

REPUBLIC OF SOUTH AFRICA

HIGHER EDUCATION AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
the Bill published in Government Gazette No. 39384 of 9 November 2015)
(The English text is the official text of the Bill)*

(MINISTER OF HIGHER EDUCATION AND TRAINING)

[B 36—2015]

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[] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

To amend the Higher Education Act, 1997, so as to provide for the insertion of new definitions; to provide for the determination of transformation goals and oversight mechanisms for the public higher education system; to provide for the development of articulation and recognition of prior learning frameworks; to provide for the conversion of public higher education institutions; to provide for the powers of the council of a public higher education institution to invest funds; to provide further for the issuing of Ministerial directives; to provide for indemnification of an independent assessor; to provide for the indemnification and termination of the term of office of an administrator; to provide for different categories of registration of private higher education institutions and the associated rights; to provide for the withdrawal and revocation of qualifications by public higher education institutions; and to provide for matters connected therewith.

Amendment of section 1 of Act 101 of 1997, as amended by section 1 of Act 44 of 1999, section 1 of Act 54 of 2000, section 1 of Act 63 of 2002, section 1 of Act 39 of 2008 and section 1 of Act 26 of 2010

“ ‘**auditor**’ means a person registered in terms of section 37 of the Auditing Professions Act, 2005 (Act No. 26 of 2005);”;

“‘**directive**’ means the written communication from the Minister to the council of a higher education institution or the council of a national institute for higher education, as applicable, contemplated in section 42.”;

“ ‘**Constitution**’ means the Constitution of the Republic of South Africa, 1996;

- ‘convert’** means the process of conversion as contemplated in section 20(1) in terms of which an identified higher education institution or subdivision, faculty, school, department, section or component of a public higher education institution or education institution becomes a juristic or new juristic person, as the case may be, on a date specified by the Minister in the notice contemplated in section 20(1);”;
- (e) by the substitution for the definition of “foreign juristic person” of the following definition:
- “**‘foreign juristic person’** means a person that—
- (a) has the legal authority to provide higher education in its country of origin;
- (b) is registered or established as a juristic person in terms of a law of a foreign country; and
- (c) is entitled to be registered as an external company in terms of section 23 of the Companies Act, 2008 (Act No. 71 of 2008);”;
- (f) by the deletion of the definition of “HEQF”;
- (g) by the insertion after the definition of “HEQF” of the following definition:
- “**‘HEQSF’** means the sub-framework for higher education as contemplated in section 7(d) of the National Qualifications Framework Act;”;
- (h) by the substitution for the definition of “higher education” of the following definition:
- “**‘higher education’** means all learning programmes which must be registered in accordance with the provisions of the National Qualifications Framework Act, 2008 (Act No. 67 of 2008), as a qualification or part-qualification on the HEQSF, regardless of whether such programmes are in fact registered or not on the sub-framework;”;
- (i) by the insertion after the definition of “higher education” of the following definition:
- “**‘higher education college’** means an institution providing higher education, but with a limited scope and range of operations, and which meets the criteria for recognition as a higher education college as prescribed by the Minister in accordance with sections 3(3)(a) and 20(5)(b), and established, deemed to be established, converted, or declared as a higher education college under this Act;”;
- (j) by the substitution for paragraph (a) of the definition of “higher education institution” of the following paragraph:
- “(a) converted, merged, established or deemed to be established as a public higher education institution under this Act;”;
- (k) by the insertion after the definition of “incorporation of a subdivision” of the following definition:
- “**‘independent assessor’** means the person appointed under section 44;”;
- (l) by the insertion after the definition of “Minister” of the following definition:
- “**‘national institute for higher education’** means any institute for higher education established as a national institute for higher education in terms of Chapter 6A;”;
- (m) by the insertion after the definition of “organ of the state” of the following definitions:
- “**‘PAJA’** means the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);
- ‘PFMA’** means the Public Finance Management Act, 1999 (Act No. 1 of 1999);”;
- (n) by the substitution for the definition of “public higher education institution” of the following definition:
- “**‘public higher education institution’** means any higher education institution that is established, deemed to be established, converted or declared as a public higher education institution under this Act;”;
- (o) by the insertion after the definition of “private higher education” of the following definition:
- “**‘provide higher education’** means the performing of any or all of the following functions—
- (a) registering of students for higher education;

- (b) taking responsibility for the provision and delivery of a higher education curriculum;
- (c) assessing a student's performance in a higher education programme; and
- (d) conferring a higher education qualification.”; 5
- (p) by the deletion of the definition of “to provide higher education”
- (q) by the insertion after the definition of “registrar” of the following definition:
 - “**‘relative’** in relation to any person, means—
 - (a) the spouse of that person;
 - (b) anybody related to that person or his or her spouse within the third degree of consanguinity or affinity; or
 - (c) any adoptive child within the first degree of consanguinity;”; 10
- (r) by the insertion after the definition of “senate” of the following definition:
 - “**‘spouse’** means a person's partner in a marriage—
 - (a) recognised as such in terms of the laws of the Republic or a foreign country; or
 - (b) concluded in terms of Islamic or other religious rites;”; 15
- (s) by the deletion of the definition of “technikon”;
- (t) by the substitution for the definition of “university” of the following definition: 20
 - “**‘university’** means [any university] an institution providing higher education and with a scope and range of operations including undergraduate and postgraduate higher education programmes, research and community engagement, which meets the criteria for recognition as a university prescribed by the Minister in accordance with sections 3(3)(a) and 20(5)(b) and established, deemed to be established, converted or declared as a university under this Act.”; 25
- (u) by the insertion after the definition of “university” of the following definition: 30
 - “**‘university college’** means an institution providing higher education, but with a limited scope and range of operations and which meets the criteria for recognition as a university college as prescribed by the Minister in accordance with sections 3(3)(a) and 20(5)(b) and established, deemed to be established, converted or declared as a university college under this Act.”. 35

Substitution of section 2 of Act 101 of 1997

2. The following section is hereby substituted for section 2 of the principal Act:

“Application and interpretation

2. This Act—

- (a) applies to higher education and related matters in the Republic; and
- (b) prevails, subject to section 34 of the National Qualifications Framework Act, over any provision of other legislation that regulates matters referred to in paragraph (a) and that is materially inconsistent with the objects, or a specific provision, of this Act.”. 40

Amendment of section 3 of Act 101 of 1997, as amended by section 2 of Act 54 of 2000

3. Section 3 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

- “(3) The Minister may, in terms of the policy contemplated in subsection (1) and in the interest of the higher education system as a whole[,]—
 - (a) determine the scope and range of operations of— 50
 - [(a)] (i) public higher education institutions;
 - [(b)] (ii) private higher education institutions; and
 - [(c)] (iii) individual public or private higher education institutions;
 - (b) determine transformation goals for the higher education system and institute appropriate oversight mechanisms; and 55

- (c) develop articulation and recognition of prior learning frameworks for the post school education and training system.”.

Amendment of section 7 of Act 101 of 1997, as amended by section 1 of Act 23 of 2001 and substituted by section 3 of Act 39 of 2008

4. Section 7 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The CHE is responsible for the implementation of the [HEQF] HEQSF.”.

Amendment of section 20 of Act 101 of 1997, as amended by section 4 of Act 23 of 2001 and section 3 of Act 63 of 2002

5. Section 20 of the principal Act is hereby amended— 10

- (a) by the substitution for subsection (1) of the following subsection:

“(1) The Minister may, after consulting the CHE, by notice in the *Gazette* and from money appropriated for this purpose by Parliament—

(a) establish a public university, public university college or a public higher education college [technikon or college]; or 15

(b) with the concurrence of the council of a public higher education institution, convert that institution, or a subdivision of that institution, into a public university or a public university college.”;

- (b) by the insertion after subsection (1) of the following subsection:

“(2) The Minister may, after consultation with the CHE and with the concurrence of the governance body of a private education institution, by notice in the *Gazette* and from money appropriated for this purpose by Parliament, declare an institution, or subdivision of an institution to be a public university, public university college or public higher education college.”; 20 25

- (c) by the substitution for subsection (4) of the following subsection:

“(4) Every public higher education institution established, merged, converted, deemed to have been established or declared as a public higher education institution under this Act, is a juristic person.”; and

- (d) by the insertion of the following subsections after subsection (5): 30

“(5A) Notwithstanding subsection (5), a higher education institution may invest its funds with a financial institution as defined in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), or in securities listed on an exchange as defined in section 1 of the Financial Markets Act, 2012 (Act No. 19 of 2012), or in such other prudent investments in financial investments and assets as the Commissioner for the South African Revenue Service may determine for public benefit organisations. 35

(5B) The Minister may, in the notice contemplated in subsection (1) and with the concurrence of the council of another public higher education institution, determine— 40

(a) certain functions which the newly established or converted public higher education institution must perform under the supervision of the other public higher education institution; and

(b) the terms, conditions and period applicable to such supervision.”. 45

Amendment of section 21 of Act 101 of 1997, as amended by section 5 of Act 23 of 2001 and section 4 of Act 63 of 2002

6. Section 21 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraphs (a) and (b) of the following paragraphs, respectively: 50

“(a) a university, [technikon] university college or higher education college; or

(b) an incorporated subdivision of a university, [technikon] university college or higher education college.”; and

- (b) by the substitution in subsection (2) for paragraphs (a), (b) and (c) of the following paragraphs, respectively:
- “(a) the date on which the education institution becomes a university, **[technikon]** university college or higher education college or a subdivision of a university, **[technikon]** university college or higher education college, as the case may be; 5
 - (b) the name of the university, **[technikon]** university college or higher education college; and
 - (c) the physical location and the official address of the university, **[technikon]** university college or higher education college.”. 10

Amendment of section 23 of Act 101 of 1997, as amended by section 5 of Act 23 of 2001 and section 6 of Act 63 of 2002

7. Section 23 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) Before making a decision under subsection (1), the Minister must— 15
- (a) give written notice to the councils of the public higher education institutions concerned of the intention to merge the institutions and the reasons for the intended merger; 15
 - (b) publish a notice giving the reasons for the intended merger in one or more newspapers circulating in the area in which the public higher education institutions concerned are situated; 20
 - (c) give the councils of the public higher education institutions concerned and any other interested persons an opportunity to make representations within at least 90 days of the date of the notice referred to in paragraph (b); and
 - (d) consider the representations contemplated in paragraph (c).” 25

