



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:BMsh100724

10 July 2024

Small Business Commissioner
4 Parramatta Square
12 Darcy Street
Parramatta NSW 2150

By email: review@smallbusiness.nsw.gov.au

Dear Commissioner,

Discussion Paper – Review of small business experiences with regulatory policymaking

Thank you for the opportunity to provide feedback on the Discussion Paper, *Review of small business experiences with regulatory policymaking*. The Law Society's Business Law Committee contributed to this submission.

Our feedback on relevant questions in the Paper is provided in the attached comments table.

Any questions in relation to this letter should be directed to Sonja Hewison, Policy Lawyer, at sonja.hewison@lawsociety.com.au or on (02) 9926 0219.

Yours sincerely,

Brett McGrath
President

Encl.

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No.	Questions for consideration	Law Society comments
1. Stakeholder consultation and engagement practices		
1.1	Have you had experience participating in a public consultation for a NSW Government policy proposal? Please provide details of the proposal and consultation process?	<p>The Law Society regularly participates in public and targeted stakeholder consultations. Our 18 policy committees bring together solicitors from all areas of practice who, among other things:</p> <ul style="list-style-type: none"> • participate in the review of a range of research-based publications including discussion papers, regulatory impact statements, reports, practice notes and draft legislation, • consider practical issues and resolution of problems in legal practice, • act as a liaison body, and • contribute to the development of Law Society policy proposals and reform initiatives. <p>In 2022/23, the Law Society developed over 200 policy submissions to NSW and Commonwealth Government across multiple policy areas.¹</p>
1.2	<p>Have you ever provided feedback for a public consultation through any of the below feedback channels. If so, describe your experiences and whether you were able to effectively convey your views and perspectives.</p> <ol style="list-style-type: none"> Feedback channels on the NSW Government's 'Have Your Say' website Industry forums or meetings where you were able to discuss as a group Providing a written submission Surveys Meeting with government representatives to discuss your perspectives. 	<p>The Law Society endorses the offering of a variety of feedback channels to facilitate broad-based engagement. While we have utilised all the channels listed, the primary modes are written submissions and meetings with government representatives (including participation in roundtable talks).</p> <p>We consider that we can effectively convey the views and perspectives of the NSW legal profession through these channels. However, we also observe that our contributions may be limited, and optimum consultation opportunities foregone, where the time provided to respond is short.</p>

¹The Law Society of NSW, *Annual Report 2023*, September 2023, 7, 18-20, <https://www.lawsociety.com.au/sites/default/files/2023-09/LSNSW%20Annual%20Report%202023.pdf>.

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1.3	At what stage were you asked to provide feedback as part of the consultation? For example, were you invited to contribute evidence or perspectives on the problem and possible solutions or was it limited to providing feedback on draft legislation?	<p>The Law Society has been invited to provide feedback at all stages of the consultation process. We regularly respond to calls for submissions by government agencies, parliamentary committees and the courts. While many of our submissions have been in response to public consultations, we are also regularly invited through targeted stakeholder approaches to provide feedback on consultation documents such as discussion papers and regulatory impact statements (RIS) designed to inform the development of legislation. Our contributions have included advancing suggested solutions to specific problem scenarios.</p> <p>We have also been requested to provide feedback on draft legislation where we have not previously been involved in the design and development phases and, occasionally, urgent reviews of draft legislation scheduled for imminent introduction to Parliament.</p> <p>The Law Society welcomes opportunities to provide input to policy development as early as possible in the process. This is particularly important where our members represent clients that may be adversely affected by the proposal. Timely consultation demonstrates that policymakers value the input sought which in turn increases buy-in and ultimately promotes better compliance. Please see our response to 1.6 below, for further discussion regarding appropriate consultation periods for participation by representative organisations.</p>
1.4	Do you feel you have an industry body or representative that can effectively represent your interests to government if you are unable to engage in a consultation affecting your industry?	See 1.1 above.

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No.	Questions for consideration	Law Society comments
1.5	Do you have any examples of where your perspectives were considered and taken on board when designing new regulatory requirements? Do you have any instances where you feel your feedback was ignored?	<p>We acknowledge that the Government values the input of the legal profession in the consultation process and considers the Law Society to be a key stakeholder across multiple government portfolios. As previously mentioned, we are regularly approached to participate in consultation through a variety of channels. The Law Society may also proactively make submissions to government, for example, where a legislative anomaly has been identified.</p> <p>We also engage in direct liaison with government representatives, who are appointed to our policy and practice committees from a number of agencies, including the Department of Housing and Infrastructure, Office of Registrar General, Revenue NSW, Department of Communities and Justice, the Information and Privacy Commission, Legal Aid NSW, Aboriginal Legal Service NSW, NSW Police, NSW Industrial Relations, and officials from NSW courts and tribunals.</p> <p>Our experience is that policymakers are generally responsive to Law Society submissions and have adopted a number of our suggestions ranging from practical improvements to administrative arrangements through to proposed legislative reform.</p>
1.6	Is there anything else that would assist small business engagement as part of consultation processes?	<p>As a representative organisation with a diverse membership and a broad policy committee consultative structure, we consider the Law Society to be a valuable source of stakeholder input. It is important when considering consultation design that sufficient time is provided to representative organisations for contributions to be compiled and agreed from across the membership and for a response to be approved at Executive level. We note the Commonwealth Government has recommended additional time is allowed for consultative bodies to provide responses, particularly where small business is affected.²</p> <p>In setting realistic timeframes, policymakers should also consider periods of peak demand on small businesses. For example, school holidays and the end of financial year should be avoided.³</p>
2. Managing the flow: Impact assessment and the NSW Regulatory Policy Framework		

²Office of Impact Analysis, Guidance Note, [Best practice consultation](#), May 2023, 7.

