

Department of Public Works

Draft Built Environment Professions (BEP) Policy

Comment

25 June 2014

Introduction and purpose of this document

The Department of Public Works (DPW) has prepared a draft Built Environment (BEP) policy (referred to as the 'draft BEP Policy, 2014'), which is published in Notice 370 of 2014 in Government Gazette No. 37653 dated 23 May 2014. The DPW has invited comment on the draft policy.

The voluntary associations listed below have reviewed the draft BEP Policy, 2014 and jointly submit comment.

- The South African Institute of Electrical Engineers SAIEE
- The Southern African Institute of Industrial Engineers SAIIE
- The South African Institution of Civil Engineering SAICE
- The Chamber of Engineering Technology COET
- The Institute of Professional Engineering Technologists IPET
- The South African Forum of Civil Engineering Contractors SAFCEC
- The Concrete Society of Southern Africa
- The Concrete Institute

Collectively the voluntary associations represent 21,300 registered professionals and candidate professionals, as well as 400 industry bodies.

The purpose of this document is to comment on the draft BEP Policy, 2014 as the outcomes of the policy will have an important impact on individual professionals, on the Built Environment Professions (BEPs) as well as on the public.

This document is structured to:

- outline what are the purposes of a professional council;
- indicate the importance of legislation in relation to a profession;
- compare the proposals in the draft BEP Policy, 2014 with the purposes of a professional council as well as with the importance of legislation; and
- propose improvements to certain aspects of the draft BEP Policy, 2014.

For the purposes of illustration, examples are drawn from the engineering profession, but the matters raised are applicable to the Built Environment Professions (BEPs).

Purposes of a professional council

The draft BEP Policy, 2014 does not clearly define what is meant by the BEPs and the relationship between individual professionals, the BEPs and the Built Environment Professions Councils (BEPCs).

There are in essence three components, which can be described as:

- individual professionals;
- the BEPs (which include juristic persons such as voluntary associations (VAs), business, industry, mining, energy, public bodies and state owned enterprises. Each has a specific role and together they constitute the core of the BEPs. The source of the professional skills they require is relevant faculties of academic institutions (Universities and Universities of Technology in the main) that provide basic as well as post-graduate training for professionals of the future and post-graduate training for existing professionals. In turn, the juristic persons provide in-service training together with continuing professional development); and
- the professional councils.

The professional councils regulate the individual professional. They do not regulate the juristic persons.

In the Preamble, it is interesting to note the statement in the second paragraph, specifically the last two sentences, where professional expertise is recognised as a high value scarce resource and that the professions must be regulated from within. This recognises the importance of self-regulation of the individual professional as well as of the juristic persons. The BEPCs were never intended to regulate both and cannot.

In the case of engineering the main purpose of the professional council is to protect the public in terms of health, safety and the environment from actions of incompetent people working in engineering. (Regulation of the individual professional.)

For those professions that operate in a high risk environment, the professional councils need to mitigate risk. A professional council thus has the following main functions/tasks:

- set educational standards and assess education programmes against these standards;
- set professional development standards and register professionals against these standards;
- see to professional conduct by setting and enforcing a Code of Conduct;
- charge professionals for misconduct where they have been found to be negligent;
- identify work to be reserved for a specific profession;
- acquire and retain international recognition of standards and professionals; and
- liaise with government through the relevant department (in the case of the BEPs the DPW).

These functions/tasks are confirmed in different words on pages 74 and 75 of the draft BEP Policy, 2014.

Page 75 of the draft BEP Policy, 2014 contains a statement to the effect that a “central theme embedded in the achievement of national priorities is that of transforming society by redressing historically skewed ownership, employment, skills and other patterns. The BEPs have a central role to play in redressing the aforementioned.”

It is correct that the BEPs have a central role and many of the BEPs as well as the tertiary education institutions are well advanced in transformation. The contention on the same page of the draft BEP Policy, 2014 is that the BEPCs, as the regulators of the professions, would enforce the role. That is not correct as it is not a function/task of the BEPCs to see to it that those matters are redressed. Government has many other mechanisms it is applying to encourage/force the BEPs and tertiary education institutions to comply.