Amendment of section 27 of Act 101 of 1997, as amended by section 8 of Act 23 of 2001, section 7 of Act 63 of 2002, section 1 of Act 21 of 2011 and sections 5A and 5B of Act 23 of 2012

8. Section 27 of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection: 30

“(2) Subject to the policy determined by the Minister, as contemplated in section 3, and with due observance of the relevant provisions of the Use of Official Languages Act, 2012 (Act No. 12 of 2012), the council, with the concurrence of the senate, must—

 - (a) determine the language policy of **[a]** the public higher education institution **[and must]** concerned; 35
 - (b) publish the policy; and
 - (c) make **[it]** the policy available on request.”.
- (b) by the substitution for subsection (3) of the following subsection: 40

“(3) The council, after consultation with the students’ representative council, must provide for and establish a suitable structure to advise on the policy for student support services within the public higher education institution;”;
- (c) by the substitution for subsection (5B) of the following subsection: 45

“(5B) Any person who has been a member of a council of a public higher education institution—

 - (a) under circumstances contemplated in sections **[49A(4)(a)]** 49B(1)(a) and 49E; and
 - (b) **[who is implicated]** against whom an independent assessor has made an adverse finding in the report **[of the independent assessor]** contemplated in section 47(1)(b), 50

[is] shall not be eligible for appointment, election, re-appointment or re-election as a member of a council of **[a]** any public higher education institution unless the Minister, having regard to such representations as the person may make, determines that the finding is not of such a nature as to disqualify the person from becoming or continuing to be a member of the council of a public higher education institution;”;

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- (d) by the substitution in subsection (7) for the words preceding paragraph (a) of the following words:
“A member of a council or a member of a committee of a council or a person with delegated functions in terms of section 68(2)—”;
- (e) by the substitution in subsection (7) for paragraphs (b) and (c) of the following paragraphs, respectively: 5
“(b) must participate in the deliberations of the council or the committee of the council, or exercise any delegated function in the best interests of the public higher education institution concerned;
(c) must before he or she assumes office, and annually for as long as he or she continues to hold such office, declare any business, commercial or financial activities undertaken for financial gain that may raise a conflict or a possible conflict of interest with the public higher education institution concerned;”;
- (f) by the substitution in subsection (7)(e) for subparagraphs (ii) and (iii) of the following subparagraphs, respectively: 15
“(ii) may not have a direct or indirect financial, personal, or other interest in any matter to be discussed at a meeting, or in regard to which he or she is to make a decision in terms of a delegated function, and which entails or may entail a conflict or possible conflict of interest with the public higher education institution concerned; 20
(iii) must, before the meeting of the council or the committee concerned and in writing, inform the chairperson of that meeting of [that] the existence of a conflict or possible conflict of interest.”;
- (g) by the substitution for subsection (7A) of the following subsection: 25
“(7A) Any person may, in writing, inform the chairperson of a meeting of the council or a committee of the council concerned, before [the] that meeting, of a conflict or possible conflict of interest of a member of the council or of a committee of the council with the public higher education institution concerned of which such person may be aware.” 30
- (h) by the substitution for subsection (7C) of the following subsection:
“(7C) [A] In the event that any member of a committee of the council or any employee, with delegated functions in terms of section 68(2), has a conflict or possible conflict of interest as contemplated in this section in respect of a matter to be considered, the committee or the employee concerned may not take part in any consideration or a decision on [a] the matter [considered by it if any member of the committee has a conflict of interest contemplated in this section] but must refer the matter for decision by council, having noted the member’s or the employee’s interest in the matter;” 35 40
- (i) by the substitution in subsection (7E) for paragraph (a) of the following paragraph:
“(a) having regard to the provisions of [sections 27(9) and (7A) to (7D)] subsections (7A) to (7D), (9) and section 34 and after consultation with the institutional forum, adopt a code of conduct to which all the members of the council, all the members of committees of the council and all other persons who exercise functions of the council in terms of delegated authority must subscribe in writing;”; and 45
- (j) by the substitution for subsection (9) of the following subsection: 50
“(9) If a council resigns as contemplated in subsection (8) a new council must be constituted in terms of the institutional statute of the public higher education institution concerned by the administrator appointed in accordance with section 49G within a period of six months following the administrator’s appointment.” 55

Amendment of section 31 of Act 101 of 1997, as amended by section 11 of Act 23 of 2001 and section 8 of Act 63 of 2002

9. Section 31 of the principal Act is hereby amended by the insertion after subsection (1) of the following subsection:

- “(1A) The council must—
(a) consider the advice given by the institutional forum; and

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(b) provide written reasons if the advice is not accepted.”.

Amendment of section 34 of Act 101 of 1997, as amended by section 2 of Act 21 of 2011

- 10.** Section 34 of the principal Act is hereby amended—
- (a) by the substitution for subsection (2) of the following subsection: 5
- “(2) Notwithstanding subsection (1) the principal, any vice-principal and the academic employees of the public higher education institution must be appointed by the council after consultation with the senate;”;
- (b) by the substitution in subsection (4) for paragraph (a) of the following paragraph: 10
- “(a) (i) before he or she assumes office;
(ii) annually, while holding office; and
(iii) whenever a new interest, not disclosed as contemplated in subparagraph (i) or (ii), arises,
declare any business, commercial or financial activities undertaken for financial or other gain that may raise a conflict or a possible conflict of interest with the public higher education institution concerned; and”; 15
- (c) by the substitution in subsection (5) for the words preceding paragraph (a) of the following words: 20
- “An employee may not conduct business directly or indirectly with the public higher education institution at which he or she is employed that entails or may entail a conflict of interest with the public higher education institution unless the council of such public higher education institution is of the opinion, and takes a decision, that—”; and 25
- (d) by the substitution for subsections (6) and (7) of the following subsections, respectively: 30
- “(6) An employee may not on behalf of [that] the public higher education institution concerned contract with himself or herself or his or her relative or any entity in which [he or she] the employee or any relative has a direct or indirect financial [or], personal, fiduciary or other interest. 30
- (7) Contracting referred to in subsection (6) relates to conduct that is aimed at receiving any direct or indirect financial, personal, fiduciary or other gain that does not form part of the employment relationship contemplated in subsection (1).”.

Repeal of sections 38A to 38O of Act 101 of 1997

- 11.** Sections 38A to 38O of the principal Act are hereby repealed.

Amendment of section 39 of Act 101 of 1997, as amended by section 4 of Act 55 of 1999

- 12.** Section 39 of the principal Act is hereby amended by the insertion after subsection (3) of the following subsections: 40
- “(3A) If the council of a public higher education institution fails to comply with any—
- (a) provision of this Act under which an allocation from money appropriated by Parliament is paid to the institution; or 45
- (b) condition subject to which any such allocation is paid to such institution, the Minister may in writing request such council to comply with the provision or condition within a specified period.
- (3B) If such council thereafter fails to comply with the provision or condition within the specified period as contemplated in subsection (3A), the Minister— 50
- (a) may withhold payment of any commensurate portion of any allocation appropriated by Parliament in respect of the public higher education institution concerned; and
- (b) must in writing inform the council concerned of his decision. 55

- (3C) Before acting under subsection (3B), the Minister must—
- (a) give notice in writing to the council of the public higher education institution concerned of the intention so to act;
 - (b) give such council a reasonable opportunity to make representations; and
 - (c) consider such representations.
- (3D) The Minister must table a report in Parliament, regarding any action taken under subsection (3B), as soon as reasonably practicable after such action.”

Amendment of section 41 of Act 101 of 1997, as amended by section 5 of Act 54 of 2000 and substituted by section 10 of Act 63 of 2002

13. Section 41 of the principal Act is hereby amended—
- (a) by the substitution for the heading of the following heading:
“Records to be kept, external audit and information to be furnished by council”;
 - (b) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
“(b) in respect of the public higher education institution concerned as a whole—
 - (i) ensure the implementation of an external audit in accordance with accepted audit principles and standards on an annual basis; and
 - (ii) keep complete accounting records of all assets, liabilities, income and expenses and any other financial transactions **[of the public higher education institution as a whole, of its substructures and of other bodies operating under its auspices];”;** and
 - (c) by the substitution for subsection (2) of the following subsection:
“(2) The council of a public higher education institution must[, in respect of the preceding year and] by a date and in the manner prescribed by the Minister, provide the Minister with such information, in such format, as the Minister [prescribes] may prescribe.”.

Insertion of heading in Act 101 of 1997

14. The following heading is inserted after section 41 of the principal Act:

“CHAPTER 6

MINISTERIAL INTERVENTIONS IN HIGHER EDUCATION INSTITUTIONS”.

Repeal of section 41A of Act 101 of 1997

15. Section 41A of the principal Act is hereby repealed.

Substitution of section 42 of Act 101 of 1997

16. The following section is hereby substituted for section 42 of the principal Act:

“Ministerial directive

- 42.** (1) The Minister may issue a directive to the council of a public higher education institution if the Minister, after having complied with the provisions of subsection (3), has reasonable grounds to believe that the Council or the management of that public higher education institution—
- (a) is involved in financial impropriety or the public higher education institution is being otherwise mismanaged;
 - (b) is unable to perform its functions effectively;
 - (c) has acted in an unfair, discriminatory or wrongful manner towards a person to whom it owes a duty under this Act or any other law;

- (d) has failed to comply with any law;
- (e) has failed to comply with any directive given by the Minister in terms of section 39; or
- (f) has obstructed the Minister or a person authorised by the Minister in performing a function in terms of this Act. 5
- (2) A directive contemplated in subsection (1) must state—
- (a) the nature and extent of the deficiency;
- (b) the negative impact of the deficiency on the institution and or higher education in an open and democratic society;
- (c) the steps which should be taken to remedy the situation; 10
- (d) a reasonable period within which the steps contemplated in subparagraph (c) or any other steps contemplated by the higher education institution and approved by the Minister, must be taken; and
- (e) the manner in which the council of the public higher education institution concerned must provide written information to the Minister in respect of compliance with the directive. 15
- (3) Before making a decision under subsection (1), the Minister must—
- (a) give notice to the council of the intention to issue a directive;
- (b) provide the council with the reasons for the intended directive;
- (c) give the council a reasonable opportunity to make representations; and 20
- (d) consider the representations contemplated in paragraph (c).
- (4) In the event that the Minister has reasonable grounds to believe that the council of the public higher education institution concerned has failed to comply with the directive contemplated in this section within the stated period, or the steps taken, fail to remedy the deficiency within a reasonable period of time, the Minister may, depending on the circumstances— 25
- (a) appoint an independent assessor in accordance with section 44; or
- (b) appoint an administrator in accordance with section 49B; or
- (c) take any other appropriate action allowed by this Act or any other law.”. 30

Deletion of the heading of Act 101 of 1997

17. The heading “**CHAPTER 6 INDEPENDENT ASSESSOR**” after section 42 of the principal Act is hereby deleted.

Amendment of section 44 of Act 101 of 1997

18. Section 44 of the principal Act is hereby amended— 35
- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 40

“**[The]** Notwithstanding any other provision of this Act, the Minister may, from the independent assessment panel contemplated in section 43, appoint an assessor who is independent in relation to the public higher education institution concerned, to conduct an investigation at the public higher education institution—”;
 - (b) by the insertion after subsection (1) of the following subsection: 45

“(1A) The Minister must publish a notice on the appointment of the independent assessor contemplated in subsection (1) in the *Gazette* as soon as possible;”;
 - (c) by the substitution for subsection (2) of the following subsection: 50

“(2) The council of the public higher education institution, employees and students of the public higher education institution concerned and any person affected by the investigation must, subject to relevant legal provisions and practice, assist and co-operate with the independent assessor in the performance of his or her functions in **[terms of]** accordance with section 47.”.