³Ibid., 5.

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2.1	Are there any areas where you believe the existing regulatory policy framework could be improved to better meet the needs of small business?	<p>Apart from the measures suggested above to ensure timely and continuous engagement, we make the following observations.</p> <p>Identifying where regulatory issues intersect at the various levels of government and developing measures to achieve harmonisation would assist in promoting consistency and avoiding duplication or conflict of regulations. For example, depending on the industry, small businesses may be subject to national standards and state regulations, with enforcement carried out, by local governments and state authorities.⁴ We endorse the Productivity Commission’s approach which encourages jurisdictions to consider whether there are certain industries for which a “one business, one licence” model may lead to lower regulatory burdens with similar or improved regulatory outcomes.⁵</p> <p>As small business may be subject to compliance checks and sanctions by multiple regulators from various jurisdictions, it is also important that access to systems for the timely review of decisions by regulators, and at reasonable cost, is readily available.</p>
2.2	Have you participated in a consultation to inform an assessment of the costs, benefits and impacts of a regulatory proposal? What was your experience, and do you feel your feedback informed policy development?	Yes. See 1.5 above

⁴ See case study for “Residential builder”, Productivity Commission Research Report, *Regulator Engagement with Small Business*, 299-302, <https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf>.

⁵ Ibid, 15.

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No.	Questions for consideration	Law Society comments
2.3	Are you aware of any examples where costs, benefits and impacts on small business were not properly assessed?	<p>The disproportionate impact of the regulatory burden on small business is well documented⁶ and the volume of regulation, generated by a multiplicity of regulatory agencies, is a major source of concern for our members.</p> <p>Small businesses cover all industry sectors and supply chains and operate in all communities across Australia.⁷ Insight into the real-world workings of a regulation can be gained through well-designed and continuous consultation including early integration of impact analysis work, such as by release of a consultation RIS. This allows relevant industry interests to test the detail and assists in accurately measuring impacts on small businesses.⁸</p>
2.4	Do you have any examples where the specific needs of small businesses were not considered as part of a regulatory proposal? Do you think the concept of a Small Business Impact Statement would secure better outcomes for small businesses?	<p>See our response to 2.3 above.</p> <p>We support the concept of a Small Business Impact Statement (SBIS) as a complementary mechanism to the RIS requirements and endorse the factors suggested in the Discussion Paper that agencies must consider when developing regulatory policy proposals impacting small business.</p> <p>In addition, we recommend that State agencies be required to develop consultation plans and to include liaison with the Small Business Commissioner in that process (we note Commonwealth agencies are similarly advised to consult with the Australian Small Business and Family Enterprise Ombudsman).⁹</p>

⁶ J Douglas and A Land Pejaska, “Regulation and small business”, 28 August 2017, <https://treasury.gov.au/publication/p2017-t213722a>.

⁷ Office of Impact Analysis, Guidance Note, *Small business impact analysis guidance note*, May 2024, <https://oia.pmc.gov.au/resources/guidance-assessing-impacts/impacts-small-businesses>

⁸ See OECD Regulatory Policy Committee, *Recommendation of the Council on Regulatory Policy and Governance*, November 2012, 13-14, https://www.oecd.org/en/publications/recommendation-of-the-council-on-regulatory-policy-and-governance_9789264209022-en.html.

⁹ n 7.



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2.5	Apart from Small Business Impact Statements, are there any other mechanisms that could be used to assess impacts of regulatory proposals on small business?	Another mechanism that could be used to assess the impact of regulatory policy on small business is to review the performance of regulatory reform programs. Regular publication of reports and performance data provides opportunities for stakeholders to consider and comment on whether regulatory reforms are being implemented effectively. They also provide incentives to agencies to improve their practices. ¹⁰
3. Managing the stock: Efforts to reduce existing regulatory burden		
3.1	Do you have any feedback regarding a specific regulatory requirement affecting your business or industry?	NA
3.2	As a representative of small business, would you feel confident about raising your concerns about a regulatory requirement? Would you know who and how to raise your concerns? Would you be confident your concerns would be addressed?	NA
3.3	Do you have any feedback regarding current or previous initiatives to reduce regulatory burden?	<p>Our members have provided positive feedback regarding the implementation of the Service NSW Business Bureau as a centralised government interface with small business. We commend this “front door” approach to accessing support for small businesses and the streamlining of processes for retrieving resources, advice and programs across all stages of a business cycle.</p> <p>We suggest that adopting the “user experience” approach to government requirements and continuously engaging with small business will improve regulatory outcomes.</p>

¹⁰ n 8, 30.