It is not the BEPCs’ purpose to implement the policies of any government of the day, other than those that are necessary for the professional council to fulfil the functions/tasks outlined above.

It is one of the functions/tasks of a BEPC, however, to work with the government of the day to protect the public in terms of health, safety and the environment.

BEPCs have a duty to society and to the professions to be consistent, to last beyond the currency of any government of the day and to protect the public in terms of health, safety and the environment in respect of the professions irrespective of policies and agendas of a government of the day.

The ‘draft BEP Policy, 2014’ reflects a view that the BEPCs can be the agents of the DPW and can force Government policy on the professions through the BEPCs. The ‘draft BEP Policy, 2014’ also reflects a view that the BEPCs can fix everything for the professions, transformation, numbers of students and to sort out industry for training. This is neither the functions/tasks of the BEPCs nor do the BEPCs have the resources to undertake such activities.

A thrust of the proposals in the draft BEP Policy, 2014 that is worrying is that the DPW seems to see the BEPCs as implementation arms of government for functions that other parties should do but are not. The BEPCs are not implementing agents nor are they intended to be such. The BEPCs do not have the resources to be implementers and are but one part of a greater whole in the BEPs, each of which has its distinct roles. The juristic persons are better placed to be implementing agents.

The importance of legislation in relation to a profession

VAs have existed in South Africa for more than a century. In the case of the engineering profession, the only form of regulation was through the Government Certificates of Competence. The profession argued and lobbied for broad-based regulation of engineering practice and this led to the 1968 Act. The first Professions Act in the built environment being the 1968 Professional Engineers Act (Act 81 of 1968) which gave rise to the formation of the South African Council for Professional Engineers (SACPE). The subsequent 1990 Act brought Engineering Technologists, Engineering Technicians and Certificated Engineers into the fold.

A major thrust of the 1968, 1990 and the current 2000 Acts is the protection of the public. The same principles apply to the other BEPs.

The whole push pre 1968, and subsequently, was to have the power of law behind the professions so they could regulate their professionals, to ensure that the interests of the public were covered in terms of public health, safety and the environment.

The Government at the time accepted this, as it was in their interest that the professions had this power to protect the public. With that the VAs handed over power to the BEPCs to accept/accredit tertiary education qualifications, to register professionals following a check on their competence and to discipline those breaking the code of conduct. Most institutions used registration with a BEPC as meeting membership requirements. However, many of them kept their ethics standards in place, but rarely used them.

Prior to the professions' Acts, the institutions could only act against a member for misdemeanours, and the worst punishment would be being struck off the role of membership. At that time the percentage of the professions that were members of an Institution varied depending on discipline. So, in many cases, the institutions were powerless in terms of those people who were not members. **The Acts gave the professions as a whole the legal power to regulate competence and to facilitate the professions in regulating their members.** These are the two purposes of the BEPs' Acts.

However, the Acts have a major shortcoming in that registration was not compulsory, and still is not. This needs to be addressed. While the mechanism exists, compulsory registration has been delayed unnecessarily by more than a decade.

A second shortcoming is that Government is trying to use the Acts to control the professions. This was not the original intention prior to 1968 nor is it in the interests of Government, society or the professions. Government can only benefit if the professions regulate their professionals and the Government works with the professions (and the sectors in which they participate - rather than the professional councils) to resolve other issues that are in the national interest.

Government's role is one of oversight. There are levels of **oversight**. The Engineering Professions Act, for example, is clear on the level of oversight from above. The Minister appoints the Council and in the worst case, may fire it. The Council is obliged to report annually to the minister on matters within its competence. Unfortunately this has been escalated to quarterly reports of an onerous nature. The absence of clarity is not beneficial and has been a significant cause of conflict. This is an aspect for the DPW to take into account when considering the DPW's relationship with the BEPs, individual professionals and the professional councils.