Substitution of section 45 of Act 101 of 1997

19. The following section is hereby substituted for section 45 of the principal Act:

“Cases where independent assessor may be appointed

45. [An] The Minister may appoint an independent assessor [may be appointed] under section 44 if— 5
- (a) the council of a public higher education institution requests [the] such appointment in writing; [or]
 - (b) (i) circumstances arise at a public higher education institution that—
 - [(i)](aa) involve financial or other maladministration of a serious nature; or 10
 - [(ii)](bb) seriously undermine the effective functioning of the public higher education institution; [or]; and
 - [(c)](ii) the council of the public higher education institution has failed to resolve such circumstances; [and] 15
 - (c) the circumstances contemplated in section 42(4) arise; and
 - (d) the appointment is in the best interest of the public higher education institution concerned and in the interests of higher education in an open and democratic society.”.

Amendment of section 45A of Act 101 of 1997, as inserted by section 9 of Act 23 of 2012 20

20. Section 45A of the principal Act is hereby amended—

- (a) by the substitution for subsections (1) and (2) of the following subsections, respectively:
 - “(1) (a) The independent assessor has the power on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which [points] amounts to conduct such as referred to in section 45, to conduct an investigation for the purpose of determining— 25
 - (i) the merits of the complaint, allegation or information; and 30
 - (ii) the manner in which the matter concerned should be dealt with.
 - (b) The format and the procedure to be followed in conducting any investigation [shall] must be determined by the independent assessor with due regard to the PAJA, substantive fairness and the circumstances of the case. 35
 - (c) The independent assessor may direct that any category of persons or all persons whose presence is not desirable [shall] may not be present at any proceedings pertaining to any investigation or part thereof: Provided that in the event that the rights, interests or potential interests of a person so excluded may be affected by such proceedings, all information related to such excluded person obtained during the proceedings concerned must be made available in writing to him or her within a period not exceeding 14 calendar days after such proceedings in order to enable him or her to make written representations to the assessor if he or she so wishes. 40 45
 - (2) Notwithstanding anything to the contrary contained in any law, no person may disclose to any other person the contents of any document in the possession of the independent assessor or the record of any evidence given to the independent assessor during an investigation, unless the independent assessor determines otherwise: Provided that such document or evidence must be made available— 50
 - (a) for purposes of, or during, proceedings before a court, tribunal or forum; and
 - (b) to a person, or his or her union representative or legal representative, in the event that the rights, interests or potential interests of that person may be affected by such document or evidence.”; 55

- (b) by the substitution for subsections (4) and (5) of the following subsections, respectively:

“(4) (a) For the purposes of conducting an investigation the independent assessor may in writing direct any member of the council, employee, student or service provider of the higher education institution or any other person or representative of an entity with a business or other relationship with the institution to submit an affidavit or affirmed declaration or to appear before him or her to—

- (i) give evidence; or **[to]**
- (ii) produce any document—
 - (aa) in his or her possession; or
 - (bb) under his or her control,

which has a bearing on the matter being investigated, and may **[examine]** interview such person.

(b) The independent assessor or any person contemplated in section 48 and duly authorised thereto by the independent assessor may request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being, or to be, investigated.

(5) A **[direction]** directive referred to in subsection (4) must contain particulars of the matter in connection with which the person concerned is required to appear before the independent assessor and **[shall]** must be signed by the independent assessor and served on the person either by **[a]**—

- (a) registered **[letter sent through the post]** mail; or
- (b) [delivered] delivery executed by a person contemplated in section 48,

to the concerned person’s last known address as registered with the public higher education institution.”; and

- (c) by the substitution for subsections (7) to (9) of the following subsections, respectively:

“(7) The independent assessor or any person contemplated in section 48—

- (a) must be appointed as a commissioner of oaths in accordance with the relevant Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963), prior to administering an oath to, or accepting an affirmation from; and
- (b) may administer an oath to, or accept an affirmation from, any [such] person contemplated in subsection (6).

(8) (a) If it appears to the independent assessor during the course of an investigation that any person is **[being]** implicated in the matter being investigated and that—

- (i) such implication may be to the detriment of that person; or
- (ii) **[that]** an adverse finding pertaining to that person may result, the independent assessor must give such a person notice of the detrimental implication or possible adverse finding, as the case may be, and provide such person with all the relevant documentation and evidence affecting the rights, interests or potential interests of such person obtained during the investigations conducted by the independent assessor and afford such person **[or the council an]** the opportunity to respond in connection therewith, in [any] a manner that [may be] is expedient under the circumstances.

(b) If such implication forms part of the evidence submitted to the independent assessor during the proceedings contemplated in section 45A(1)(c) or during an appearance in terms of the provisions of subsection (4), such person must be afforded [an] the opportunity to be heard in connection therewith by way of giving evidence.

(9) The independent assessor **[may]** must allow a legal representative or a representative from a trade union of which a person is a member to assist the person contemplated in subsection (1)(c), (2), (4) or (8) **[, in accordance with section 3 (5) of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000)].”.**

Substitution of section 45B of Act 101 of 1997

21. The following section is hereby substituted for section 45B of the principal Act:

“Entering upon premises by independent assessor

45B. The independent assessor [shall be] is competent to enter, or to authorise another person contemplated in section 48 to enter, any building or premises of the public higher education institution under investigation in terms of section 45 and to make such investigation or assessment as he or she may deem necessary, and to copy any documents on those premises which in his or her opinion have a bearing on the investigation and to hand a signed inventory of such copied documents to the person or persons to whom the custody of the documents is entrusted.”.

Amendment of section 47 of Act 101 of 1997, as amended by section 3 of Act 21 of 2011 and substituted by section 10 of Act 23 of 2012

22. Section 47 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(c) suggest in the report appropriate measures and provide the reasons why the measures are needed.”; and

(b) by the insertion of the following subsection after subsection (1):

“(1A) The Minister may, on good cause shown, at the request of the independent assessor extend the period in subsection (1).”.

Substitution of section 49 of Act 101 of 1997

23. The following section is hereby substituted for section 49 of the principal Act:

“Remuneration and allowances of independent assessor

49. The Minister, with the [concurrency] written approval of the Minister of Finance, may determine the remuneration and allowances to be paid to an independent assessor and any other person appointed under section 48.”.

Substitution of section 49A of Act 101 of 1997

24. The following section is hereby substituted for section 49A of the principal Act:

“Indemnification of independent assessor

49A. The Minister shall be liable for any loss or damage suffered by another person, which arose from an act or omission of an independent assessor as a claim against the State and may not recover such loss from the independent assessor, provided that the independent assessor shall forfeit this cover if he or she, with regard to the act or omission, is liable in law and guilty of the following acts:

- (a) Intentionally exceeded his or her powers;
- (b) made use of alcohol or drugs;
- (c) did not act in the course and scope of his or her terms of reference;
- (d) acted recklessly or intentionally;
- (e) without prior consultation with the State Attorney, made an admission that was detrimental to the best interest of higher education; or
- (f) failed to comply with or ignored standing instructions, of which he or she was aware of or could reasonably have been aware of, which led to the loss, damage or reason for the claim, excluding damage arising from the use of a vehicle for official purposes; and
- (g) in the case of a loss, damage or claim arising from the use of a vehicle for official purposes, the independent assessor—
 - (i) used the vehicle without authorisation;

- (ii) did not possess a valid driver's licence or other appropriate licence;
- (iii) did not use the vehicle in the interest of higher education;
- (iv) allowed unauthorised persons to handle the vehicle; or
- (v) deviated materially from the official journey or route without prior authorisation." 5

Amendment of section 49B of Act 101 of 1997, as inserted by section 11 of Act 23 of 2012

25. Section 49B of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection: 10

“(1) Notwithstanding any other provision of this Act, the Minister may **[after consultation with the council of a public higher education institution, if practicable,]** appoint a person as administrator **[to take over the management, governance and administration of the public higher education institution and to perform the functions of the public higher education institution]**, if any of the following circumstances occur: 15

 - (a) An audit of the financial records of a public higher education institution or the report by an independent assessor or any other report or information reveals financial or other maladministration of a serious nature or serious undermining of the effective functioning of the public higher education institution; 20
 - (b) **[any other circumstances arising that reveal financial or other maladministration of a serious nature or the serious undermining of the effective functioning of the public higher education institution; or]** the circumstances contemplated in section 42(4) arise; 25
 - (c) the council of the public higher education institution requests such appointment; or
 - (d) if the council of the public higher education institution is deemed to have resigned as contemplated in section 27(8).”; 30
- (b) by the insertion after subsection (1) of the following subsection:

“(1A) The Minister must, before making an appointment under subsection (1) on the grounds listed in section (1)(a) or (b)— 35

 - (a) give written notice that complies with section 42(3) to the council of the higher education institution concerned of his or her intention to make such an appointment; 35
 - (b) provide the council of the higher education institution concerned with the reasons for the appointment;
 - (c) give the council of the higher education institution a reasonable opportunity to make written representations; and 40
 - (d) consider the representations contemplated in paragraph (c);”; and
- (c) by the substitution for subsection (2) of the following subsection:

“(2) The Minister may only act in terms of subsection (1)(a) or (b) if he or she has reason to believe that the appointment of an administrator is in the best interest of the public higher education institution concerned and of higher education in an open and democratic society.”. 45

Insertion of section 49BA in Act 101 of 1997

26. The following section is hereby inserted in the principal Act after section 49B:

“Publication of appointment of administrator 50

49BA. The Minister must, when appointing an administrator as contemplated in section 49B or 49G, by notice in the *Gazette* publish—

- (a) the name of the public higher education institution concerned;
- (b) the name, address and other contact details of the administrator so appointed; 55
- (c) the period of appointment as contemplated in section 49B(3)(a) or 49G;

- (d) the period of extension as contemplated in section 49B(3)(b) or 49G, as the case may be and if applicable; and
- (e) any other information that the Minister may deem necessary.”.

