

REPUBLIC OF SOUTH AFRICA

HIGHER EDUCATION AMENDMENT BILL

*(As amended by the Portfolio Committee on Education (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF EDUCATION)

[] 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 consequential matters arising out of declarations and mergers of public higher education institutions in relation to labour and student matters; to provide for changes in the size of councils and institutional forums; to provide for the appointment of an administrator to take over the functions of a council which is deemed to have resigned; to make new provision for the Minister's authority to make regulations; and to make certain textual alterations; and to provide for matters connected therewith.

Amendment of section 1 of Act 101 of 1997

1. Section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997) (hereinafter referred to as the principal Act), is hereby amended-
- (a) by the substitution for the definition of "higher education institution" of the following definition:
- "higher education institution" means any institution that provides higher education on a full-time, part-time or distance basis and which is-
- (a) merged established or deemed to be established as a public higher 10 education institution under this Act;
- (b) declared as a public higher education institution under this Act; or
- (c) registered or [conditionally] provisionally registered as a private higher education institution under this Act;" ;
- (b) by the insertion after the definition of "higher education quality committee" 15 of the following definition:
- "incorporation of a subdivision means the process of incorporation as contemplated in section 21(1)(b) or 24 in terms of which an identified subdivision, faculty, school, department, section or component of a public higher education institution or education institution becomes part of another 20 public higher education institution while the latter institution's legal personality as contemplated in section 20(4) is not affected by the incorporation and "an incorporated subdivision has a similar meaning;" and
- (c) by the insertion after the definition of "local juristic person" of the following 25 definition:
- "merger means the process contemplated in section 23 in terms of which two or more public higher education institutions lose their status as juristic persons

on the date that they are merged into a new juristic person as contemplated in section 20(4)."

Amendment of section 8 of Act 101 of 1997

2. Section 8 of the principal Act is hereby amended by the substitution, in subsection (3), for paragraph (b) of the following paragraph:

"(b) national organisations representing students, academic employees, employees other than academic employees, university principals, technikon principals, **[principals of colleges of education,]** principals of higher education colleges, principals of private higher education institutions, the further education sector, the distance education sector, educators, organised business and organised labour;".

Amendment of section 20 of Act 101 of 1997

3. Section 20 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:

-(4) Every public higher education institution established, merged, deemed to have been established or declared as a public higher education institution under this Act, is a juristic person."

Amendment of section 21 of Act 101 of 1997

4. Section 21 of the **principal Act** is hereby amended—

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

"(b) [a] an incorporated subdivision of a university, technikon or college.";

(b) by the substitution in subsection (3) for paragraph (b)(i) of the following subparagraph:

"(i) published a notice in one or more [daily] newspapers circulating in the area in which the education institution provides higher education, containing the reasons for the declaration referred to in subsection (1), in all the *official languages* used as media of instruction by the education institution concerned;"; and

(c) by the substitution for subsection (5) of the following subsections:

"(5) (a) Notwithstanding sections 197 and 197A of the Labour Relations Act, 1995 (Act No. 66 of 1995), the contracts of employment between the education institution (herein referred to as 'the old employer') and its employees are, transferred automatically to the declared higher education institution (herein referred to as 'the new employer') as from the date of the declaration contemplated in subsection (1), but any redeployment of an employee as a consequence of the declaration is subject to applicable labour legislation.

(b) If an education institution is declared a higher education institution as contemplated in subsection (1), all the rights and obligations between the old employer and each employee at the time of the declaration continue in force as if they were rights and obligations between the new employer and each employee and anything done before the declaration by or in relation to the old employer is deemed to have been done by or in relation to the new employer.

(c) A declaration referred to in subsection (1) does not interrupt the employee's continuity of employment.

(d) The provisions of this subsection do not affect the liability of any person to be disciplined for, prosecuted for, convicted of, and sentenced for any offence or misconduct.

(e) An employee or a student is subject to the disciplinary codes and rules applicable to the higher education institution as from the date of the declaration contemplated in subsection (1), but if any enquiry into incapacity or any proceedings in respect of a charge of misconduct had been instituted or commenced against any employee or student before the date of the declaration, such enquiry or proceedings continue in terms

of the codes and rules applicable to the education institution immediately prior to the declaration.

(6) Notwithstanding subsection (5)(a), the old employer may undertake rationalisation of its workforce according to operational requirements in accordance with section 189 of the Labour Relations Act, 1995 (Act No. 66 of 1995), prior to the date of the declaration contemplated in subsection (1).