The third paragraph of the Preamble to the draft BEP Policy, 2014 contains the sentence "This process culminated in 2000, with the promulgation of seven pieces of legislation, six Acts each regulating the Built Environment Profession through the establishment of statutory Councils"

In the case of the engineering professional council at least, this is not correct as outlined above. The engineering profession already had a statutory council for more than three decades prior to 2000. Consequently, the functions/tasks of the engineering professional

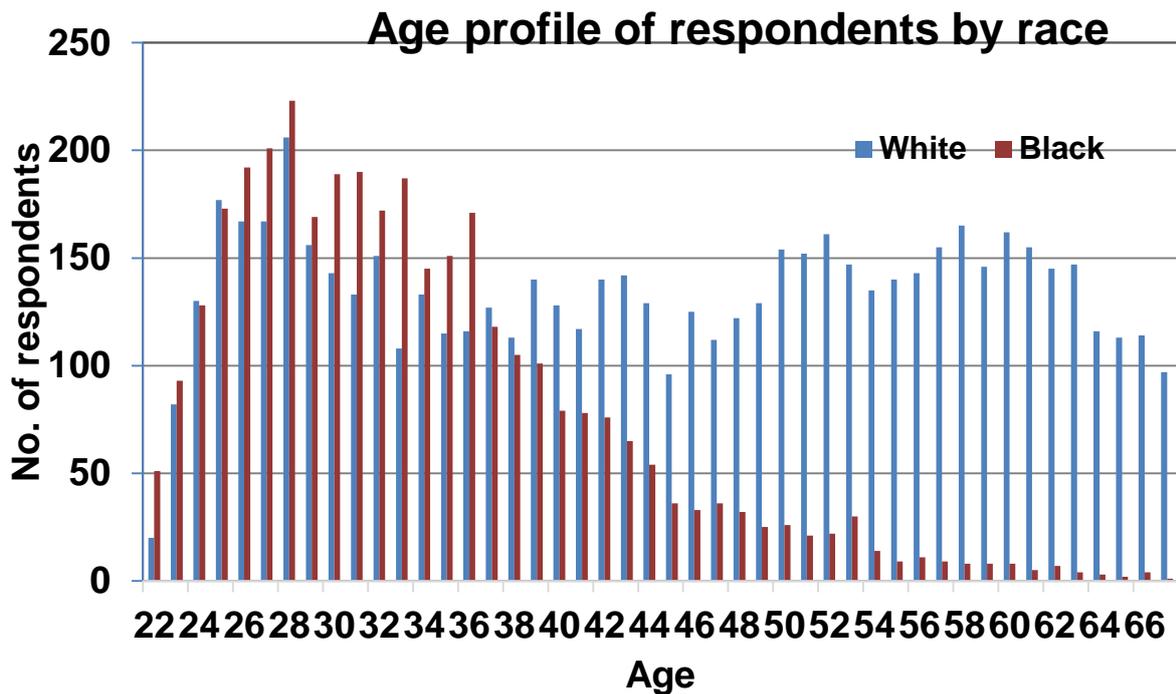
council were well established and much experience had been gained. Also a partnership between the DPW and the professional council commenced some 45 years ago, which should continue but be focussed on the needs of the profession through the individual professional and the protection of the public.

The difficulties alluded to in the Preamble to the draft BEP Policy, 2014 have arisen through deviation from the cardinal purpose of the legislation and the functions/tasks of professional councils, coupled with the introduction of the Council for the Built Environment that endeavours to impose a 'one size fits all' approach to the BEPs and to impose unrealistic policies on the BEPCs.

Comparison of the proposals in the draft BEP Policy 2014 with the functions/tasks of a BEPC and the purpose of legislation

The 'draft BEP Policy, 2014' summarises the challenges of the present regulatory framework on pages 76 to 78. Comments follow in order to clarify some misperceptions.