Substitution of section 49D of Act 101 of 1997

27. The following section is hereby substituted for section 49D of the principal Act: 5

“Remuneration and allowances of administrator

49D. (1) The Minister, in consultation with the Minister of Finance, must determine the remuneration and allowances to be paid to—

- (a) the administrator appointed in accordance with section 49B or 49G; and
- (b) any other person appointed in accordance with section 49C.

(2) All costs associated with the appointment of—

- (a) an administrator appointed in accordance with section 49B or 49G; and
 - (b) any other person contemplated in subsection (1)(b),
- are for the account of the public higher education institution concerned.”.

Insertion of sections 49F to 49J in Act 101 of 1997

28. The following sections are hereby inserted in the principal Act after section 49E:

“Role, powers, functions and duties of administrator

49F. (1) The administrator appointed in accordance with section 49B must, subject to the provisions of section 49G—

- (a) take over the role, powers, functions and duties of the council concerned;
- (b) carry out the role, exercise the powers, perform the functions and execute the duties of the council concerned to the extent that such role, powers, functions and duties relate to governance;
- (c) take over and execute the management of the public higher education institution concerned;
- (d) identify and initiate processes and initiatives that restore proper governance and management; and
- (e) ensure that a new council for the higher education institution concerned is appointed and constituted in accordance with the institutional statute as soon as is practicable.

(2) The Minister may, depending on the circumstances—

- (a) confine the mandate of the administrator to the role, powers, functions and duties related to the governance of the higher education institution concerned only; and
- (b) determine the mandate of the administrator to include specific tasks related to the circumstances justifying the appointment.

(3) Subject to this Act, the institutional statute and the rules of the higher education institution concerned, employees and students of the higher education institution concerned must comply with instructions given by the administrator.

Appointment of administrator on resignation of council

49G. (1) In the event that a council is deemed to have resigned as contemplated in section 27(8), the Minister must appoint a person for a period not exceeding six months as an administrator on behalf of the public higher education institution concerned to—

- (a) take over the role, powers, functions and duties of the council;
- (b) carry out the role, exercise the powers, perform the functions and execute the duties of the council to the extent that such role, powers, functions and duties relate to governance; and

(c) ensure that a new council is constituted in accordance with the institutional statutes of the institution concerned within a period not exceeding six months subsequent to his or her appointment.

(2) For the purposes of subsection (1), section 49C applies with the changes required by the context.

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Termination of term of office of administrator

49H. (1) The term of office of an administrator is terminated in the event of—

(a) the constitution of the council of the higher education institution in accordance with the institutional statute of the higher education institution concerned;

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(b) the expiry of term of appointment;

(c) death or incapacity;

(d) resignation; or

(e) removal from office by the Minister.

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(2) The decision contemplated in subsection (1)(e) must be taken with due observance of the provisions of PAJA.

(3) The Minister may in instances where the term of office of an administrator is terminated in accordance with subsection (1)(b) to (e) appoint a new administrator after consultation with the principal of the higher education institution concerned for the remainder of the term of office of the previous incumbent.

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(4) Sections 49BA, 49D, 49F and 49G apply with the changes required by the context to an appointment made as contemplated in subsection (3).

Directive to council appointed by administrator

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49I. (1) The Minister may—

(a) after the term of office of an administrator is terminated as contemplated in section 49H(1)(a);

(b) within the term of office of the first council of the higher education institution concerned appointed by the administrator; and

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(c) after consultation with that council, issue a directive to the council to take such action as specified by the Minister in the event that the Minister has reasonable grounds to believe that certain matters related to the effective and efficient functioning of the institution and the execution of its mandate require specific or continued attention of the council and the management.

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(2) The provisions of section 42(4) apply with the changes required by the context in instances of non-compliance by the council with the directive contemplated in subsection (1).

Indemnification of administrator

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49J. Section 49A, with the changes required by the context, applies to an Administrator appointed in terms of section 49B or 49G.”.

Insertion of Chapter 6A in Act 101 of 1997

29. The following heading and sections are hereby inserted in the principal Act.

“CHAPTER 6A

45

NATIONAL INSTITUTES FOR HIGHER EDUCATION

Establishment of national institute for higher education

49K. (1) The Minister may, after consultation with the CHE and the public higher education institutions affected by the establishment, establish a national institute for higher education as a juristic person with a specific scope of application.

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(2) The Minister must prescribe particulars of the establishment of the national institute for higher education, its board and its specific scope of application by notice in the *Gazette*.

Functions of national institute for higher education

49L. (1) The functions of a national institute for higher education relate to its specific scope of application and may include one or more of the following—

- (a) to provide services to higher education within its specific scope of application;
- (b) to advance learning within its specific scope or application by ensuring collaboration and co-ordination of the work of higher education institutions and other national institutes for higher education; and
- (c) to advise the Minister on matters relating to its specific scope of application, or to higher education generally.

(2) Subject to subsection (1) and the provisions of section 49K, the Minister must prescribe the functions of each national institute for higher education by notice in the *Gazette*.

Governance, composition of board and committees

49M. (1) A national institute of higher education is governed by a board.

(2) The board of a national institute for higher education consists of—

- (a) a chairperson; and
- (b) not more than 10 ordinary members.

(3) The majority of members contemplated in subsection (1) must have specific knowledge and experience in—

- (a) higher education generally; and
- (b) the scope of application of the specific institute established in terms of section 49K(1), specifically.

(4) The board may co-opt persons to the board, for a period not exceeding the term of office of the board and these co-opted persons have no voting rights.

(5) The chairperson and members contemplated in subsection (2) are appointed by the Minister from nominations received in the manner prescribed for that national institute for higher education and must, as far as is practically possible, be representative of the higher education institutions affected by the establishment of the specific national institute.

(6) The board—

- (a) must establish—
 - (i) an executive committee;
 - (ii) an audit and risk committee;
 - (iii) a human resources and remuneration committee; and
 - (iv) any other committee prescribed by the Minister; and
- (b) may establish any other committee.

(7) The composition, manner of election, functions, procedure at meetings and the dissolution of committees of the board are determined by the institutional rules and policies of the board and the principles of good governance.

Term of office of chairperson and members

49N. The chairperson and a member of the board hold office for a period of four years and may only serve a maximum of two consecutive terms.

Vacation of office

49O. (1) A person ceases to be a member of the board if he or she—

- (a) resigns by giving written notice to the chairperson or, in the case of the chairperson, to the Minister;
- (b) is absent from three consecutive meetings of the board without the leave of the chairperson;

- (c) is declared insolvent;
 - (d) is removed from an office of trust by a court of law;
 - (e) is convicted of an offence involving dishonesty or an offence for which the sentence is imprisonment without the option of a fine;
 - (f) is declared unfit to attend to his or her personal affairs by a court of law; or
 - (g) is removed from office by means of a resolution passed by at least two-thirds of the total number of serving members of the board present at the meeting on account of misconduct, incapacity to carry out his or her official functions, or on account of any other reason recognised by law.
- (2) Removal of a member of the board from office is subject to the processes and procedures prescribed by notice in the *Gazette*, the institutional rules and or legal prescripts in general.
- (3) Without limiting the generality of subsection (2), the resolution of the board contemplated in subsection (1)(g) may not be passed without prior notice to the member of the board concerned of the pending motion for his or her removal and the reasons therefore, and providing him or her with a reasonable opportunity to obtain assistance, to appear in person, and to present his or her case.

Filling of vacancies

49P. (1) In the event of a vacancy occurring in the board, such vacancy is filled by the Minister in terms of section 49M(5).

(2) Any person appointed to fill a vacancy holds office for the unexpired portion of the vacating member's term.

Delegations

49Q. (1) The board may delegate any of its functions under this Act to any committee of the board or person employed by the board and may at any time revoke such delegation.

(2) A delegation by the board must be in writing and is subject to such conditions as the board may impose.

(3) The board is not divested of responsibility for the performance of any function delegated or assigned to a committee or an employee under subsection (1) and is, despite any delegation, not prevented from performing the function itself.

Staff and conditions of service

49R. (1) The board may appoint a chief executive officer and other staff required to manage and administer the national institute for higher education in accordance with the institutional rules and procedures developed and approved by the board of the national institute on such conditions as it may determine.

(2) The national institute for higher education must out of its own funds pay to its employees such remuneration, allowances and other benefits as the board may determine.

Funds of national institute for higher education

49S. (1) The Minister must, after consultation with the CHE and with the approval of the Minister of Finance, determine the policy on the funding of national institutes for higher education and publish such policy by notice in the *Gazette*.

(2) The Minister must, subject to the policy determined in terms of subsection (1), allocate public funds to national institutes of higher education on a fair and transparent basis.

(3) The Minister may, subject to the policy determined in terms of subsection (1), impose—

- (a) any reasonable condition in respect of an allocation contemplated in subsection (2); and
- (b) different conditions in respect of different national institutes of higher education, if there is a reasonable basis for such differentiation.
- (4) The funds of a national institute for higher education consist of— 5
 - (a) money appropriated by Parliament;
 - (b) donations or contributions;
 - (c) money raised by the institute; and
 - (d) any other income.
- (5) The board— 10
 - (a) must keep a record of all—
 - (i) funds received and spent;
 - (ii) assets and liabilities; and
 - (iii) financial transactions;
 - (b) must, once in each financial year, submit to the Minister, at the time 15
 and in the manner which the Minister may determine, a statement of estimated income and expenditure for the ensuing financial year for approval by the Minister and the Minister of Finance;
 - (c) may in any financial year submit an adjusted statement of its estimated 20
 income and expenditure to the Minister for approval by the Minister and the Minister of Finance; and
 - (d) may not incur any expenses which exceed the total amount approved in terms of paragraph (b) or (c), as the case may be.
- (6) If the Minister does not approve of the board's statement of estimated 25
 income and expenditure or adjusted statement of estimated income and expenditure contemplated in subsection (5)(b) or (c), as the case may be—
 - (a) the Minister must—
 - (i) inform the board in writing of the fact that the statement 30
 concerned was not approved; and
 - (ii) indicate in writing a time period in which the board must submit a revised statement of estimated income and expenditure, which period may not be less than 30 calendar days;
 - (b) the board must submit a revised statement of estimated income and expenditure to the Minister within the specified period; and
 - (c) the Minister must consider the revised statement of estimated income 35
 and expenditure for approval as contemplated in subsection (5)(c).
- (7) (a) The funds contemplated in subsection (4) must be used in accordance with the approved statement referred to in subsection (5) or (6), as the case may be.
- (b) Any funds not utilised within a specific financial year must be carried 40
 over as a credit to the following financial year.
- (8) Subject to subsection (7), the board may invest any portion of its funds in such manner as the Minister and the Minister of Finance may approve.

