**OPINION ON *HIGHER EDUCATION AMENDMENT BILL, 2015***

**Introduction**

The *South African Parastatal and Tertiary Institutions Union* (“SAPTU”) requested me to provide it with a legal opinion on the *Higher Education Amendment Bill, 2015* (“Bill”). This Bill will be introduced into the National Assembly during the 2016 Parliamentary session.

My comments on the Bill are provided below.

In compiling my comments on the Bill I consulted the following documents:

1. The *Higher Education Amendment Bill, 2015* (hereafter “Bill”);
2. The *Higher Education Act, 101 of 1997* (hereafter “Act”)*;*
3. The *Use of Official Languages Act, 12 of 2012*;
4. The *Constitution of the Republic of South Africa, 1996*;
5. *Memorandum on the Objects of the Higher Education Bill* prepared by the Department of Higher Education and Training; and

**Opinion**

1. The Bill is the result of a comprehensive review of the Higher Education Act, 101 of 1997 (“the Act”), that began in 2013. A Ministerial Task Team comprising “key stakeholders of the higher education sector” was established to assist with the review. It concluded its work in October 2014. A range of public and private higher education stakeholders provided submissions to the Department of Higher education and Training (“DHET”) for its consideration during the review process. The most important stakeholder, *Higher Education South Africa* (“HESA”) (now called “Universities of South Africa”), made a submission in March 2014; DHET met with HESA in August 2014 and HESA made a second submission in October 2014. It is therefore fair to say that the Bill has been widely consulted and that there was extensive opportunity for submissions and discussions. Public hearings on the Bill are set to take place in February 2016.
2. The proposed amendments to the Higher Education Act incorporated in the Bill are many and various. They are of a substantive and a formal nature. Many, in fact most, of the proposed amendments are necessary for the more effective functioning of the higher education sector. I have concentrated my comments below on those proposed amendments which could have a direct bearing on the conditions of service of members of a trade union such as SAPTU. My comments are divided into three sections:
3. Transformation goals and oversight mechanisms.
4. Ministerial directives and the appointment of an independent assessor and administrator.
5. Increased administrative burden on public higher education institutions.
6. Transformation goals and oversight mechanisms
   1. The Bill proposes to extend the Minister’s existing powers (contained in section 3 of the Act) to determine higher education policy, “in the interests of the higher education system as a whole”, to “determine transformation goals for the higher education system and institute appropriate oversight mechanisms”. This would be contained in a new section 3(3)(b).
   2. This is the only section that deals with “transformation goals” and “appropriate oversight mechanisms”. The assumption is that the “transformation goals” and the “appropriate oversight mechanisms” will be contained in regulations the Minister is empowered to make in respect of higher education policy (section 69(d) of the Act).
   3. No definitions are provided of the terms “transformation”, “transformation goals”, “appropriate” and “oversight mechanisms”. Given the definitional vagueness attached to the term “transformation” and the strong passions and emotions evoked by the wide range of meanings attached to the term in popular discourse, one would have expected the term to be given some content in the Act. The same comment applies to the term “oversight mechanisms”. No legal precision attaches to the term “oversight”. The Act is silent on who engages in the oversight role (in other words, who applies the “mechanisms” to the institution and under what circumstances); what powers those engaged in oversight of a particular institution have; and what powers the Minister has upon receipt of an adverse “oversight” report flowing from the application of “appropriate mechanisms” to determine that transformation goals have not been met. In the absence of more detail the conclusion is inevitable that the “appropriateness” of the oversight mechanisms is determined by the Minister alone.
   4. Given the potential intrusiveness that can result from the imposition of transformation goals and the implementation of appropriate oversight mechanisms into the institutional autonomy and academic freedom of higher education institutions, the dearth of detail is cause for real concern. “Transformation goals” can refer to such matters as employment equity targets, the racial and ethnic composition of an institution’s student body (as a whole or with reference to a faculty/college/school/department/campus), race-based pass, throughput and graduation rates and targets, and race-based profiling of institutional or national research output. It can also refer to a range of other non-race-based transformative aims. All of these directly impact on institutional autonomy and academic freedom.
   5. Undoubtedly the Minister has the right and the responsibility to determine policy “in the interest of the higher education system as a whole” (s 3(3)). Clearly, too, as stated in the Preamble to the Act, it is desirable for higher education institutions to enjoy their acknowledged freedom and autonomy in their relationship with the State within the context of public accountability. It is proper, therefore, for a Minister to determine policy that holds higher education institutions to public account and that is in the interest of the higher education sector as a whole. The determination of transformation goals and the institution of appropriate oversight mechanisms, however, can in many respects go to the heart of the academic enterprise and impact severely on institutional autonomy and academic freedom. It must and will raise serious questions about the justifiability, in the interest of public accountability and the higher education sector as a whole, of such potentially severe intrusions upon the acknowledged freedom and autonomy institutions should enjoy in their relationship with the State. As such, to relegate the scope, nature, impact and execution of transformation goals and oversight mechanisms to the subordinate status of regulations cannot be acceptable. Nor can it be acceptable that the important consequences that attach to a determination, by the Minister, that transformation goals have not been met by a particular institution, are relegated to subordinate legislation.
   6. Certain proposals may meet the serious objections highlighted above:
7. The proposed insertion of the new section 3(3)(b) can be withdrawn. The Minister’s power to make policy already exists in section 3(1) and, as the setting of transformation goals is a policy matter, surely there is no need to make specific reference to this in the Act.
8. Given the importance attached to transformation in society and in the higher education sector, far more legislative clarity and detail needs to be provided in the Act itself on the transformation goals and the oversight mechanisms.
9. In light of the potentially intrusive nature of transformation goals and appropriate oversight mechanisms on institutional autonomy and academic freedom, it is essential that transformation goals should be determined by the Minister *in consultation with* university councils and/or university management and that appropriate oversight mechanisms should be determined by the Minister *with the concurrence of* university councils.