- The BEPs are markedly different in many ways, even within specific professions. Despite certain professions' breadth, each can be regulated as a whole, whereas the different BEPs cannot be regulated or co-ordinated collectively as a whole. Hence, the CBE's endeavours to attain synchrony through a 'one size fits all' approach (which is impracticable) and by trying to enforce unrealistic policies on the BEPCs are bound to fail. The same can be expected if the DPW adopts a similar approach. The question also arises as to whether it is in the country's and the professions' interests to force synchrony.
- Professional councils must be independent of the State as they regulate the individual professionals. The appropriate mandate for a professional council is from the profession as the councils enforce professionalism on individuals and, as outlined above, require legislation merely to have the power of law behind the professions to regulate registered (licenced) professionals as well as to prevent unregistered (unlicensed) persons from harming the public.
- Professional fees are raised from professionals merely to run the BEPCs. Fees are not raised from the public. Consequently, the BEPCs are not financed from public funds and are not subject to the Public Finance Management Act (PFMA). Officials of National Treasury support this view.
- The CBE forms an unnecessary barrier between the BEPCs and the DPW and has not functioned as intended from the outset.
- On page 77 the statement regarding the registration of professionals having only reached 25% does not reflect the full situation. All BEPs have a pipeline of progress from learner to registered professional which must be taken into account. In the case of the engineering profession, for example, the statistics of registration show significant progress. Given that engineering professionals were almost all white male until the mid-nineties, 25% means that amongst the professionals under 40 years of age there is some 50 to 60% transformation. The graph below indicates this trend.



- The BEPs have addressed and are addressing the change. The redress of historic imbalances is not in a professional council’s mandate, but falls to the, business, industry, mining, energy, public bodies, state owned enterprises and the VAs with the education system providing suitable graduates to be registered as candidate professionals.
- The funding of resource poor professional councils will remain an issue to be addressed irrespective of the institutional arrangement.
- Non-compulsory registration has been a shortcoming in the regulation of professionals since the introduction of the concept of professional registration. The delay in addressing the issue is due to the procedure that has been followed. The signatory VAs to this document have and are willing to continue working with the BEPCs and the DPW to address the shortcoming provided a “one size fits all” synchrony is not sought for all BEPCs.
- On page 78 reference is made to the costs of investigating complaints against professionals. This matter needs to be addressed in any amendment to legislation without interfering with the independence and self-regulatory roles of the BEPCs.

The signatories to this document concur with the DPW’s view that Option 3 is the more beneficial of the three options in the ‘draft BEP Policy, 2014’. However, there are concerns about what the detail contents of the amendments to the professions’ Acts will be as well as about certain of the proposals in Section 6 – Policy Recommendations in the ‘draft BEP Policy, 2014’ regarding what the parties will address.

An example of matters of concern is that on page 79 there is a proposal to the effect that “The Minister of Public Works will directly regulate the Built Environment Professions and entrench the DPW’s shareholder role.” However, in several places the ‘draft BEP Policy, 2014’ emphasises that the professions must regulate themselves. It is not the DPW’s role to

regulate the BEPs. This contention is supported, also on page 79, by the proposal related to “The operationalization and institutionalization of the DPW’s oversight across the BEPCs...”. This is more in line with what should be the arrangement. The Minister of the DPW should have **oversight** to the extent necessary *to ensure a clear focus on the public as opposed to professional interest and to provide independent representation of the public interest*. The BEPs and the DPW could work directly with each other to address other agreed objectives.

In taking Option 3 forward, great care will need to be taken to define terms, to refine some of the concepts as well as to be clear in the terminology that is adopted.

To assist in this process, comment is made in the table below of matters in Section 6 of the ‘draft BEP Policy, 2014’ that need specific attention in order to align the proposals with the purposes of the legislation as well as with the functions/tasks of the BEPCs.

