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Select Committee on Social Services  
National Council of Provinces  
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Dear Ms Marcelle Williams

**PUBLIC SUBMISSION: PROPERTY PRACTITIONERS BILL ("BILL"), [B 21-2018B]**

The Banking Association South Africa ("The Banking Association") would like to thank The Department of Human Settlements (DHS), the National Assembly Committee on Human Settlements and the National Council of Provinces select Committee on Social Services for the opportunity to comment on the above-mentioned Bill.

**Who we are?**

The Banking Association South Africa (The Banking Association) is an industry body representing all banks registered and operating in South Africa. Currently, The Banking Association has 33-member banks which include both South African and International banks. All licenced banks are members of The Banking Association. Our vision and role, together with our areas of focus, including a list of our members may be found on our website, [www.banking.org.za](http://www.banking.org.za)

The Banking Association as the mandated association for commercial banks has had the opportunity to work very closely with the Department over the years to improve access to housing finance and to accelerate housing delivery, for which we thank you.

**Context**

The Banking Association has publicly promoted the need for all property intermediaries to be regulated, as we believe that this is in the interest of the public. We are therefore favourably disposed towards and would like to add our support for this Bill.

We also recognize and support the need for Department of Human Settlements to transform the property sector and are pleased to note the inclusion of capacity building and training support that the Board intends providing to Black intermediaries. We believe that such capacity building and training should however be extended to include the rental market, which we comment on below.

We would like to express our gratitude to the Department of Human Settlements and the National Assembly Committee on Human Settlements for considering and

including our comments submitted in the previous round of public commentary. We note a number of material changes have been made to this version of the Bill, hence this submission.

## **TECHNICAL COMMENTS**

### **Section 1 - Definition of the reference to a "Person"**

There are multiple references to a "person" throughout the Bill. It is not clear whether the reference is intended to be natural persons, juristic persons or both, as there is no definition for a "person" in the Bill.

For example:

- In section 4 Exemptions of the Act, if "person" means only natural person, then juristic persons cannot claim an exemption.
- Under the property practitioner definition, section (b) references "person" if this is interpreted as a natural person only, then a loophole exists for juristic persons.

#### ***Recommendation***

We suggest that a definition for "person" is added to the Bill and that this denotes that a "person" includes both a natural and juristic person.

### **Section 1 – Additional definitions recommended, namely definitions for the "Attorney" and updating the definition for "conveyancer"**

The Bill does not provide a definition for an "attorney". Moreover, the Bill places reliance on the definition of a "conveyancer" from the Attorneys Act No.53 of 1973. We highlight that this Act by the Legal Practice Act 28 of 2014.

#### ***Recommendation***

We recommend that the Bill adopts the definition of a "conveyancer" and an "attorney" as prescribed in Section 1 of the Legal Practice Act 28 of 2014, which reads as follows:

- "attorney" means a legal practitioner who is admitted and enrolled as such under this Act;
- "conveyancer" means any practising attorney who is admitted and enrolled to practise as a conveyancer in terms of this Act;

### **Section 1 – Reference to "financial Institution" in the definition of "Property Practitioner"**

In the definition of "Property Practitioner" the Financial Services Board Act is referenced for the definition of a "financial institution". However, the Financial Sector Regulation Act 2017 (Act No. 9 of 2017) has repealed this section of the Financial Services Board Act.

#### ***Recommendation***

The reference to Financial Services Board Act should therefor be changed to the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017).

### **Section 2 – Adding the word "Hiring" to the Application of the Act**



The scope of the Bill extends to include "hiring", as it is detailed in various clauses in the Bill. However, the word "hiring" is omitted in the Application of the Act section of the Bill.

### ***Recommendation***

We recommend that the word "hiring" be inserted into the list of activities included as being included the application of the Bill i.e. "hiring" to be added to the clause "... marketing, promotion, managing, sale, letting, financing and purchase of immovable property...".

## **MATERIAL COMMENTS**

### **Chapter 2 - Board of Authority**

This section of the Bill is vague as it does not adequately address issues concerning the accountability of the Board.