1. Ministerial directives and the appointment of an independent assessor or administrator
   1. The power granted in the Act to the Minister to appoint an independent assessor or an administrator in certain circumstances cannot be disputed. Higher education institutions are organs of state as defined in article 239 of the Constitution and as such are state-funded and fulfil public responsibilities. They must be held to public account and the power of the Minister to appoint an independent assessor or an administrator is perfectly acceptable. The grounds, though, on which such appointments can be made, as proposed in the Bill, can be questioned.
   2. The proposed new section 42 provides that the Minister may issue a directive to the council of a public higher education institution if she/he has reasonable grounds to believe that the institution is deficient in respect of any of six grounds listed in section 42(1) and which, in her/his view, negatively impact on the institution and/or higher education in an open and democratic society (see section 42(2)(b)). The Minister can only do so if she/he has notified the institution, with reasons, of the intention to issue a directive; has given the council reasonable opportunity to make representations; and has considered the representations (section 42(3)). The directive states the nature and extent of the deficiency, the steps which the Minister expects the council to take to remedy the deficiency and the reasonable period within which the steps need to be taken. If the Minister “has reasonable grounds to believe” (section 42(4)) that the council failed to comply with the directive, she/he can appoint an independent assessor or an administrator.
   3. The section contains a number of references to reasonableness: “reasonable grounds to believe” (2X); “reasonable period”; “reasonable opportunity”. It also provides for adequate prior consultation with the council concerned and opportunities for engagement with the council by the Minister. As such, the demands for compliance with administrative justice and fairness seem to have been met in respect of a Ministerial intrusion as serious as a directive followed by the appointment of an independent assessor or administrator.
   4. Five of the six grounds enumerated in section 42(1) for issuing a directive should not be contentious. One of the grounds, though, should be cause for serious concern. This is namely if the Minister has reasonable grounds to believe that the council or management of the institution “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” (section 42(1)(c)). This should be read with section 42(2)(b) which provides that the Minister, in the directive, must state why such actions have a negative impact on the institution or on higher education “in an open and democratic society”. It should also be read with the proposed new section 45(d) in terms of which the appointment of an independent assessor must be “in the best interest of the public higher education institution concerned”.
   5. The ground discussed in 4.4 above provides ample opportunity for the intrusion of political ideology into the decision-making process. To be sure, the “unfairness” or “discriminatory nature” or “wrongfulness” of the action must be measured against a duty imposed by law. This does not provide sufficient defence against politically-motivated intrusion by a Minister. What counts, in law, as “unfair” or “discriminatory” is still very much an open question in law (“wrongfulness” on the other hand has far more legal precision). This is so particularly if the nature of the unfairness or discrimination is measured against the “negative impact … in an open and democratic society”. The “openness” of a society and its “democratic” nature fundamentally determined within the context of the contested political ideology of a governing party. Conceivably, it allows the Minister to declare a particular institution’s policies unfair or discriminatory if it denies access to a person on the grounds of its language policy, its academic exclusions policy or its financial exclusions policy. There is much room here for political manoeuvring against an institution, based on perceptions of unfairness or discrimination within the context of an open and democratic society.
   6. A proposal to meet the objection raised in 4.5 is to delete the terms “unfair” and “discriminatory”. Since, in law, wrongful conduct would include unfair or discriminatory conduct, a simple reference to wrongful conduct will encompass actions that are deemed unfair or discriminatory and, importantly, it will demand from the Minister that her/his powers be exercised within the context of established law and that the manner in which those powers were exercised can be tested in an independent legal forum against established legal principles.
   7. It needs to be pointed out that the existing section 44 provides that an independent assessor must be “independent in relation to the public higher education institution concerned”. This is acceptable, but no guarantee of independence from party political persuasion of the individual appointed by the Minister to exercise wide-ranging powers in an institution is provided.
2. Increased administrative burden on higher education institutions
   1. The Bill proposes a number of new measures that will substantially increase the administrative burden on higher education institutions. These are the following:
3. Until now a council was obliged to furnish the Minister with such information as she/he required in respect of the preceding year. In terms of section 41(2) the Minister’s right to ask for information is no longer limited to information from the preceding year. It can therefore include current information and also information prior to the preceding year. The increased reporting burden on institutions, particularly if such a ministerial request is not based on advanced planning, is obvious.
4. In terms of a proposed new section 34(4)(a) all employees of public higher education institutions must declare “any business, commercial or financial activities undertaken for financial or other gain” that may lead to a conflict of interest with the institution concerned. Such activities must be declared when the employee assumes office, annually thereafter and whenever a new, undisclosed interest arises. The very onerous burden this places on an institution’s administration, to get the information on an annual basis and to determine the accuracy or completeness of the information in respect of each of the thousands of employees at any one institution can be readily imagined.
5. A proposed new section 34(6) enjoins an employee not to contract on behalf of the institution with him- or herself or her or his “relative”. No definition of a relative is provided and again the burden on the institution to determine whether a contractual arrangement exists with a “relative” of an employee is onerous.

5.2 One acknowledges the need to regulate against corruption and the promotion of individual self-interest in the context of employment within an organ of state, but placing such onerous administrative obligations on an institution seems unnecessary. Self-regulation in this sphere by individual councils is a much better approach to adopt.

**Professor Derek van der Merwe**

**Emeritus Professor of Law, University of Johannesburg**

**Independent consultant**

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