

REPUBLIC OF SOUTH AFRICA

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**PORTFOLIO COMMITTEE AMENDMENTS  
TO  
HIGHER EDUCATION  
AMENDMENT BILL**

**[B 36—2015]**

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*(As agreed to by the Portfolio Committee on Higher Education and Training  
(National Assembly))*

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**[B 36A—2015]**

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**AMENDMENTS AGREED TO**  
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 HIGHER EDUCATION AMENDMENT BILL  
 [B 36—2015]  
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LONG TITLE

1. On page 2, in the second line of the Long Title, to omit “**goals**” and to insert “**policy**”
2. On page 2, in the fourth line of the Long Title, after “**frameworks**” to insert “**across the education system; to provide for new institutional types;**”
3. On page 2, in the tenth line of the Long Title, after “**rights;**”, to insert “**to extend the power to award diplomas, certificates and confer degrees to private higher education institutions;**”
4. On page 2, in the eleventh line of the Long Title, after “**public**” to insert “**or private**”

CLAUSE 1

1. On page 3, in line 29, to substitute for the definition of “higher education college”, the following definition:
 

“**‘higher education college’** means a higher education 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 under section 69(d) and—

(a) established, merged, converted, deemed to have been established or declared as a public higher education college; or

(b) registered as a private higher education college, in terms of this Act;”;
2. On page 3, after line 42, to insert the following paragraph:
 

“(l) by the substitution for the definition of “local juristic person” of the following definition:

“**‘local juristic person’** means a person established as a juristic person in South Africa in terms of the Companies Act, [1973 (Act No. 61 of 1973)] 2008 (Act No. 71 of 2008);”;
3. On page 3, from line 51, to omit the definition of “PFMA”;
4. On page 4, in line 9, after “spouse”, to insert “or partner”.
5. On page 4, in line 17, to omit “Islamic or other”;
6. On page 4, in line 21, to substitute for the definition of “university”, the following definition:
 

“**‘university’** means a higher education 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 as prescribed by the Minister under section 69(d) and—

- (a) established, merged, converted, deemed to have been established or declared as a public university; or
- (b) registered as a private university, in terms of this Act;”;

7. On page 4, in line 29, to substitute for the definition of “university college”, the following definition:

“**‘university college’** means a higher education 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 under section 69(d) and—

- (a) established, merged, converted, deemed to have been established or declared as a public university college; or
- (b) registered as a private university college, in terms of this Act;”.

### CLAUSE 3

1. Clause rejected.

### NEW CLAUSE

1. That the following be the new clause:

**“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 (1) of the following subsection:

- “(1) The Minister must, taking into consideration the provisions of the Constitution and after consulting the CHE, determine policy on higher education, which policy includes, but is not limited to—
- (a) transformation goals and oversight mechanisms for these goals;
  - (b) articulation and recognition of prior learning frameworks across the education system; and
  - (c) criteria for recognition as a university, university college, or higher education college.”.

### CLAUSE 5

1. On page 5, in line 30, to omit “subsections” and to substitute “subsection”.
2. On page 5, from line 31 to line 38, to omit the whole of subsection (5A).
3. On page 5, in line 39, to omit “5B” and to substitute “5A”.

### CLAUSE 8

1. On page 6, in line 31, to omit the comma.
2. On page 6, from line 32, to omit “and with due observance of the relevant provisions of the Use of the Official Languages Act, 2012 (Act No. 12 of 2012),”.

3. On page 6, from line 54 to 57, to omit “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”.

#### CLAUSE 10

1. On page 8, in line 11, to omit “;” and to substitute “; and”.
2. On page 8, in line 12, to omit the whole of subparagraph (ii).
3. On page 8, in line 13, to omit “(iii)” and to substitute “(ii)”.
4. On page 8, in line 13, to omit “, not disclosed as contemplated in subparagraph (i) or (ii)”.

#### CLAUSE 12

1. On page 9, in line 6, to omit “as soon as reasonable practicable after such” and to substitute “within a period of 30 days of the”.

#### CLAUSE 22

1. On page 13, in line 18, to omit “and”.
2. On page 13, in line 21, to omit the full stop after the inverted comma and to substitute “; and”.
3. On page 13, after line 21 to insert the following paragraph:

“(c) by the substitution for subsection (2) of the following subsection:

“(2) The Minister must [**as soon as practicable**] within 90 days of receiving the report referred to in subsection (1), provide a copy of the report [**referred to in subsection (1)**] to the council concerned, table the report before the National Assembly and publish such report in the Gazette.”.

#### CLAUSE 28

1. On page 16, in line 26, after “Minister” to insert the following “, after taking into account the report of the administrator”.