### ***Recommendation***

We recommend that a section be added to the Bill that expressly addresses issues of accountability such as:

- Who does the Board account to;
- The need for the Board quarterly meeting reports to be provided to the accountable person;
- How are potential fraud and other malpractices mitigated and sanctioned (e.g. alignment to the King Report and the annual external audits (the Property Practitioners Board will receive public funds and so this introduces a material "public interest" component);
- Outlining the processes and carrying of motions for Board when voting;
- That the Board and the fund be subjected to an annual external audit and that this annual report is made available to the public.

Further, clause (7) of section 13 should be amended so that the Bill is applicable to the latest King report and not King III as it currently reads in the Bill. In this regard, the suggested wording is the "King Code".

### **Section 4 & 28 – Reinstatement of the Property Practitioners Ombud and the Lodging of complaints**

We believe that a Property Practitioners Ombud should be reinstated into the Bill, as an Ombud process can facilitate both a cost-effective and efficient means for having disputes resolved. By removing this section in the latest version of the Bill both consumers and property intermediaries alike will be forced to resort to the courts, which poses both cost and timeline constraints. This is particularly important for previously disadvantaged individuals and transformation within the sector as this requires such a support mechanism.

However, an Ombud should be an independent entity that does not report to the Property Practitioners Board as this will promote fairness and equity when complaints are lodged against the Board. This is especially important where matters have not been resolved and are affecting the ability of a practitioner to continue operating and in extension, the livelihood of the practitioners in that agency become affected. This



will also ensure that there is balance in respect of the role that the Ombud fulfils and is vital to fulfilment of the objects of this Bill.

### ***Recommendation***

We recommend that the Property Practitioners Ombud be reinstated and that the scope of the Ombud should be extended to include complaints from intermediaries against the Board.

We further recommend that the Property Practitioners Ombud be located within National Treasury's planned "Super Ombud", which Ombud will house several Ombuds' as they relate to the financial industry. This will benefit consumers, practitioners and the regulatory authority alike, as it allows a stream lined and cost-effective process that further guarantees the independence of the Ombud. For ease of reference please find attached the National Treasury Discussion paper "A known trusted Embed system for all."

### **Section 23 –Exemption from appointing an auditor**

This section permits the appointment of an accountant rather than an auditor for property practitioners with a turnover of less than R2.5 million. Whilst the Bill specifies the criteria for an "auditor", there are no criteria or definition for an "accountant". While we recognize that the intent of this clause is to cater for small/ new entrants into the sector (reduce the cost burden of having their affairs audited), this poses a risk to consumers who entrust monies to property practitioners in the form of deposits. This may adversely affect consumers whose lives the Bill seeks to support due to fraud or malpractice. Further, this does not support the principle of "public interest".

### ***Recommendations***

We recommend that property practitioners with a turnover of under R2.5 million not be compelled to have a trust account or hold consumers monies, and that these funds could be held in an attorney's trust account. If a property practitioner in this threshold opts to hold a trust account, we submit that they should be required to be audited by an auditor.

If a property practitioner below the R2.5 million does not have a trust account, then their accounting records should be reviewed by a registered accountant.

We further recommend that the criteria for qualifying accountants be liked to that of a qualifying auditor (i.e. "auditor" means an individual or firm registered in terms of section 37 or 38 of the Auditing Profession Act, 2005 (Act No. 26 of 2005)).

The definition of an Independent Reviewer is provided for in Regulation 29(4) of the Companies Act No. 71 of 2008, which requires them to be registered with one of the following accounting professional bodies:

- ACCA - Association of Chartered Certified Accountants;
- CIMA - Chartered Institute of Management Accountants;
- IAC - Institute of Accounting and Commerce;
- ICOSA - Institute of Chartered Secretaries of South Africa;
- SAICA - South African Institute of Chartered Accountants;



- SAIPA - South African Institute of Professional Accountants;
- SAIBA - Southern African Institute for Business Accountants.

Moreover, all other requirements as they apply to companies, such as an annual accounting review to be undertaken within 6 months of the property practitioner's year end to take place, and the property practitioner be required to provide an annual notification to the Property Practitioners Board concerning the appointment and details of the accountant. To compliment this change, we recommend that the word "accountant" be added to areas of the Bill where this makes reference to an "auditor".

### **Section 25 – Adjudication**

While we welcome an adjudication process, which may reduce the burden of our courts, the Bill does not stipulate a maximum timeline for an adjudication process. This could hinder a fair and just adjudication process, as a dispute can be held up indefinitely, due to an order being withheld.