(7) If an education institution is declared a higher education institution as contemplated in subsection (1), the higher education institution –

- (a) continues with all academic programmes offered by the education institution under the rules applicable to the education institution immediately before the date of the declaration, until such programmes and rules are amended or restructured by its council; and 10
- (b) awards a degree, diploma or certificate to a student who qualifies before or after the date of the declaration in its own name, but if the student started the course before the date of the declaration, such degree, diploma or certificate must also reflect the name of the education institution as it was before the declaration." 15 20

Amendment of section 23 of Act 101 of 1997

5. Section 23 of the principal Act is hereby amended –

- (a) by the substitution in subsection (2) for paragraph (b) of the following paragraph:
 - "(b) publish a notice giving the reasons for the proposed merger in [at least] one [national **and one** regional newspaper] or more newspapers circulating in the area in which the public higher education institutions concerned are situated;" 25
- (b) by the deletion of subsection (2) of paragraph (e);
- (c) by the insertion after subsection (2) of the following subsections: 30
 - "(2A) Notwithstanding sections 197 and 197A of the Labour Relations Act, 1995 (Act No. 66 of 1995), the contracts of employment between the public higher education institution (herein referred to as 'the old employer') and its employees are transferred automatically to the merged single public higher education institution (herein referred to as 'the new employer') as from the date of the merger contemplated in ~~the~~ (1), but any redeployment of an employee as a consequence of the merger is subject to applicable labour legislation. 35
 - (2B) If two or more public higher education institutions are merged into a single public higher education institution as contemplated in subsection (1), all the rights and obligations between the old employers and each employee at the time of the merger continue in force as if they were rights and obligations between the new employer and each employee and anything done before the merger by or in relation to the old employers is considered to have been done by or in relation to the new employer. 40 45
 - (2C) A merger referred to in subsection (1) does not interrupt the employee's continuity of employment.
 - (2D) The provisions of subsections (2A) to (2F) do not affect the liability of any person to be disciplined for, prosecuted for, convicted of and sentenced for any offence or misconduct. 50
 - (2E) An employee or a student is subject to the disciplinary codes and rules applicable to the new single public higher education institution as from the date of the merger contemplated in subsection (1), but if any enquiry into incapacity or any proceedings in respect of a charge of misconduct had been instituted or commenced against any employee or student before the date of the merger, such enquiry or proceedings continue in terms of the codes and rules applicable to the relevant public higher education institution immediately prior to the merger. 55
 - (2F) Until the new single public higher education institution has made disciplinary codes or rules, the disciplinary codes and rules of the 60

respective old public higher education institutions are applicable to the respective employees and students -

(2G) Notwithstanding subsection (2A), the old employer may undertake rationalisation of its workforce according to operational requirements in accordance with section 189 of the Labour Relations Act, 1995 (Act No. 66 of 1995), prior to the date of the merger contemplated in subsection (1).

(2H) If two or more public higher education institutions are merged into a single public higher education institution as contemplated in subsection (1), the new single public higher education institution-

(i) continues with all academic programmes offered by the old higher education institutions under the rules applicable to the respective higher education institutions immediately before the date of the merger, until such programmes and rules are amended or restructured by the new council; and

(ii) awards a degree, diploma or certificate to a student who qualifies before or after the date of the merger in its own name, but such degree, diploma or certificate must also reflect the name of the -----education institution at which the student was registered immediately before the date of the merger if the -student was so ----- registered."

(d) by the substitution for subsection (3) of the following subsection:

(3) (a) The single public higher education institution contemplated in subsection (1) is deemed to be a public higher education institution established under [this Act] section 20.

(b) The Minister must, after consultation with the councils of the public higher education institutions that are to be merged, determine by notice contemplated in section 23(1)-

(i) the date of establishment of the institution;
(ii) the type and name of the institution; and
(iii) the physical location and official address of the institution."

(e) by the substitution for paragraph (b) of subsection (7) of the following paragraph:

"(b) [four other members] a minimum of six members and a maximum of eight members."; and

(f) by the insertion after subsection (11) of the following subsections:

"(12) Upon a written request by the Minister and within 60 days thereof, each of the public higher education institutions referred to in subsection (1) must provide the Minister with no fewer than four nominations for appointment of the members as contemplated in subsection (8)(a).

(13) Notwithstanding subsection (8), if any of the public higher education institutions fail to provide the nominations in terms of subsection (12), the Minister may appoint the members referred to in subsection (7)(b) from the nominations received from the other institution concerned, or at his or her discretion."