Annual audit

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49T. The Auditor-General must—

- (a) audit the books of account and financial statements of every national institute for higher education; and
- (b) submit a separate audit report to the Minister for each national institute 50
 for higher education within three months of receipt of the financial statements from the national institute for higher education concerned.

Annual report

- 49U.** (1) The board must, within three months after the end of each financial year, submit a report to the Minister which includes a financial statement on the performance of its functions during the preceding financial year. 55
- (2) The annual report contemplated in subsection (1) must—
 - (a) fairly present the financial state of affairs of the national institute for higher education;

- (b) fairly present its activities and other business;
- (c) fairly present its financial results and financial position at year end;
- (d) fairly present its performance against predetermined objectives;
- (e) contain the report drafted by the audit committee contemplated in section 49L(6)(a)(ii) and approved by the board; and
- (f) contain any other information that may be prescribed by the Minister from time to time.

Ministerial interventions

49V. The provisions of sections 42 to 49J apply to national institutes of higher education with the changes required by the context.

Disestablishment of national institute for higher education

49W. (1) In the event that the functions of a national institute for higher education, as contemplated in section 49L, have become obsolete or, in the view of the Minister, could be performed effectively and efficiently otherwise, the Minister may, after consultation with the CHE and by notice in the *Gazette*, disestablish any national institute for higher education.

(2) Before making a decision under subsection (1), the Minister must—

- (a) give notice to the board of the national institute for higher education concerned of the intention to disestablish such national institute for higher education;
- (b) provide the board with the reasons for the disestablishment;
- (c) give the board a reasonable opportunity to make representations; and
- (d) consider the representations contemplated in paragraph (c).

(3) In the event that a national institute for higher education is disestablished in accordance with subsection (1), all assets and liabilities of such national institute for higher education must be dealt with by the Minister according to law and any assets remaining after payment of all liabilities vest in the Minister.

(4) The Minister may appoint a person on the terms of reference specified by the Minister to administer the closure of the national institute concerned.”.

Amendment of section 50 of Act 101 of 1997, as amended by section 7 of Act 55 of 1999

30. Section 50 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The Director-General is—

- (a) the registrar for; and
- (b) responsible for registering,
private higher education institutions in terms of section 53 as contemplated in section 29 of the Constitution.”.

Amendment of section 51 of Act 101 of 1997, as amended by section 6 of Act 54 of 2000 and section 2 of Act 26 of 2010

31. Section 51 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:

“**Authority to provide private higher education**”;

- (b) by the substitution for subsection (1) of the following subsection:

“(1) No person [other than a public higher education institution or an organ of state] may perform one or more of the functions to provide higher education unless that person is—

- (a) [in the prescribed manner, registered or conditionally registered as a private higher education institution in terms of this Act; and] an organ of state with the statutory responsibility to provide higher education;
- (b) [registered or recognised as a juristic person in terms of the Companies Act, 1973 (Act 61 of 1973), before such person is

registered or conditionally registered in accordance with paragraph (a)] a public higher education institution merged, established or deemed to be established as a higher education institution under this Act;

- (c) declared as a public higher education institution under this Act; or
- (d) registered or provisionally registered as a private higher education institution under this Act.”; and

(c) by the deletion of subsection (2).

Amendment of section 53 of Act 101 of 1997, as amended by section 7 of Act 54 of 2000, substituted by section 16 of Act 23 of 2001 and section 5 of Act 39 of 2008

32. Section 53 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:

“Requirements for registration of private higher education institutions”; and

- (b) by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) is able to provide higher education that will—

- (i) maintain acceptable standards that are not inferior to standards at a comparable public higher education institution; and
- (ii) comply with the requirements of the CHE.”.

Amendment of section 54 of Act 101 of 1997, as substituted by section 8 of Act 54 of 2000

33. Section 54 of the principal Act is hereby amended—

- (a) by the substitution for subsection (7) of the following subsection:

“(7) No independent school as defined in the South African Schools Act, 1996 (Act No. 84 of 1996), and no other private education institution may call itself a university, university college or higher education college, or use such wording in its name, unless it is registered—

- (a) in terms of Chapter 7; and
- (b) in the particular category of institutions which, in accordance with the Regulations, may call themselves universities, university colleges or higher education institutions, as the case may be.”; and

- (b) by the addition of the following subsection:

“(8) Only a private higher education institution registered as a university or university college in accordance with subsection (7)(b) may confer a professorship or an honorary degree, or use the title of chancellor and vice-chancellor for its titular head and its principal, respectively.”.

Amendment of section 57 of Act 101 of 1997

34. Section 57 of the principal Act is hereby amended by the substitution in paragraph (b) of subsection (1) for the words preceding subparagraph (i) of the following words:

“(b) prepare financial statements within [three] six months of the end of the financial year, including at least—”.

Insertion of section 65AB in Act 101 of 1997

35. The following section is hereby inserted in the principal Act after section 65A:

“Change of type and scope of higher education institution

65AB. (1) The Minister may after consultation with the CHE and at the request of the council of the institution concerned, by notice in the *Gazette*, change the type of a higher education institution concerned or amend or remove any restrictions on the scope and operations of a public higher education institution contemplated in sections 3(3) and 20(5)(b).

(2) The Minister must, before acting under subsection (1), comply with the provisions of section 23(2), with the changes required by the context.”.

Insertion of section 65BA in Act 101 of 1997

36. The following section is hereby inserted in the principal Act after section 65B:

“Withdrawal and revocation of degree, diploma, certificate or other qualification 5

65BA. (1) Subject to the provisions of subsection (2), the council of a public higher education institution may, in consultation with the senate, withdraw and revoke any degree, diploma, certificate or other qualification that was awarded— 10

(a) on the basis of a material error on the part of the public higher education institution concerned: Provided that such withdrawal and revocation may only take place within a period not exceeding two years after the conferment concerned; or

(b) as a result of a fraudulent or dishonest act in connection with the obtaining of such degree, diploma, certificate or other qualification. 15

(2) (a) Prior to the council of a public higher education institution withdrawing and revoking the conferment of a degree, diploma, certificate or other qualification, the council must—

(i) notify the recipient of the qualification concerned that a revocation and withdrawal is being considered; 20

(ii) provide the recipient with relevant information justifying the intended action;

(iii) provide the recipient with an opportunity to obtain assistance and to present his or her case; and 25

(iv) consider the submissions and representations of the recipient.

(b) In the event that the withdrawal and revocation relates to circumstances contemplated in subsection (1)(b), the higher education institution must report the matter for criminal investigation as contemplated in section 66(2).”.

Amendment of section 65D of Act 101 of 1997, as inserted by section 24 of Act 23 of 2001

37. Section 65D of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) Any public higher education institution identified by the Minister in accordance with policy determined under section 3, must offer an education programme or trade and occupational learning programme that leads to a qualification or part-qualification on the sub-framework for trades and occupations contemplated in section 7(c) of the National Qualifications Framework Act and in compliance with any condition set by the Minister.”. 35 40

Amendment of section 66 of Act 101 of 1997, as substituted by section 10 of Act 54 of 2000

38. Section 66 of the principal Act is hereby amended by the insertion after subsection (1) of the following subsection—

“(1A) Any person contravening the provisions of section 51 or 65D is guilty of an offence and is liable on conviction to a sentence which may be imposed for fraud.”. 45

Amendment of section 68 of Act 101 of 1997, as amended by section 9 of Act 55 of 1999 and substituted by section 11 of Act 54 of 2000

39. Section 68 of the principal Act is hereby amended— 50

(a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(c) the board of a national institute for higher education;”; and

(b) by the addition of the following subsection:

“(5) The provisions of subsections (2) and (3) apply to national institutes for higher education with the changes required by the context.”.

Amendment of section 69 of Act 101 of 1997, as substituted by section 13 of Act 63 of 2002 and amended by section 6 of Act 39 of 2008 5

40. Section 69 of the principal Act is hereby amended by the substitution for paragraph (c) of the following paragraph:

“(c) the planning and reporting framework for public higher education institutions.”.

Repeal of section 70 of Act 101 of 1997

41. Section 70 of the principal Act is hereby repealed.

Substitution of Long Title of Act 101 of 1997

42. The following Long Title is hereby substituted for the Long Title of the principal Act:

“To regulate higher education; to provide for the establishment, composition and functions of a Council on Higher Education; to provide for the determination of transformation goals and oversight mechanisms for the public higher education system; to provide for the development of articulation and recognition of prior learning frameworks; to provide for the establishment, disestablishment, conversion, merging, incorporation, governance and funding of public higher education institutions; to provide for the powers of the council of a public higher education institution to invest funds; to provide for the conflict of interest and code of conduct of members of the council, committees of the council, and employees, of a public higher education institution; to provide for the issuing of Ministerial directives; to provide for the appointment [and], functions and indemnification of an independent assessor; to provide for the appointment, functions, indemnification and termination of the term of office of an administrator; to provide for the issuing of post-administration directives by the Minister; to provide for the establishment, disestablishment, governance and funding of national institutes for higher education; to provide for the registration of private higher education institutions, the different categories of registration and the associated rights; to provide for quality assurance and quality promotion in higher education; to provide for the withdrawal and revocation of qualifications by public higher education institutions; to provide for transitional arrangements and the repeal of certain laws; and to provide for matters connected therewith.”.