#### ***Recommendation***

We recommend that a "time frame" clause be inserted into the Bill which prescribes a maximum time frame for matters being adjudicated.

### **Section 32 – Funds of Authority**

Section 32 list all the funds of the Authority, however fines and interest are not listed.

#### ***Recommendation***

We recommend that fines and interest be included as a source of funds for the authority.

### **Section 47 - Fidelity Fund Certificates**

Section 47 proposes that a property practitioner must apply for a fidelity fund certificate and pay the prescribed fees every three years. The possession of a Fidelity Fund certificate will be a mandatory requirement for acting as a property practitioner.

In instances where a juristic person participates as a property intermediary every director of the company will be required to be in possession of a certificate. The same applies to:

- (i) All members of a close corporation;
- (ii) All trustees of a trust; and
- (iii) All partners of a partnership."

We believe that this requirement will place an undue burden on all directors/members/trustees/partners to possess a fidelity certificate as such entities employ specialists to fulfil roles without their having any knowledge or involvement as a property practitioner e.g. a financial accountant. In addition, this will place an undue financial burden on such entities. These costs will in turn be on passed on to the consumer by such entities, which will hamper transformation.

#### ***Recommendation***

We recommend that at least one key individual be required to be in possession of a fidelity fund certificate. The key individual would be the individual elected by the directors/members/trustees/partners with the most knowledge/experience in the



property sector and who is fulfilling the duties of a property practitioner. We therefore propose that the following definition be inserted in the Bill:

""key individual" in relation to an authorised property practitioner, or a representative, carrying on business as - a) a corporate or unincorporated body, a trust or a partnership, means any natural person responsible for managing or overseeing, either alone or together with other so responsible persons, the activities of the body, trust or partnership relating to the rendering of any property related service; or b) a corporate body or trust consisting of only one natural person as member, director, shareholder or trustee, means any such natural person."

## **Section 50 - Disqualification from issuing a Fidelity Fund Certificate**

The Draft Bill proposes a long list of mandatory reasons why the Property Practitioners Board should withhold a Fidelity Fund certificate, thereby preventing intermediaries from practising and therefore earning an income.

A number of these grounds may, depending on the circumstances, be contrary to the principle that the punishment must fit the crime and, more importantly, the Constitutional limitation of rights considerations. There is also a concern of potential abuse of processes for *ultra vires* reasons. Grounds based on court orders tend to hold more *gravitas* and be more immediately justifiable. We note that these same grounds are not reflected in the grounds for disqualification from the Board or Authority itself?

### **Recommendation**

We recommend that this section of the Bill be redrafted to include commentary as per our concerns detailed above.

We further recommend that consideration be given to including this content for a Board/Authority.

## **Section 54 - Trusts**

In terms of Regulations in support the Banks Act No.94 of 1990, a bank may not open a trust account for a property practitioner unless they are registered with the Property Practitioners Board. Clause 54(1)(c) is therefore incorrect as it should require a property practitioner to register with the Property Practitioners Board and only to approach a bank thereafter for a trust account to be opened.

We assume that the Property Practitioners Board would, when approving the registration of a Property Practitioner ensure that the name used for the trust account is appropriate and that the descriptor name clearly identifies that the trust account is for a property practitioner, as currently some of the name descriptors used by Estate Agents/Estate Agencies make it impossible for banks when undertaking a search of their computer database to determine that the account is in fact a trust account, or the purpose for what the account is to be used.

### **Recommendation**

We recommend that the process of registering a trust with the Board and the opening of the trust account be detailed in Regulations to this Bill. This includes the need for the Property Practitioners Board to approve the descriptor name that the property practitioner intends using prior to opening the trust account.



**Section 66 – Prohibition on conduct to influence the issue of certain certificates**

We submit that the list is incomplete as property owners are compelled by legislation to provide a certificate which confirms that gas and security electrical fencing is compliant.

***Recommendations***

We recommend that a clause (d) and (e) be added to this section of the Bill to include gas and security electrical fencing.

An additional clause which makes provision for new/additional certificate classes to be included within the Bill, without the need for amendments to the Bill if/when additional regulated certificate classes are introduced.

**Conclusion**

Whilst we are fully supportive of the strategic intent of this Bill, we suggest that the above changes be included to this version of the Bill.

Yours sincerely



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