



## **SUBMISSION TO THE PORTFOLIO COMMITTEE ON HIGHER EDUCATION AND TRAINING ON THE HIGHER EDUCATION AMENDMENT BILL, 2015**

### **1. INTRODUCTION**

- 1.1 On 28 January 2016, the Secretary to the Portfolio Committee on Higher Education and Training of the Parliament of the Republic of South Africa, issued an invitation to higher education and training stakeholders to make written submissions on the Higher Education Amendment Bill, 2015 (hereinafter simply referred to as 'the Bill'). This is in preparation for public hearings on the Bill, which are scheduled to take place from 16 to 19 February 2016.
- 1.2 The Bill seeks to amend the Higher Education Act 101 of 1997, as amended, (hereinafter simply referred to as 'the Act').
- 1.3 The Council on Higher Education (CHE) is a statutory body established under the provisions of the Act to, *inter alia*, advise the Minister of Higher Education and Training on matters relating to higher education; and to perform quality assurance and promotion functions for the higher education sector.
- 1.4 The CHE, therefore, has legitimate interest in the amendments to the Act under whose provisions it was created, and which govern its functions. In this light, the CHE is clearly an 'interested and/or affected party' (I&AP) in the amendments, and it is in this context that it makes this submission to the Portfolio Committee.
- 1.5 It is the CHE's hope that the Portfolio Committee will seriously consider its submission, and engage it as necessary.

### **2. OVERVIEW OF THE AMENDMENTS**

- 2.1 The CHE has noted that the main object of the amendments is, aptly, to ensure that the Act is aligned to, and consistent with, the administrative law provisions of the Constitution of the Republic of South Africa; the Promotion of Access to Information Act 2 of 2000 (PAIA); the Promotion of Administrative Justice Act 3 of 2000 (PAJA); and other administrative law norms and judicial decisions relating to administrative actions.
- 2.2 The CHE has similarly noted that the amendments seek to rectify inconsistencies and contradictions within the Act, and fill gaps which have been identified in the provisions

of the Act. It is further noted that some of the amendments are intended to address, illuminate and clarify some matters pertaining to institutional autonomy, public accountability and cooperative governance arising from the Higher Education Laws Amendment Act 21 of 2011, and the Higher Education and Training Laws Amendment Act 23 of 2012, which have been matters of contention in the sector since they came into effect.

2.3 A significant amendment is the repeal of Section 70 of the Act, which is replaced by the new Section 2. The new Section 2 captures the current legal position and explicitly informs the reader that the supremacy of the Act over any other law dealing with the higher education, other than the Constitution, is in fact restricted by Section 34 of the National Qualifications Framework Act with regard to the matters legislated therein.

2.4 Other noteworthy amendments include:

- Insertion of new definitions;
- Provision for the determination of transformation goals for the public higher education system and oversight mechanisms;
- Provision for the development of articulation and recognition of prior learning frameworks;
- Provision for the conversion of public higher education institutions;
- Provision for the issuing of Ministerial directives;
- Provision for the indemnification of an independent assessor;
- Provision for the indemnification and termination of the term of office of an administrator;
- Provision for the different categories of registration of private higher education institutions and associated rights;
- Provision for the withdrawal and revocation of qualifications by public higher education institutions; and
- Provision for transitional arrangements and for matters connected there-to.

### **3. AMENDMENTS THAT THE CHE WELCOMES**

3.1 The CHE notes the intention and spirit of the provision for the Minister to determine the transformation goals for the higher education system and institute oversight mechanisms thereon. In doing so, the CHE recalls that the Education White Paper 3<sup>1</sup> identified transformation as a central priority in 1997, and it therefore featured pervasively in the policy document. The general sentiment is that nineteen years later, the progress made at some institutions requires sustained monitoring of the agreed goals set for transformation. It has become clear that left to their own devices, higher education institutions may not accord this key goal the urgency it deserves and the sustained attention necessary to measure progress.