#### CLAUSE 31

1. On page 20, in line 45, to omit “private”.
2. On page 20, in line 46, to substitute for subsection (1), the following subsection:

“(1) No local juristic person or foreign juristic person other than a public higher education institution or an organ of state may 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

- (b) registered or recognised as a juristic person in terms of the Companies Act, [1973 (Act No. 61 of 1973)] 2008 (Act No. 17 of 2008), before such person is registered or conditionally registered in accordance with paragraph (a).” ; and
3. On page 21, in line 8, to substitute for paragraph (c), the following paragraph:

“(c) by the substitution for subsection (2) of the following subsection:

“(2) If the person contemplated in subsection (1) is a foreign juristic person, that person must ensure that any qualification or part-qualification offered within the Republic is registered on the [sub-framework] sub-frameworks for higher education and trades and occupations on the National Qualifications Framework contemplated in section 7(b) and (c) read with section 13(1)(h) of the National Qualifications Framework Act.”.

#### CLAUSE 33

1. On page 21, in line 33, to omit “institutions” and to substitute “colleges”.

#### CLAUSE 35

1. On page 21, in line 48, after “Minister” to insert “, at the request of the council of the institution concerned,”.
2. On page 21, from line 48, to omit “and at the request of the council of the institution concerned”.
3. On page 21, in line 52, to omit “3(3) and 20(5)(b)” and to substitute with “3(1) and 20(4)”.
4. On page 22, after line 2, to add the following subsection:

“(3) The provisions of subsections (1) and (2) apply to registered private higher education institutions, subject to the necessary changes required by the context.”.

#### NEW CLAUSE

1. The following clause is inserted on page 22, after line 2:

**“Amendment of section 65B of Act 101 of 1997, as substituted by section 24 of Act 23 of 2001**

**36.** Section 65B of the principal Act is hereby amended by the addition of the following subsection:

“(3) The provisions of subsections (1) and (2) apply to registered private higher education institutions, subject to the necessary changes required by the context.”.

## CLAUSE 36

1. On page 22, after line 30, to add the following subsections:

“(3) The provisions of subsections (1) and (2) shall apply to registered private higher education institutions, subject to the necessary changes required by the context.

(4) In the event that any degree, diploma, certificate or other qualification that was awarded, is withdrawn or revoked, the relevant Quality Council responsible for the qualification or part-qualification and SAQA must be informed so as to amend the National Learner Record Database, if necessary.”

## CLAUSE 37

1. On page 22, from line 33, to omit the following:

“Section 65D of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:”, and to substitute the following:

“Section 65D of the principal Act is hereby amended—

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

“(1) No person may offer, award or confer a degree, or a higher education diploma or a higher education certificate, provided for on the [HEQF] HEQSF unless such degree, diploma or certificate is registered on the sub-framework for higher education on the National Qualifications Framework contemplated in section 7(b) read with section 13(1)(h) of the National Qualifications Framework Act.” and

(b) by the substitution for subsection (2) of the following subsection:”

## CLAUSE 42

1. On page 23, in line 18, to omit “**goals**” and to insert “**policy**”.
2. On page 23, in line 20, after “**frameworks**” to insert “**across the education system; to provide for new institutional types**”.
3. On page 23, in line 35 after “**public**” to insert “**or private**”

## CLAUSE 45

1. On page 24, from line 52, to omit “fixed by the President by proclamation”, and substitute “to be determined by the Minister by notice”.
2. On page 24, after line 52, to add the following subsection:

“(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.”

MEMORANDUM ON THE OBJECTS OF THE HIGHER EDUCATION  
AMENDMENT BILL, 2015 [B36B — 2015]

1. The following Memorandum is hereby substituted for the Memorandum on the Objects of the Higher Education Amendment Bill, 2015:

**“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 policy and oversight mechanisms for the public higher education system; to provide for the development of articulation and recognition of prior learning frameworks across the education system; 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 extend the powers of private higher education institutions to award diplomas, certificates and confer degrees; to provide for the withdrawal and revocation of qualifications by public or private 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 policy and oversight mechanisms for the public higher education system.
  - 1.6.2 Development of articulation and recognition of prior learning frameworks across the education system.
  - 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 or private higher education institutions, if obtained fraudulently.
  - 1.6.8 To provide for the extension of powers of private higher education institutions to award diplomas, certificates and to confer degrees.

## **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 of the Act, dealing with the application and interpretation of the Act. The amendment provides that the 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 section 3 of the Act by substituting subsection (1) thereof in order to provide that the Minister must, taking into consideration the Constitution and after consulting the Council for Higher Education, determine policy on higher education, which policy includes but is not limited to—

- transformation goals and oversight mechanisms for such goals;
- articulation and recognition of prior learning frameworks across the education system; and
- criteria for recognition as a university, university college, or higher education college.