Substitution of section 24 of Act 101 of 1997

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

"[Merger] Incorporation of subdivisions of public higher education institutions

24. (1) The Minister may, after consulting the CHE and by notice in the *Gazette*, [merge] incorporate a subdivision of a public higher education institution with another public higher education institution.

(2) The assets, liabilities, rights and obligations of the subdivisions concerned devolve upon the public higher education institution with which the subdivision has [merged] been incorporated in a manner agreed by the councils of the public higher education institutions concerned or failing such agreement, in a manner determined by the Minister after consulting such councils.

(3) Sections 22(2) to (6) and 23(2), with the changes required by the context, apply to [a **merger**] an incorporation referred to in subsection (1).".

Amendment of section 27 of Act 101 of 1997

7. Section 27 of the principal Act is hereby amended by the substitution for subsections (4) and (5) of the following subsections, respectively :

- "(4) The council of a public higher education institution must consist of not more than 30 members made up of
- (a) the principal;
 - (b) the vice-principal or vice-principals;
 - (c) not more than five persons appointed by the Minister ;
 - (d) a member or members of the senate elected by the senate ;
 - (e) an academic employee or academic employees of the public higher education institution, elected by such employees ;
 - (f) a student or students of the public higher education institution, elected by the students' representative council ;
 - (g) employee employees other than academic employees, elected by such employees of the public higher education institution; and
 - (h) such additional persons as may be determined by the institutional statute .
- (5) The number of persons contemplated in subsection (4)(b), (d), (e), (f), (g) and (h) and the manner in which they are elected, where applicable, must be determined by the institutional statute **[or an Act of Parliament]**."

Amendment of section 31 of Act 101 of 1997

8. Section 31 of the principal Act is hereby amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

"(2) The institutional forum of a public higher education institution must consist of representative r representatives of-".

Amendment of section 40 of Act 101 of 1997

9. Section 40 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (b) of the following paragraph:

- ~~"(b) A resolution contemplated in paragraph (a) must be approved by the~~
 Minister if the sum of the borrowing it authorises plus the borrowing previously approved but not yet taken up, plus the institution's short-term and long-term debt at that date exceeds-
- (i) such amount as the Minister has determined for such institution;
 - or
 - (ii) in the absence of such determination, five per cent of the average annual income of the public higher education institution during the two years immediately preceding the date of such resolution."

Substitution of section 41 of Act 101 of 1997

10. The following section is hereby substituted for section 41 of the principal Act:

"Records to be kept and information to be furnished by council

- 41.** (1) The council of a public higher education institution must in the manner **[determined] prescribed** by the Minister-
- (a) keep records of all its proceedings; and
 - (b) 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.
- (2) The council of a public higher education institution must, in respect of the preceding year and by a date or dates **and in the manner [determined] prescribed by the** Minister, provide the Minister with[-

- (a) a report on the overall governance of the public higher education institution;
- (b) a duly audited statement of income and expenditure; and
- (c) a balance sheet and cash flow statement.

(3) The council of a public higher education institution must provide the Minister with] such information, in such format, as the Minister [may reasonably require] prescribes ."

Amendment of section 41A of Act 101 of 1997

11. Section 41A of the principal Act is hereby amended by the insertion after subsection (2) of the following subsection: 10

- "(3) Notwithstanding subsection (1) if a council is deemed to have resigned as contemplated in section 27(8), the Minister must appoint a person for a period of not longer than six months as an administrator on behalf of the institution to-
- (a) take over the authority of the council;
 - (h) perform the council's functions relating to governance; and 15
 - (c) ensure that a new council is constituted."

Amendment of section 65A of Act 101 of 1997

12. Section 65A of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The seat of a public higher education institution is the physical location of 20 the institution, as contemplated in sections 20(3)(c), [and] 21(2)(c) and 23(3)(c) where an institution carries out its teaching activities and must be defined in the institutional statute."

Amendment of section 69 of Act 101 of 1997

13. Section 69 of the principal Act is hereby amended by the substitution for section 25 69 of the following section:

"Regulations

69. The Minister may make regulations consistent with this Act on-

- (a) any matter which the Minister is empowered or required to prescribe by regulation in terms of this Act; 30
- (b) the maximum remuneration of council members;
- (c) the annual reporting framework;
- (d) any policy matter as contemplated in section 3; and
- [(b)](e) any other matter [in respect of which the Minister deems] which it is necessary or expedient to prescribe in order to achieve the 35 objects of this Act."

