowledge required of certifiers, what the gaps in knowledge are and what training programs would be required to bridge the gaps.</li> <li>- Expanding the accreditation scheme to recognise nationally</li> </ul>

- recognised training organisations and universities.
- Working with relevant tertiary institutions to develop an assessment tool that can assess the knowledge of certifiers in each category against what is required for that category, as well as identifying the gaps that need to be addressed to move to a higher category and using this tool as an objective means to assessing the knowledge of certifiers.
  - Extending the current annual accreditation system from an annual scheme to allow for accreditation for period of three to five years for certifiers with a satisfactory history, with provision to continue with annual accreditation where a certifier has a less satisfactory record, until such time as there is evidence of an improvement in performance.
  - Replacing the current manual accreditation system with a fully online system which consolidates, in one database, information on certifiers including qualifications, accreditation history, history of continuing professional development, complaints lodged and outcomes.
- 7.2 Consideration be given to the creation of a building certifier classification A1R, that is A1 Regional that would provide sufficient capability for a certifier with suitable experience to certify for the typical range of building work undertaken in regional NSW.
- 7.3 Expand the education and training role of BPB by:
- BPB taking primary responsibility for the design and content of the continuing professional development (CPD) program for each category of certifier, in concert with the relevant professional associations, including standards to be met by training providers
  - Developing a continuous process of establishing education and training needs for certifiers based on evidence such as data from investigations and advice from certifiers and their professional associations
  - Establishing and actively maintaining a panel of suitable training course designers and providers who will work closely with BPB to address any gaps in training needs of certifiers.
  - Monitoring of training and education including CPD to ensure relevance, currency and achieving expected learning outcomes, with audits to focus on content and quality of learning material and suitability of lecturers/trainers/educators
  - Establish an online system for management of CPD, including a list of CPD training approved by the Board for certifiers to choose from and an online diary system for certifiers to record their training in real time.
  - Establish criteria and a process for the assessment and recognition of qualifications.
  - Develop and provide an online Accreditation Exam which can be used to allow both self-assessment and BPB assessment of the knowledge of certifiers in various categories.
  - Broaden the scope of accreditation to include accreditation with respect to town planning, building design and the design, installation and commissioning of critical building systems and elements, including fire safety systems and waterproofing, with BPB to assess what other areas would benefit from accreditation.
- 7.4 Expand the support provided to certifiers by:
- Establishing, maintaining and publicising a single dedicated hot line for all building regulation and certification inquiries, consolidating the advice function currently provided separately by BPB, BPU, e-Business Branch in respect to BASIX and the Codes Unit.
  - Establishing in conjunction with the Certifier Associations a both an Advisory Panel of experienced certifiers who can provide more in depth guidance to certifiers, particularly on complex buildings and alternative solutions as well as a Reference Panel for mandatory review of certain designated complex matters.

	<p>7.5 BPB develop with universities, certifiers, councils and private certifiers a program for providing work experience for students, traineeships and facilitating a career path for each category of certifier.</p> <p>7.5 Remove the current restrictions on the participation of accredited private certifiers as PCA in subdivision work and require council subdivision certifiers to be accredited with BPB.</p> <p>7.6 BPB to establish for guidance of certifiers and potential customers, an indicative fee schedule for each class of building work, based on undertaking the work set out in the practice guide.</p> <p>7.7 Councils and private certifiers to publish their fee structure, including any variable fees for handling non-compliance and for there to be audit of fees charged.</p>
<p><b>8. Refocus of the complaints handling process</b></p>	<p>8.1 Refocus the approach to the investigation of complaints concerning certifiers to assess and act on the underlying development issue raised by the complainant in a timely manner before addressing possible professional misconduct or unsatisfactory professional conduct by certifiers</p> <p>8.2 More timely and effective handling of complaints, through both the application of more resources, more effective management of complaints and clear advice to the community about the process and potential outcomes.</p> <p>8.3 Establish a less prescriptive approach in the legislation to the handling of complaints to facilitate a more streamlined administrative approach.</p> <p>8.4 Establish a complaints lodgement and management system, which should also include creating an integrated database of all the information on accredited certifiers, including complaints and disciplinary actions, and this information, should be accessible to potential clients.</p> <p>8.5 Broaden the range of penalties that can be imposed, covering not just certifiers but all building professionals, to include:</p> <ul style="list-style-type: none"> <li>- making greater use of an existing system of penalty infringement notices to address detected administrative and procedural errors</li> <li>- introducing a demerits point system, noting a demerit system is in place in Queensland and has the benefit that it takes account of an individual action that of itself may not justify a fine or suspension of accreditation, but may justify more serious action if it becomes part of a pattern.</li> </ul>
<p><b>9. Enhance the sustainability of Personal Indemnity Insurance</b></p>	<p>9.1 BPB in conjunction with the certifier association(s) introducing an industry scheme to cover run offs and any other gaps in cover, with the scheme open to all certifiers and with cost reflective insurance pricing at the individual certifier level.</p> <p>9.2 BPB and the certifier associations to undertake an active role in establishing a panel of approved insurers with agreed conditions and, exclusions; an active program of risk management, identifying and addressing areas generating claims; and establishing a review process for all material claims before submitting the claim to the insurer.</p> <p>9.3 Consideration be given to changing the maximum liability period for building professionals, including certifiers, under the EP&amp;A Act in the event it is found not possible to obtain run off professional indemnity insurance for the full 10 year period</p>
<p><b>10. Appropriate resourcing and funding</b></p>	<p>10.1 Provide the means for councils to fund building compliance function by the State setting an upper limit on a levy for DAs and CDCs and allowing individual councils, within that limit to determine the appropriate mix of funding sources between rate payer funding the levy and PINs for building compliance activity.</p> <p>10.2 The Office of Building Regulation and BPB to work with the Treasury to identify the incremental level of resources required to undertake the role set out in this report and the mix of budget and industry funding to be applied.</p>

	<b>B Implementation</b>
<b>11. A resourced, committed and accountable implementation approach</b>	<p>11.1 The Minister for Building Regulation be given ministerial responsibility and authority to drive the reforms</p> <p>11.2 A reform task force be established that is suitably resourced with experienced personnel, headed by a person with the experience, capability and commitment to manage the implementation of the reforms and guided by the outline implementation plan set out in Chapter 18.</p> <p>11.3 The implementation of the reforms fully involve the key stakeholders.</p>