Amendment of the Arrangement of Sections of Act 101 of 1997

43. The Arrangement of Sections of the principal Act is hereby amended—

(a) by the substitution for item 2 of the following item: 40

“2. Application and interpretation”;

(b) by the deletion of items 38A to 38O;

(c) by the substitution for item 41 of the following item:

“41. Records to be kept, external audit and information to be furnished by council”; 45

(d) by the insertion after item 41 of the following heading:

“CHAPTER 6
MINISTERIAL INTERVENTIONS IN HIGHER EDUCATION
INSTITUTIONS”

(e) by the deletion of item 41A; 50

(f) by the substitution for item 42 of the following item:

“42. Ministerial directive”;

- (g) by the deletion after item 42 of the following heading:

“CHAPTER 6

INDEPENDENT ASSESSOR”

- (h) by the substitution for item 49 of the following item: 5
“49. Remuneration and allowances of independent assessor”;
- (i) by the substitution for item 49A of the following item:
“49A. Indemnification of independent assessor”;
- (j) by the insertion after item 49B of the following item:
“49BA. Publication of appointment of administrator”;
- (k) by the substitution for item 49D of the following item: 10
“49D. Remuneration and allowances of administrator”;
- (l) by the insertion after item 49E of the following items:
“49F. Role, powers, functions and duties of administrator
49G. Appointment of administrator on resignation of council
49H. Termination of term of office of administrator
49I. Directive to council appointed by administrator
49J. Indemnification of administrator”; 15
- (m) by the insertion after item 49J of the following heading and items:
“CHAPTER 6A
NATIONAL INSTITUTES FOR HIGHER EDUCATION 20
49K. Establishment of national institute for higher education
49L. Functions of national institute for higher education
49M. Governance, composition of board and committees
49N. Term of office of chairperson and members
49O. Vacation of Office
49P. Filling of vacancies
49Q. Delegations
49R. Staff and conditions of service
49S. Funds of national institute for higher education
49T. Annual audit
49U. Annual report
49V. Ministerial interventions
49W. Disestablishment of national institute for higher education”; 25
 (n) by the substitution for item 51 of the following item:
“51. Authority to provide private higher education”; 30
 (o) by the substitution for item 53 of the following item:
**“53. Requirements for registration of private higher education institu-
 tions”;** 35
 (p) by the insertion after item 65A of the following item:
“65AB. Change of type and scope of higher education institution”; 40
 (q) by the insertion after item 65B of the following item:
**“65BA. Withdrawal and revocation of degree, diploma, certificate or
 other qualification”;** and
 (r) by the deletion of item 70.

Transitional arrangements 45

44. Any action taken under the repealed sections 38A to 38O of the principal Act, immediately prior to the commencement date of section 11 of the Higher Education Amendment Act, 2015, is deemed to have been taken under the authority of the corresponding provision of Chapter 6 of the principal Act.

Short title and commencement 50

45. This Act is called the Higher Education Amendment Act, 2015, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE HIGHER EDUCATION AMENDMENT BILL, 2015

1. MAIN OBJECT OF BILL

- 1.1 The main object of the Higher Education Amendment Bill, 2015 (the Bill), is to amend the Higher Education Act, 1997 (Act No. 101 of 1997) (the Act), to ensure alignment and consistency with the administrative law provisions of the Constitution of the Republic of South Africa, 1996; the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (PAIA); the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (PAJA); and other administrative law norms and judicial decisions relating to administrative actions. This was necessitated because the Act came into force prior to the enactment of the PAIA and the PAJA and since 2000 a number of significant judicial decisions on the implementation and application of these Acts (also in respect of public higher education institutions) have provided clarity on the minimum content of administrative actions (both procedurally and substantively).
- 1.2 The Bill is not aimed at broadening the scope of the Act to cover areas beyond higher education, such as the central applications service and the admissions agency, but seeks to account for the changes and envisaged changes (with specific reference to the *White Paper for Post-School Education and Training*) in the higher education landscape and the lessons learnt from recent tendencies and experiences in the public and private higher education sector.
- 1.3 On 20 November 2013 the Cabinet approved the *White Paper for Post-School Education and Training (Building an Expanded, Effective and Integrated Post-School System)*. This White Paper, described as a “definitive statement of the government’s vision for the post-school system, outlining government’s main priorities and strategies for achieving them, is a vision for an integrated system of post-school education and training, with all institutions playing their role as parts of a coherent but different whole”.
- 1.4 In general, the Bill seeks to rectify any inconsistencies, contradictions or gaps in the Act, address issues pertaining to institutional autonomy, public accountability and co-operative governance arising from the Higher Education Laws Amendment Act, 2011 (Act No. 21 of 2011) (HELA Act, 2011) and the Higher Education and Training Laws Amendment Act, 2012 (Act No. 23 of 2012) (HETLA Act, 2012) and propose certain amendments and additions related to the independent assessment and administration, dispensations and post administration needs of public higher education institutions.
- 1.5 In essence, the Bill seeks to amend the Long Title and the way the Act is arranged; seeks to provide for the insertion of new definitions; to provide for the determination of transformation goals for the public higher education system and oversight mechanisms; to provide for the development of articulation and recognition of prior learning frameworks; to provide for the conversion of public higher education institutions; to provide for the issuing of Ministerial directives; to provide for indemnification of an independent assessor; to provide for the indemnification and termination of the term of office of an administrator; to provide for different categories of registration of private higher education institutions and the associated rights; to provide for the withdrawal and revocation of qualifications by public higher education institutions; to provide for transitional arrangements and for matters connected therewith.
- 1.6 The following matters are specifically addressed in the Bill:
 - 1.6.1 Determination of transformation goals for the public higher education system and appropriate oversight mechanisms.

- 1.6.2 Development of articulation and recognition of prior learning frameworks.
- 1.6.3 Powers of the council of a public higher education institution to invest funds.
- 1.6.4 Issuing of Ministerial directives.
- 1.6.5 Alignment of the institutional types to provide pro-actively for envisaged new developments.
- 1.6.6 Different categories of registration of private higher education institutions and the associated rights.
- 1.6.7 Withdrawal and revocation of qualifications by public higher education institutions, if obtained fraudulently.

2. SUMMARY OF PROVISIONS OF THE BILL

2.1 Clause 1: Amendment of section 1 of Act 101 of 1997

This clause inserts certain definitions in the Act required by the amendments made to the Act and the need to define certain important concepts used in the Act.

2.2 Clause 2: Substitution of section 2 of Act 101 of 1997

This clause amends section 2, dealing with the application and interpretation of the Act. This Act applies to higher education and related matters in South Africa, subject to section 34 of the National Qualifications Framework Act, 2008 (Act No. 67 of 2008).

2.3 Clause 3: Amendment of section 3 of Act 101 of 1997

This clause amends subsection 3—

- by renumbering subsection (3); and
- by inserting subparagraphs *(b)* and *(c)* after the newly numbered subparagraph (3)*(a)* to provide that the Minister may determine transformation goals for the higher education system (and appropriate oversight mechanisms) and develop articulation and recognition of prior learning frameworks for the post-school education and training system.

2.4 Clause 4: Amendment of section 7 of Act 101 of 1997

This clause amends section 7 by replacing “HEQF” with “HEQSF”.

2.5 Clause 5: Amendment of section 20 of Act 101 of 1997

This clause—

- amends subsection (1) and inserts subsection (2) to provide that the Minister may establish, or convert, as appropriate, the different types of higher education institutions introduced in the Bill and the procedures to be followed;
- amends subsection (4) to provide for a converted public higher education institution to acquire the status of a juristic person;
- inserts subsection (5A) to determine the power of the council of a public higher education institution to invest its funds with financial and other approved institutions; and

- inserts subsection (5B) to provide that the Minister may determine the functions of a newly established higher education institution must perform under the supervision of another identified higher education institution.

2.6 Clause 6: Amendment of section 21 of Act 101 of 1997

This clause amends section 21 to provide that the Minister may, after following the prescribed procedure, declare any education institution as one of the recognised types of public higher education institutions.

2.7 Clause 7: Amendment of section 23 of Act 101 of 1997

This clause amends subsection (2) to provide that the prescripts of administrative law norms and judicial decisions relating to administrative actions must be complied with before a decision to merge higher education institutions is taken.

2.8 Clause 8: Amendment of section 27 of Act 101 of 1997

This clause amends—

- subsection (2) to provide that the council and the senate of a public higher education institution must comply with the provisions of the Use of Official Languages Act, 2012 (Act No. 12 of 2012) as part of the process to determine the language policy of the public higher education institution;
- subsection (3) to provide that councils of higher education institutions must establish a suitable structure to advise on the policy for student support services;
- subsection (5B) to provide that any person against whom an adverse finding is made in the report of the independent assessor should be given the opportunity to submit submissions in respect of such finding with a view to soliciting a final decision on the matter from the Minister;
- subsection (7) to provide that—
 - o persons with delegated functions in terms of section 68(2) must be persons with knowledge and experience relevant to the objects and governance of the public higher education institution;
 - o members of the council, a committee of the council and persons with delegated functions in terms of section 68(2) must—
 - ‡ participate in the deliberations of the council or a committee of the council, or exercise any delegated function in the best interests of the public higher education institution concerned;
 - ‡ declare business, commercial or financial activities undertaken for financial or other gain that may raise a conflict or a possible conflict of interest with the public higher education institution concerned, also after a member has assumed office;
 - ‡ may not have a direct or indirect financial, personal, or other interest in any matter to be discussed at a meeting, or in regard to which he or she is to make a decision in terms of a delegated function, and which entails or may entail a conflict or possible conflict of interest with the public higher education institution; and
 - ‡ must, before the meeting of the council or the committee of the council concerned and in writing, inform the chairperson of that meeting of a conflict or possible conflict of interest;

- subsection (7A) to provide that any person may in writing inform the chairperson of a meeting of the council, or a committee of the council, of a public higher education institution before the meeting, of a conflict or possible conflict of interest of a member of the council, or of a committee of the council;
- subsection (7C) to provide that in instances where members of a committee of the council or any employee with delegated functions of a public higher education institution have a conflict or possible conflict of interest in respect of a matter to be considered by the committee, the committee may not discuss or take a decision on the matter and must refer the matter to the council for a decision;
- subsection (7E) to adjust the cross references appropriately and to provide that members of the council, members of the council committees and all other persons exercising functions of the council of a public higher education institution must subscribe in writing to the principles embedded in the code of conduct contemplated in this section; and
- subsection (9) to provide that, upon resignation of a council of a public higher education institution, a new council must be constituted within a period not exceeding six months after the appointment of the administrator.