Reference	Relevant text in the 'draft BEP Policy, 2014'	Alignment	Comment/proposal
6. Policy Recommendations			
Pg. 79 Repeal of the CBE Act	".....it is recommended that the Council for the Built Environment Act be repealed. The CBE's function be transferred to the DPW."	Yes	Supported, but the function of the then superfluous CBE must be amended to be oversight when transferred to the DPW. These function need to be limited to those that are essential and which are appropriate to be discharged by the DPW.
"The DPW will address the issues of:			
Pg. 80 The DPW's role	a) ".....direct mandate from the Minister of Public Works, it making the DPW better placed to guide and direct the BEPCs on Government policy and national imperatives."	No	The BEPCs are autonomous regulators of professionals and are not under the direction of the DPW. In the main the DPW should guide the BEPCs when the Minister is of the view that their actions are not in the public interest (the oversight role)
	b) ".....there will be no competing interests or conflicting views that would impede the DPW from executing actions or tasks"	No	There will be competing interests or conflicting views if the DPW endeavours to impinge on the functions/tasks of the BEPCs, to control them or to impose on the BEPCs requirements that are not within or are in conflict with the functions/tasks of the BEPCs
	c) ".....BEPCs will report directly to the DPW"	No	The DPW should have an oversight function not a control function which is implied by this statement in the 'draft BEP Policy, 2014'. The BEPCs would report to the Minister in respect of the functions/tasks with which they are charged in order to attain the oversight role in the interest of the public
	d) ".....cooperation will be enhanced through amendments to the legislation of the BEPCs to clearly define roles and responsibilities between the BEPCs and the DPW"	Can attain alignment	The legislation must be amended (possibly replaced). Clarification of roles and responsibilities, not only of the BEPCs and the DPW but also of the other components of the professions, would remove causes of poor cooperation. Other components of the BEPs are the appropriate entities to address government's aspirations that are being inappropriately forced on the BEPCs.
	e) "Oversight – The DPW will be in good stead to oversee the alignment in the	Can attain alignment	The oversight in the amended (replacement) legislation must be in respect of the functions/tasks of the BEPCs and not to force on the

Reference	Relevant text in the 'draft BEP Policy, 2014'	Alignment	Comment/proposal
	<p>implementation of the legislation and of Government priorities through the direct mandate from the Minister and the amended legislation of the BEPCs.”</p> <p>f) “Procedural matters related to professionals gaining international recognition.”</p> <p>g) “Serving as the body for appeals for any person aggrieved by any decision taken by a BEPC”</p>	<p>No</p> <p>No</p>	<p>BEPCs matters that the BEPCs should not or are not able to address. Hence the importance of clarity of roles between the BEPCs, the DPW and the other components of the professions is critical</p> <p>International recognition of professionals is not a function of Government. It is the responsibility of the BEPCs. The recognition is binding on the BEPCs and not on Government. Officials of the Department of International Relations supports this view</p> <p>Having an appeal mechanism located in government is unprecedented among countries against which we should be benchmarking our BEPCs. The norm is for the next step after an appeal within a Council’s mechanisms to be to an Ombudsman or the Courts</p> <p>Appeals involving peer judgement cannot be handled by an authority higher than a BEPC, unless the handling of that appeal relates only to the process followed. So, the DPW endeavouring to handle such an appeal cannot venture into the peer judgement arena</p> <p>The amended (replacement) legislation must contain a dispute resolution mechanism that ensures impartiality. The DPW cannot be such an impartial body as circumstances can arise in which the DPW (as a client) is party to an appeal or an individual in the DPW (possibly even the Director General or the Minister if she/he is a built environment professional) could be the applicant in such an appeal</p> <p>The dispute resolution mechanism should be within the BEPC, while a body of appeal should be totally independent of the DPW and the BEPCs. Also, the distinction between appeals against registration and disciplinary decisions and appeals arising from</p>

Reference	Relevant text in the 'draft BEP Policy, 2014'	Alignment	Comment/proposal
	h) "Ensuring consistent application of policy by the BEPC and inform the Minister of any inconsistency."	Can attain alignment	<p>unresolved disputes occurring between parties for other reasons must be very clear.</p> <p>The policy to which the statement relates must only be that which is necessary for the BECPs to fulfil their functions/tasks. The terminology in the amended (replacement) legislation must be very specific (should be the BEPCs' policies) to avoid confusion regarding whose policy this requirement refers to and whether or not the BEPCs can or even should apply a particular policy</p>
Page 80	<p>"The Acts regulating the BEPCs will be amended, where necessary, to improve governance and accountability,"</p> <p>".....The BEPCs will retain autonomy on matters related to the BEPs"</p>	<p>Yes</p> <p>Yes</p>	<p>It is agreed. The question begs itself as to whether the Acts can be appropriately amended or whether they need to be replaced. At least as far as the engineering profession is concerned, all stakeholders and not only the professional council must be engaged in determining the appropriate process, the content and the determination of rights and obligations of the parties (not only those of the BEPCs and the DPW). This would assist in removing the misperceptions regarding the functions/tasks of the professional councils and in establishing a mechanism through which desirable policies, which must not be in the professional councils' mandate, can be handled</p> <p>This is critical and must not be compromised in respect of the functions/tasks of the BEPCs. It must not imply that the BEPCs are in control of all aspects of the professions, but in respect of individual professionals</p>