On the other hand, continued perceptions of the lack of transformation perpetuate the sense of disquiet across the system, which has often manifested itself in disruptive

---

<sup>1</sup> Department of Education (1997) *Education White Paper 3: A Programme for the Transformation of Higher Education*, Department of Education: Pretoria

student protests and restive staff. The CHE is of the view that an oversight mechanism of the nature intended will ensure that the matter receives adequate attention and rises above the radar in terms of accountability and measurable progress while mitigating the effects of volatility and upheaval instigated from time to time by vocal and militant constituencies which perceive progress to be too slow. It is therefore critical that the methodology that will be adopted for exercising the oversight should be consistent and transparent to all the parties.

- 3.2 The CHE also supports the amendments and subsequent clarification of various constructs such as 'Ministerial directive', 'independent assessor' and 'administrator'. The CHE is of the view that these amendments serve to strengthen the accountability of institutions in terms of good governance, without interfering with the autonomy and academic freedom of institutions of higher learning. It has become imperative for speedy intervention in dysfunctional institutions or those in protracted crisis so that remedial action can be taken timeously, and long before irreparable damage is done to an institution and the value of its qualifications.

The interventions that the amendments prescribe are in our estimation, within the governance sphere, and enable intervention where this is warranted, to protect the public interest, that of students, staff and alumni. We do not read in them an intention to dilute the academic freedom and independence in teaching and research functions, which we believe are central to what universities stand for and value most. It is indisputable that poor governance and weak accountability are responsible for most of the paralysis that has been witnessed in some parts of the system over the last two decades. This situation is untenable and requires effective mechanisms to intervene to avert disastrous situations in public institutions. The CHE believes that interventions aimed at tackling the challenges of poor governance, slow pace of transformation and weak accountability measures are necessary steps towards revitalising higher education, assuring quality, and optimising value for the public that foots the enormous bill for higher education.

- 3.3 The CHE supports the provision for those private higher education institutions that fulfil all the necessary requirements, to register and operate as universities or university colleges. The CHE is of the view that this is a step in the right direction in the interest of creating a diverse, high quality, and integrated higher education system. It will also dispel the perception that qualifications obtained from private higher education institutions are of lower stature and value, because these institutions are not universities. We are of the view that a place exists for private higher education in an expanding and increasingly diverse higher education system offering students a variety of choice in a spectrum of modalities of delivery, and responding to changing student needs in the digital age and the 21<sup>st</sup> century world of work. Increased collaborations and competition in the sector may have positive effects in better quality of provision.

- 3.4 The CHE further welcomes the inclusion of provisions for the withdrawal and revocation of degrees, diplomas, certificates and other qualifications that public institutions may award erroneously or fraudulently. It believes that this will contribute significantly to the efforts aimed at eliminating casualness, lack of due diligence, fraud and other malpractices in the issuing of qualification certificates. These provisions will also strongly de-incentivise the misrepresentation of qualifications, while enhancing the integrity of

the Higher Education Qualifications Sub-Framework (HEQSF) and, by extension, the National Qualification Framework (NQF).

- 3.5 The CHE appreciates the amendment relating to the procedures that independent assessors have to follow in conducting investigations. The stipulation that such investigations shall be undertaken with due regard to PAJA, substantive fairness and specific circumstances of each case, is vitally important in a democratic country that upholds the rule of law. The rights of those being investigated are protected and respected, and grounds for *mala fide* intent are minimised.