2.9 Clause 9: Amendment of section 31 of Act 101 of 1997

This clause inserts subsection (1A) to provide that the council must consider advice given by the institutional forum and to provide written reasons if the advice is not accepted.

2.10 Clause 10: Amendment of section 34 of Act 101 of 1997

This clause amends—

- subsection (2) to provide that the principal, vice-principals and the academic employees of a public higher education institution must be appointed by the council after consultation with the senate;
- subsection (4)(a) to provide that employees must, after assuming office and continuously thereafter declare business, commercial or financial activities undertaken for financial or other gain that may raise a conflict or a possible conflict of interest with the public higher education institution concerned;
- subsection (5) to require a decision by the council that the business of an employee that entail or may entail a conflict of interest with the public higher education institution, is unique, the supplier is a sole provider and that it is in the best interest of the institution to conduct business with such employee;
- subsection (6) to include a member or members of his or her immediate family; and
- subsection (7) to include references to financial and fiduciary gain, not forming part of the employment relationship, as being included in the prohibitions of benefiting from contracts by an employee on behalf of a public higher education institution with him or herself.

2.11 Clause 11: Repeal of sections 38A to 38O of Act 101 of 1997

This clause repeals these sections as they are currently incorrectly located under Chapter 4 of the Act which provides for the governance of public higher education institutions. The content of these sections are included, with the necessary changes and additions, by means of clause 29 in the newly inserted

Chapter 6B, (sections 49K to 49W) providing for national institutes for higher education.

2.12 Clause 12: Amendment of section 39 of Act 101 of 1997

This clause amends section 39 by inserting subsection (3A) after subsection (3). Subsection (3A) contains the provisions of section 42 of the principal Act, which were edited and renumbered. The provisions of section 42 are moved to section 39 with a view to consolidating the prescripts regarding the allocation of funds by the Minister. Section 42 of the principal Act is substituted in clause 16.

2.13 Clause 13: Amendment of section 41 of Act 101 of 1997

This clause amends—

- the section heading by inserting the words “external audit” between the words “kept” and “and”;
- subparagraph (1)(b) to provide for a statutory annual external audit obligation in respect of public higher education institutions as a whole; and
- subsection (2) to provide that the Minister may prescribe the submission of information beyond the activities of the public higher education institution of the previous year.

2.14 Clause 14: Insertion of heading of Chapter 6 of Act 101 of 1997

This clause inserts “Chapter 6” and its heading “Ministerial Interventions: Public Higher Education Institutions”.

2.15 Clause 15: Repeal of section 41A of Act 101 of 1997

This clause repeals section 41A as it is currently incorrectly located under Chapter 5 of the Act which provides for the funding of public higher education institutions. The content of this section is included, with the necessary changes, by means of clause 28 (section 49G), with the necessary changes.

2.16 Clause 16: Substitution of section 42 of Act 101 of 1997

This clause substitutes section 42. See clause 12.

2.17 Clause 17: Deletion of the heading “Chapter 6” and the heading of Chapter 6 “Independent Assessor” of Act 101 of 1997

This clause deletes the existing headings.

2.18 Clause 18: Amendment of section 44 of Act 101 of 1997

This clause—

- amends subsection (1) to provide that the Minister may in certain circumstances appoint an independent assessor without issuing a Ministerial directive first;
- inserts subsection (1A) to provide that the Minister must publish a notice in the *Gazette* regarding the appointment of an independent assessor; and
- amends subsection (2) to provide that every student and employee of the public higher education institution concerned has an obligation to assist and co-operate with the independent assessor in the performance of his or her functions in accordance with section 47.

2.19 Clause 19: Amendment of section 45 of Act 101 of 1997

This clause—

- edits and renumbers subparagraph (a) to (c);
- in subparagraph (a) provides that the council of a public higher education institution, when requesting the Minister to appoint an independent assessor, must do so in writing;
- in subparagraph (c) provides that the Minister may appoint an independent assessor in the circumstances contemplated in section 42(4) (substantive non-compliance by the council of a public higher education institution with a directive of the Minister); and
- adds to subparagraph (d) the additional proviso that the appointment of an independent assessor must be in the best interest of the public higher education institution concerned as well.

2.20 Clause 20: Amendment of section 45A of Act 101 of 1997

This clause—

- edits subparagraph (1)(a);
- amends subparagraph (1)(b) to provide that the independent assessor must comply with administrative law norms and judicial decisions relating to administrative actions when conducting his or her investigation;
- adds a proviso to subparagraph (1)(c) obliging the independent assessor to avail in writing all information obtained during proceedings affecting the rights, interests or potential interests of a person directed by the independent assessor not to attend the proceedings, in order to protect the rights, interests or potential interests of such a person and to allow such a person to make written submissions to the assessor;
- adds a proviso to subsection (2) creating a statutory obligation on the independent assessor to make documents or evidence available—
 - o for purposes of, or during, proceedings before a court, tribunal or forum; and
 - o in the event that the rights, interests or potential interests of a person may be affected by such document or evidence to him or her, or his or her trade union or legal representative;
- amends subsection (4)(a) by specifying the persons and entities the independent assessor is entitled to direct to submit affidavits or affirmed declarations or to appear before him or her;
- amends subsection (5) by improving the drafting style and to provide that the letter contemplated in subparagraph (5)(b) must be delivered at the address as registered with the public higher education institution concerned;
- amends subsection (7) to provide that an oath or affirmation can only be administered or accepted by a person appointed as a Commissioner of Oaths under the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963);
- amends subsection (8) to provide that the independent assessor must, when it appears during an investigation that a person is implicated, give such person notice of the implication and provide such person with all the relevant documentation and evidence affecting his or her rights, interests or

potential interests, and afford such person the opportunity to respond in connection therewith; and

- amends subsection (9) by obliging the independent assessor to allow legal representation or representation by a representative from a trade union of which the person appearing before him or her is a member.

2.21 Clause 21: Amendment of section 45B of Act 101 of 1997

This clause amends section 45B to provide that the access of the independent assessor to premises and buildings shall be in accordance with relevant legal provisions and practice and to oblige an independent assessor to hand a signed inventory of copied documents to the custodian of the documents upon leaving the premises.

2.22 Clause 22: Amendment of section 47 of Act 101 of 1997

This clause—

- amends subparagraph (1)(c) to provide that the independent assessor must suggest appropriate measures in his or her report to the Minister; and
- inserts subsection (1A) to provide that the Minister may extend the term of office of an independent assessor at his or her request.

2.23 Clause 23: Amendment of section 49 of Act 101 of 1997

This clause amends section 49 by substituting the word “concurrence” with the words “written approval”.

2.24 Clause 24: Substitution of section 49A of Act 101 of 1997

This clause inserts a provision in the Act providing indemnification to an independent assessor in certain circumstances.

2.25 Clause 25: Amendment of section 49B of Act 101 of 1997

This clause—

- amends subsection (1) to provide that the Minister may, notwithstanding any other provision of the Act, appoint an administrator under circumstances where serious undermining of the functioning of a public higher education institution is revealed as contemplated in this section;
- inserts in subsection (1A) that the Minister must, before appointing an administrator, give written notice in the format prescribed by the Act of his or her intention to make such an appointment to the council of the public higher education concerned, provide the reasons for the appointment and give the council a reasonable opportunity to make written representations and consider the representations; and
- amends subsection (2) to provide that the Minister may make such appointment only when he or she has reason to believe that the appointment is in the best interest of the public higher education institution concerned and of higher education in an open and democratic society.

2.26 Clause 26: Insertion of section 49BA in Act 101 of 1997

This clause inserts in the Act section 49BA to provide that the Minister must publish the appointment of an administrator in the *Gazette* and provide certain information regarding the incumbent and his or her term of office.

2.27 Clause 27: Substitution of section 49D of Act 101 of 1997

This clause provides that the Minister must determine the remuneration and allowances of an administrator in consultation with the Minister of Finance and that all the costs associated with the appointment of an administrator will be carried by the institution concerned. Section 49D thus consolidates financial aspects pertaining to the appointment of an administrator.

2.28 Clause 28: Insertion of sections 49F to 49J in Act 101 of 1997

This clause—

- in subsections 49F(1) and (2), introduces a consolidated section providing a full menu of the role, powers, functions and duties of an administrator. It empowers the Minister to select those relevant to a particular situation;
- in section 49F(3), provides that employees and students of the public higher education concerned must comply with instructions given by the administrator, but that these instructions would be subject to the institutional statute and rules of the public higher education concerned;
- in section 49G, reintroduces the repealed section 41A of the Act, with the changes required by the context (see clause 14);
- in section 49H, introduces a new section on the termination of the appointment of an administrator and the procedures to be followed in this regard;
- in section 49I, introduces a new section on the issuing of post-administration directives by the Minister and the procedures to be followed in this regard; and
- in section 49J, introduces a new section on the indemnification of an administrator in certain circumstances.

2.29 Clause 29: Insertion of Chapter 6A and sections 49K to 49W in Act 101 of 1997

This clause inserts Chapter 6A and sections 49K to 49W to provide, in a separate chapter in the Act, for the establishment of National Institutes for Higher Education in accordance with good governance norms and standards, public finance management principles, constitutional and administrative law principles and for matters related thereto (See also clause 11). The original chapter of the Act has been recomposed, reworded, extended and inserted under this chapter.

In particular, this clause provides for the following sections—

Section 49K: Establishment of national institute for higher education

- o Except for the removal of subsection (2), this section is similar to the former section 38A(1) and (3). Subsection (2) of the former section 38A now forms part of the new section 49M and has been redrafted to focus on the governance responsibilities of the Board only.

Section 49L: Functions of national institute for higher education

- o Subsection (1) contains the same wording as the former section 38B(1). However, subsection (2) has been redrafted to provide that the Minister must publish the functions of national institutes for higher education by notice in the Government *Gazette*.

Section 49M: Governance, composition of board and committees

- o Subsection (1) provides that a national institute is governed by its board (see section 49K) and replaces subsection 38A(2) which conflated management, governance and administration at board level;
- o Subsections (2) and (3) follows the same wording as that of the former subsection 38C(1) and (1A), with the necessary changes;
- o Subsection (4) provides that co-opted members of the board will have no voting rights;
- o Subsection (5) provides that the members of the board appointed by the Minister must, as far as is practically possible, be representative of the higher education institutions affected by the establishment of the specific national institute; and
- o Subsections (6) and (7) provide that the board must establish at least a number of board committees and determine the composition, manner of election, procedure at meetings and the dissolution of committees in accordance with institutional policies and the principles of good governance.