Transitional arrangements

14. (1) If the institutional statute of a public higher education institution provides for a council of more than 30 members the council must amend the institutional statute to provide for a council of not more than 30 members, and must do so within 12 months of 40 the commencement of this Act.

(2) If a council fails to comply with subsection (1) the Minister must amend the institutional statute of that institution, after consultation with its council, to provide for a council of not more than 30 members, and must do so within 24 months of the commencement of this Act. 45

(3) Notwithstanding any other provision, the terms of office of members of any council which has a membership of more than 30 terminate on a date to be determined by the Minister by notice in the *Gazette*.

(4) *The date contemplated in subsection (3) must be-*

- (a) at least three months after the promulgation of provisions in terms of 50 subsection (1) or subsection (2);
- (b) not later than 30 months after the date of commencement of this Act.

(5) The council of such institution must be reconstituted in terms of the amended provisions on the day after the date contemplated in subsection (3).

Short Title

15. This Act is called the Higher Education Amendment Act, 2002.

MEMORANDUM ON THE OBJECTS OF THE HIGHER EDUCATION AMENDMENT BILL, 2002

1. INTRODUCTION

This Bill seeks to amend the Higher Education Act, 1997 (Act No. 101 Of 1997).

2. REASONS FOR AND SUBSTANCE OF THE BILL

- 2.1 Clauses 2, 3,4 and 5 of the Higher Education Amendment Bill, 2002, relate to labour, student matters and consequential issues as a result of declarations and mergers of public higher education institutions. These amendments are necessary to clarify and bring legal certainty to issues on which the Act is currently silent or ambiguous. These include –

* transitional arrangements relating to, for example, the academic programmes offered by institutions prior to a merger or declaration. Provision is made to enable these programmes to be offered by the new institution under the same rules applicable to the old institutions until such programmes are amended by the new council ;

labour relations – there is potential legal uncertainty` with regard to the applicability of section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995), in relation to the Higher Education Act, 1997 (Act No 101 of 1997). The amendment seeks to make t clear that all contracts of employment will be automatically transferred by law to the new institution. This is in line with section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995);

* clarity on the authority to take the decision to merge athl td'give a name and a physical location to the new institution. Currently the Act provides through reference [section 23(3)] that the merged institution io,-deerndd'io be established as a higher education institution and that the Minister therefore has the authority to take such decision. This amendment is also in line with section 20 and 21 of the Act .

- 2.2 Clauses 7, 8 and 15 of the Higher Education Amendment Bill reduce the number of members from internal constituencies and determine the maximum membership of councils The Act currently requires that the nominations of certain internal constituencies to council and the institutional forum must always comprise two or more individuals. As a consequence, many public higher education institutions have large and unwieldy councils, especially as the Higher Education Act, 1997 (Act No. 101 of 1997), requires that 60% of council membership must comprise "outside" members. The amendment seeks to address this by providing for a minimum number of internal members per category and putting a maximum to the total membership of a council.
- 2.3 Clause 9 of the Higher Education Amendment Bill clarifies when the approval of the Minister is required in terms of borrowings by higher education institutions. The Act's current provisions are interpreted in more than one way regarding the need for Ministerial approval in terms of borrowings by higher education institutions.
- 2.4 Clauses 10 and 14 of the Higher Education Amendment Bill extend the power of the Minister to make regulations. These amendments seek to ensure that

policies are contained in regulations. This is Important in order to implement policies at the level of both individual public and private higher education institutions as well as across the system.

- 2.5 Clause 11 of the Higher Education Amendment Bill provides for *the* appointment of an administrator when it is deemed that a council of a higher education institution has resigned. The Act provides that an administrator must be appointed if there is a serious undermining of the effective functioning of a public higher education institution. This appointment can only be effected if it is based on an audit report or on the report following an investigation by an independent assessor. The Act also deems that a council effectively resigns if more than 75% of the members resign at a meeting. This can leave an institution without a council and thus no authority to govern the institution until an independent assessor can confirm that there is such a vacuum. This amendment therefore seeks to enable the Minister to immediately appoint an administrator to perform the governance function and to reconstitute a new council within a period of six months.
- 2.6. Clauses 1 and 13 of the Higher Education Amendment Bill make certain textual alterations to clarify certain aspects of the Act.

3. CONSULTATION

This Bill was published to obtain comments from all role players.

4. .. FINANCIAL IMPLICATIONS FOR STATE

No additional costs are foreseen as result of these amendments:

5. PARLIAMENTARY PROCEDURE

It is the view of the State Law Advisers and of the Department of Education that this Bill must be dealt with in accordance with the procedures established by section 75 of *the* Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.