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

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

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

This clause amends section 20 of the Act—

- by substituting subsection (1) and inserting subsection (2) to provide that the Minister may establish, convert, or declare, as appropriate, the different types of higher education institutions introduced in the Bill and provide for the procedures to be followed;
- by substituting subsection (4) to provide for a converted public higher education institution to acquire the status of a juristic person; and
- inserting subsection (5A) to provide that the Minister may determine the functions 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 of the Act 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 section 23 of the Act by substituting 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 section 27 of the Act—

- by substituting subsection (2) to provide better clarity with regard to the requirements that the council, with the concurrence of the senate, must determine the language policy of the public higher education institution concerned, publish the policy and make it available on request;
- by substituting subsection (3) to provide that councils of higher education institutions must establish a suitable structure to advise on the policy for student support services;
- by substituting subsection (7) to provide that—
  - o persons with delegated functions in terms of section 68(2) must be a persons with knowledge and experience relevant to the objects and governance of the public higher education institution;
  - o members of the council, of committees 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;
    - ❖ must 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;
- ❖ by substituting subsection (7A) to provide that any person may inform the chairperson of a meeting of the council, or a committee of the council, of a public higher education institution before the meeting, in writing of a conflict or possible conflict of interest of a member of the council, or of a committee of the council;
- ❖ by substituting 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;
- ❖ by substituting 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
- ❖ by substituting 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 6 months after the appointment of the administrator.

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

This clause amends section 31 of the Act by inserting 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 section 34 of the Act by substituting—

- 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 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 assuming office;
- 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 sections 38A to 38O of the Act 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 is 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 3 of the Act 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 section 41 of the Act by substituting—

- the section heading in order to insert the reference to an “external audit”;
- subsection (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 Independent Assessor” from Act 101 of 1997**

This clause deletes the above-mentioned existing headings.

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

This clause amends section 44 of the Act by—

- substituting subsection (1) to provide that the Minister may in certain circumstances appoint an independent assessor without issuing a Ministerial directive first;
- inserting subsection (1A) to provide that the Minister must publish a notice in the *Government Gazette* regarding the appointment of an independent assessor; and
- substituting 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 amends section 45 of the Act by editing and renumbering subparagraph (a) to (c).

Paragraph (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.

Paragraph (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).

Paragraph (d) adds the 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 subparagraph (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;
- inserts subsection (1A) to provide that the Minister may extend the term of office of an independent assessor at his or her request; and
- amends subsection (2) of the principal Act to make provision for the Minister to table an independent assessor's report before the National Assembly within 90 days of receipt thereof.

#### **2.23 Clause 23: Substitution of section 49 of Act 101 of 1997**

This clause substitutes section 49 by replacing 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 *Government 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 after taking into account the report of the administrator 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 the reference to person includes both local and foreign juristic persons and to correct the reference to the Companies Act; and
- amends subsection (2) of the principal Act to include trades and occupations sub-framework.

**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 be called universities, university colleges or higher education colleges and allow private universities 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 by the Minister, at the request of the council of the institution concerned after consultation with the CHE 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.
- inserts subsection (3) to provide for application of the provisions of subsections (1) and (2) to registered private higher education institutions, subject to the necessary changes required by the context.

**2.35A Clause 36: Amendment of section 65B of act 101 of 1997, as substituted by section 24 of Act 3 of 2001**

This clause amends section 65B of the principal Act by insertion of subsection (3) to extend the powers to award diplomas, certificates and to confer degrees to registered private higher education institutions.

**2.36 Clause 37: Insertion of section 65BA in Act 101 of 1997—Withdrawal and revocation of degree, diploma, certificate or other qualifications**

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.

This clause also inserts subsections (3) and (4) to section 65BA, to extend the application of the provisions of subsections (1) and (2) thereof to registered private higher education institutions and to provide for institutions to report the revocation or withdrawal of any degree, diploma, certificate or other qualification to the relevant Quality Council responsible for the qualification or part-qualification and SAQA so as to amend and update the National Learner Database if necessary.

#### **2.37 Clause 38: 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 39: Amendment of section 66 of Act 101 of 1997**

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

#### **2.39 Clause 40: 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 41: 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 42: Repeal of section 70 of Act 101 of 1997**

This clause repeals section 70 of the Act as its provisions are included under the proposed section 2 (clause 2 of the Bill).

#### **2.42 Clause 43: 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 44: Amendment of the Arrangement of Sections of Act 101 of 1997**

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

#### 2.44 **Clause 45: Transitional Arrangements**

This clause provides for appropriate transitional arrangements.

#### 2.45 **Clause 46: 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 Qualifi-

cations 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*, 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 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.”.