Reference	Relevant text in the 'draft BEP Policy, 2014'	Alignment	Comment/proposal
"In the main the BEPCs will be responsible for:			
Page 80	a) "All matters relating to the registration of candidates and professionals....."	Yes	Agree but must include "setting professional and education standards"
	b) "consulting and liaising with other Professional Councils and authorities"	Yes	Agree
	c) "subject to the provisions of national legislation, controlling and exercising of authority of any profession falling within the ambit of the BEPC;"	Can attain alignment	This would be appropriate, provided the legislation does not seek to control the BEPCs or to enforce on them matters that are not within the functions/tasks of the BEPCs The BEPCs cannot control and exercise authority of a profession other than in respect of individual professionals. The functions/tasks of a BEPC do not extend to juristic persons in the ambit of the professions. The scope of the control and authority of the BEPCs and the other entities will have to be clearly defined
	d) "consult with the Council on Higher Education,, regarding matters relevant to education in the professions;"	Yes	Agree Although the Council on Higher Education and the BEPCs enjoy good relationships, it is critical, that the BEPCs are protected against the Council on Higher Education being in a position to ignore and over-ride the BEPCs on matters that are necessary for the BEPCs to undertake their functions/tasks in respect of setting education standards and accrediting relevant tertiary education programmes
	e) "recommending to the Minister any matter falling within the scope of any BEP;"	Yes	Agree in respect of matters relating to individual professionals. Another mechanism is required in respect of matters relating the BEPs that fall outside of the functions/tasks of the BEPCs It is important for the Minister to be required to respond within an appropriate time

Reference	Relevant text in the 'draft BEP Policy, 2014'	Alignment	Comment/proposal
	f) "Making recommendations to the Minister on matters of public importance acquired by the BEPC,;"	Yes	Agree in respect of matters relating to individual professionals. Another mechanism is required in respect of matters relating the BEPs that fall outside of the functions/tasks of the BEPCs It is important for the Minister to be required to respond within an appropriate time
	g) "maintaining and enhancing the dignity of the profession and the integrity of the persons practicing such a profession;"	Yes	Agree Governing documents, preferably prepared by the BEPCs, will be required to clarify how this would be done Consideration should be given to including the standards required of professionals
	h) "guiding the profession,;" ".....protect the public interest;"	Can attain alignment Yes	This can be done through the individual professionals as well as by trying to influence the juristic persons – all within the functions/tasks of the BEPCs Agree. This is a core function/task of a BEPC
	i) "all complaints lodged against registered persons and/or related processes as well as appeals thereof;"	Yes	Agree Need to be consistent with the comments in g) of the matters that DPW will address (above)
	j) "comply with the requirements of the PFMA;"	No	See the comments earlier in this document
	k) (i) to (viii) "subject to other national legislation, a BEPC has the power to "	Yes	There is general agreement with the powers outlined in k (i) to (viii) Some comments are: (i) The BEPCs must not only conduct accreditation visits to education institutions offering programmes intended to