Section 49N: Term of office of chairperson and members

- o Section 49N provides that the chairperson and appointed members of the board hold office for four years and may only serve a maximum of two consecutive terms.

Section 49O: Vacation of Office

- o Subsection (1)(a) to (f) is an edited version of the former section 38E;
- o Subsection (1)(g) provides for the removal of a member of the board by means of a resolution passed by the board; and
- o Subsection (2) and (3) prescribe the procedure to be followed by the board.

Section 49P: Filling of vacancies

- o The same wording as the former section 38F.

Section 49Q: Delegations

- o Subsections (1) and (2) provide that the board may delegate, in writing and subject to conditions set by the board, any of its functions to committees of the board and to persons employed by the board and may at any time revoke such delegation; and
- o Subsection (3) confirms that the board is not divested of its responsibilities for the performance of any function so delegated or assigned.

Section 49R: Staff and conditions of service

- o Subsection (1) provides that the board may appoint a chief executive officer and other staff required to manage and administer the national institute; and
- o Subsection (2) provides that the national institute must out of its own funds pay to its employees such remuneration, allowances and other benefits as the board may determine.

Section 49S: Funds of national institute for higher education

- o Subsections (1) to (3) have been inserted and contains provisions similar to the provisions applicable to the funding of public higher education institutions;
- o Subsections (4) and (5) follows the same wording as the former section 38G(1) to (2);
- o Subsection (6) prescribes, in the interest of compliance with administrative law principles, the procedure to be followed by the Minister should he or she not approve the board's statement or adjusted statement of estimated income and expenditure; and
- o Subsections (7) and (8) follow the same wording as subsections (4) and (5) of the former section 38G.

Section 49T: Annual audit

- o The drafting style of the section is updated.

Section 49U: Annual report

- o The same wording as the former section 38I.

Section 49V: Ministerial interventions

- o This section provides that the same provisions applicable to public higher education institutions shall apply to national institutes, with the necessary changes.

Section 49W: Disestablishment of national institute for higher education

- o Subsections (1) and (2) of the former section 38O have been redrafted to describe the circumstances that could lead to a decision by the Minister to disestablish a national institute and the procedure to be followed in this regard;
- o Subsection (3) is added to provide that in the event that a national institute for higher education is disestablished all assets and liabilities of such national institute for higher education must, after disestablishment, be dealt with according to law by the Minister and any assets remaining after payment of all liabilities vest in the Minister; and
- o Subsection (4) is added to provide that the Minister may appoint a person to administer the closure of a national institute for higher education.

2.30 Clause 30: Amendment of section 50 of Act 101 of 1997

This clause now indicates clearly that the Director-General of the Department of Higher Education and Training acts as the registrar for registering private higher education institutions.

2.31 Clause 31: Amendment of section 51 of Act 101 of 1997

This clause amends section 51 to provide that no person, or a person with delegated authority of another person, or as an agent of another person may perform one or more of the functions to provide higher education unless that person is authorised to do so in accordance with subparagraphs (1)(a) to (d); and deletes subsection (2) which became redundant due to the amendments referred to above.

2.32 Clause 32: Amendment of section 53 of Act 101 of 1997

This clause is an edited version of the existing section 53 of the Act.

2.33 Clause 33: Amendment of section 54 of Act 101 of 1997

This clause provides that registered private higher education institutions may in certain circumstances call themselves universities, university colleges or higher education colleges and allow private universities and university colleges to use certain titles, confer professorships and award honorary degrees.

2.34 Clause 34: Amendment of section 57 of Act 101 of 1997

This clause amends section 57 to allow more time for private higher education institutions to prepare their financial statements.

2.35 Clause 35: Insertion of section 65AB in Act 101 of 1997

This clause inserts section 65AB to provide for the change in type and scope of higher education institutions or amend or remove any restrictions on the scope and operations of higher education institutions and to prescribe the procedure to be followed in this regard.

2.36 Clause 36: Insertion of section 65BA in Act 101 of 1997

This clause inserts subsection (1) to provide for the withdrawal and revocation of degrees, diplomas, certificates or other qualifications—

- that were conferred on the basis of a material error on the part of the public higher education institution concerned, within 2 years after the conferment concerned; or
- in the event that the recipient of a degree, diploma, certificate or other qualification had committed a fraudulent or dishonest act in connection with the obtaining of such degree, diploma, certificate or other qualification.

Subsection (2) provides for the process to be followed for such withdrawal, compliance with administrative law norms and the reporting of criminal activities.

2.37 Clause 37: Amendment of section 65D of Act 101 of 1997

This clause amends subsection (2) to provide that the Minister may identify higher education institutions who shall be obliged to offer an education programme or trade and occupational learning programme that leads to a qualification or part-qualification on the sub-framework for trades and occupations contemplated in section 7(c) of the National Qualifications Framework Act.

2.38 Clause 38: Amendment of section 66 of Act 101 of 1997

This clause inserts subsection (1A) to provide that persons contravening sections 51 (registration) and 65D (qualifications) of the Act are guilty of an offence.

2.39 Clause 39: Amendment of section 68 of Act 101 of 1997

This clause—

- amends subsection (1) to provide that the Minister may also delegate any of his or her powers to the board of a national institute for higher education; and

- inserts subsection (5) to provide that the board and the chief executive officer of an institute for higher education may delegate their authorities and assign their duties.

2.40 Clause 40: Amendment of section 69 of Act 101 of 1997

This clause amends section 69 to provide for the Minister to make regulations consistent with the Act on the matters listed in the clause.

2.41 Clause 41: Repeal of section 70 of Act 101 of 1997

This clause repeals section 70 as it is incorporated into the Act in clause 3 (section 2A(1)).

2.42 Clause 42: Substitution of the Long Title of Act 101 of 1997

This clause amends the Long Title of the Act to reflect the amendments made to the Act.

2.43 Clause 43: Amendment of the Arrangement of sections of Act 101 of 1997

This clause amends the Arrangement of the Act to reflect the amendments made to the Act.

2.44 Clause 44: Transitional Arrangements

This clause provides for appropriate transitional arrangements.

2.45 Clause 45: Short title and commencement

This clause provides for the short title of the Act and provides for the Act to come into operation on a date fixed by proclamation in the *Gazette*.

3. BODIES/PERSONS/STAKEHOLDERS CONSULTED

- 3.1 The consultative process started during 2013, when the Department embarked on a process of the review of the Act. A Task Team comprising key stakeholders in the higher education sector was established to assist with this work. The review of the Act is necessitated by two crucial factors. Firstly, the changing higher education policy environment and DHET's vision of an integrated post school system whereby all institutions play their role as parts of a coherent but differentiated whole. It is believed that a comprehensive review of the Act is needed to begin to reflect these new developments. The second contributing factor is the feedback constantly received from the higher education sector (both public higher education institutions and private providers) that certain aspects of the Act need to be revisited in order to develop and further strengthen the sector. The Task Team held a total of three meetings as follows:
 - (i) the first meeting held on 20 November 2013;
 - (ii) the second meeting held on 16 April 2014; and
 - (iii) the third meeting on 09 October 2014.
- 3.2 During the review, a targeted call for submission was made to key stakeholders, namely, Higher Education South Africa (HESA, now called Universities South Africa); Association of Private Providers of Education Training and Development (APPEDT); and Private Higher Education Interest Group (PHEIG). Letters for the call were issued on 13 December 2013, and the stakeholders were given the deadline of 28 February 2014 to submit their proposals. The request was for the stakeholders to submit to the DHET aspects that they would like to be revised in the Act. The submissions from APPEDT

were received on 27 February 2014; from PHEIG submissions were received on 28 February 2014 and for HESA, submissions were received on 31 March 2014, although an extension was granted. Contact meetings were held with the above stakeholders to discuss the revised Amendment Bill as follows: On 26 August 2014 a meeting took place with HESA; and on 27 August 2014 a meeting was arranged with both APPEDT and PHEIG. Following these meetings, HESA made a second submission on 27 October 2014. No additional inputs were received from the private providers (APPEDT and PHEIG). All the inputs were considered in drafting the Bill.

3.3 The University Branch, a Branch directly affected by the proposed amendments to existing legislation, has extensively dealt with the review of the Act in an internal process in the Department of Higher Education and Training (DHET). During these consultations, the Bill was perused and deliberated upon, further drafts were compiled for consideration by the Branch and the Bill was also introduced at Senior Management. Up to date, Higher Education South Africa (HESA, now called Universities of South Africa); internal members of the Department (DHET); Council for Higher Education (CHE); Quality Council for Trade and Occupations (QCTO), South African Qualifications Authority (SAQA) and Umalusi were consulted. Students and the public were not as yet consulted, but meetings were scheduled with student organisations. This Bill was also deliberated with SAQA, CHE, QCTO, Umalusi and representatives of DBE during the extended CEO SAQA Committee meeting of 27 February 2015. This Bill was tabled in the Social Protection, Community and Human Development (SPCHD) Cluster meeting of 8 July 2015 and the submission of the Bill to Cabinet was recommended. The Social Economic Impact Assessment System (SEIAS) evaluation was submitted to the Department of Planning, Monitoring and Evaluation in the Presidency, whom signed off on the report.

3.4 Public hearings will also take place during the Parliamentary legislative process.

4. FINANCIAL IMPLICATIONS FOR STATE

The revenue and expenditure flowing from the recommendations will not have a significant effect on the State during this financial year. Costs will be carried forward to the next financial year. Proposed funding for the implementation of the Bill has been budgeted for.

5. PARLIAMENTARY PROCEDURE

5.1 The Department of Higher Education and Training and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure prescribed by section 75 of the Constitution of the Republic of South Africa, 1996, since it is an ordinary Bill not affecting provinces.

5.2 The Constitutional Court, in **Tongoane and Others v Minister for Agriculture and Land Affairs and Others**¹, stated that the procedure envisaged in section 75 of the Constitution remains relevant to all Bills that do not, in substantial measure, affect the provinces. It stated that whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a) to (f) of the Constitution, and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.

5.3 In view of the foregoing, the Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution as it deals with higher education. Schedule 4 to the Constitution excludes tertiary education from the

¹ CCT 100/09 [2010] ZACC 10 (11 May 2010), see para 72 of the decision.

ambit of the functional areas of concurrent national and provincial legislative competence.

- 5.4 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain any provisions pertaining to customary law or to the customs of traditional communities.

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