Reference	Relevant text in the 'draft BEP Policy, 2014'	Alignment	Comment/proposal
			<p>provide the educational base for registration in any registration category, i.e. either conditionally or unconditionally grant, refuse or withdraw accreditation of a programme contemplated in (i) but must set the standards for the education and have the DHET's support</p> <ul style="list-style-type: none"> • No mention is made of the BEPCs' power to register professionals
Pg. 81	"An aggrieved party to any decision of a BEPC must lodge an appeal to the DPW"	No	See g) of the matters that DPW will address (above)
Pg. 82	"The legislation regulating the BEPs will be amended to improve accountability and governance while maintaining a streamlined and efficient BE"	Can attain alignment	<p>It is agreed that it is critical to have a streamlined and efficient built environment. This can be attained through self-regulated and highly competent BEPs.</p> <p>The DPW and the BEPCs cannot attain the desired result alone. It is critical that the DPW engages the other constituencies in the built environment professions (such as the VAs, business, industry, mining, energy, public body and state owned enterprise representatives as well as appropriate tertiary education institutions) in the formulation of changes to the legislation, even if it results in the current legislation being replaced rather than amended</p>

Proposed improvements to certain aspects of the draft BEP Policy, 2014

The draft BEP Policy, 2014 is not clear on the boundaries of the BEPCs mandate to regulate, which is in respect of the individual professional and not in respect of the profession in all its facets.

The BEPCs functions/tasks should not extend to matters over which the BEPCs have no influence or which they may not be able to handle.

Removal of uncertainty and clarifying the roles of the various parties will go a long way in reducing the challenges that the Government, the professions and the BEPCs have experienced.

Irrespective of the changes, the importance of professionals having to be registered to practice, together with remedial measures in the event of an unregistered person practicing, must be encapsulated in the legislation. The 'draft BEP Policy, 2014' is silent on this matter.

The 'draft BEP Policy, 2014' is also silent on the competency within the staff of the BEPCs. Experience has shown that a BEPC cannot fulfil its functions/tasks unless it has competent persons knowledgeable in the particular profession and ideally professionally registered persons drawn from its ranks.

Concern has also been expressed about the composition of the BEPCs. The stage is now being reached that the BEPCs are being dominated by persons who are not built environment professionals, whereas the intent has always been for the professions to regulate the individual professional. The composition and qualification requirements of members of the BEPCs must be reviewed when amending or replacing the legislation.

The regulation of the professions has gone a long way in addressing the regulatory matters of the professions since professional councils were introduced more than 4 decades ago. It would be worthwhile considering whether or not the current model is the most advantageous for the public and for the professions. For example, consideration can be given to transferring some of the BEPCs' functions/tasks to the VAs, making membership of an appropriate VA compulsory for registration and allowing the BEPCs to focus strongly on their core functions/tasks. This is done elsewhere in the world.

The combination of the VAs and the BEPCs each with its defined roles, responsibilities and oversight mechanisms will go a long way in removing the disjuncture in the aspirations of Government and the regulation of the BEPs.

The proposal to amend the statutory regulatory framework of the BEPCs provides an opportunity to look into the entire arrangement and not only into amendment of the legislation in respect of the BEPCs.

Questions are frequently raised regarding the appropriateness of the six BEPs being overseen by the DPW. The work they undertake stretches across far more than the portion of the built environment for which the DPW is responsible. Suggestions have been made that it would be more appropriate for the BEPs and the BEPCs to interface with a body that

is more representative of the spheres of activity of the professions (possibly even a Parliamentary Committee). Consideration needs to be given to this option when the legislation is amended or replaced.

The proposal to amend the statutory regulatory framework of the BEPCs also provides a real opportunity to amend the relationship between the VAs and the BEPCs. Currently this relationship does not do justice to the professional work done by the VAs on a voluntary basis for the BEPCs. Consideration must be given in the process of amending the legislation to further empowering VAs by mandating them to carry out the professional functions which they currently do voluntarily.

Conclusion

The organizations represented by the signatories that follow are acutely aware of the importance of working with stakeholders to improve and to self-regulate the BEPs. They are committed to contribute positively towards a review and improvement of the regulatory framework for the Built Environment Professions.

Signed

for:	
by:
Name	Signature
Designation:	
for:	
by:
Name	Signature
Designation:	
Witness No. 1	
.....
Name	Signature
Witness No. 2	
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Name	Signature