#### 4. CONCERNS

- 4.1 The new Section 2 of the Act depicts the current legal position with regard to the supremacy of the Act *vis a vis* the provisions of Section 34 of the National Qualifications Act and therefore the matters legislated in the said Section. This may have implications for the identity and the mandate of the CHE, as well as on the impact of its work on the national higher education system. According to the NQF Act, the CHE is a Quality Council for higher education. However, the Higher Education Act that is currently in force establishes the CHE as a body to advise the Minister on matters pertaining to higher education. It therefore functions as an advisory body with quality assurance and promotion functions. It does not function merely as a Quality Council, as it would if it operated only in terms of the provisions of the NQF Act. By making certain provisions of the NQF Act superior to the Higher Education Act may have a dilatory effect on the independent advisory and monitoring functions of the CHE.
- 4.2 It is common cause in the sector that the NQF Act is going to be amended in the next two years. It is not clear at this stage what the main areas of amendments might be. However, the mere fact that the Higher Education Act will be subordinate to certain provisions of the NQF Act, which is due to undergo changes in the near future, creates uncertainty. The uncertainty has the effect of unnecessary anxiety and a sense of lack of direction in the sector. In this regard, the CHE recalls that, at the Higher Education Transformation Summit in 2015, the majority of stakeholders expressed disquiet about this apparent uncoordinated and piecemeal amendments of the different pieces of legislation that have some bearing on different aspects of higher education. The stakeholders articulated the need for a complete overhaul of these pieces of legislation, with a view towards enacting a single and coherent 'super' piece of legislation that will govern all facets (finance, governance, health, teaching and learning, residences, etc.) of higher education. The CHE understands that the goal of such a single Act is a long-term one.
- 4.3 Section 13(1)(h)(iii) of the NQF Act 27 of 2008 confers on SAQA the responsibility to develop policies and criteria for assessment, recognition of prior learning, and credit accumulation and transfer, which form the basis for articulation. One of the amendments reflected in the Bill is that the Minister is now given the responsibility to develop articulation and recognition of prior learning (RPL) frameworks for the post-school education and training system. The CHE submits that this contradicts Section 13(1)(h)(iii) of the NQF Act as stated. Furthermore, the CHE believes that in carrying out this responsibility the Minister may inadvertently sow confusion, instead of bringing

about clarity, in the system. Last year's publication of a draft RPL policy by the Department of Higher Education and Training for comment, signalled the kind of confusion that may arise among stakeholders, who justifiably questioned the relationship between the Department's policy and one developed and published by SAQA in 2014. They also questioned how the RPL policies developed by the Quality Councils as per the directive of the Minister, fit in the bigger scheme of things. The CHE submits that the responsibility to develop policies and frameworks on RPL and articulation should be left in the domain of SAQA, and that, if there are some concerns about how SAQA is discharging its responsibilities in this regard, efforts should be focused on empowering SAQA to find solutions to address them. Duplicating this responsibility in the way the amendment suggests, is not a positive step to take in our view, and fragments or dilutes efforts.

4.4 The Act recognises the Senate as the highest decision making body on the core functions (academic and research functions) of a public university. While the CHE welcomes the amendments that will allow private higher education institutions to register as universities, provided they meet the necessary requirements, it is concerned that the amendments do not stipulate that the private universities would also be required to have Senates, as the highest decision making structures on academic and research matters. The CHE believes this is an oversight that needs to be rectified. Granted that private higher education institutions are essentially private firms governed by the Companies Act 71 of 2008 (as amended) and Kings III Code of Corporate Governance, the CHE, however, is of the view that the scope of these two governance frameworks is limited to the functions that are similar to those of councils in public universities. A void exists with respect to a structure that would be vested with the highest authority on academic and research matters. The CHE submits that it is important to also stipulate that private higher education institutions that would be registered as universities would be required to have Senates or equivalent structures, and arrangements which are clearly stipulated for a private provider to be accorded the status of university or university college. The composition of senates in terms of categories to be represented should mirror those of public universities, although the membership may not be as large as senates at public institutions. The importance of such structures cannot be overemphasised if the contemplated private universities are expected to produce good graduates and quality research outputs, and not be motivated primarily by the profit motive.

4.5 It is already stated under 3.4 above that, the CHE welcomes the inclusion, in the amendments, of provisions for the withdrawal and revocation of degree, diploma, certificate and other qualifications that public institutions may award erroneously or fraudulently. However it has two concerns in this regard, as follows:

(a) The amendment effectively states that public universities have the obligation to withdrawal or revoke degrees, diplomas, certificates and other qualifications that they may award erroneously or fraudulently. However, this obligation is not extended to private higher education institutions. The CHE is of the view that private higher education institutions should also be obliged to withdraw or revoke qualifications that they may award erroneously or fraudulently.

(b) The CHE believes that the stipulation that the withdrawal or revocation of qualifications may only be carried out within a period not exceeding two years

after conferment of a qualification could be problematic because the processes leading to the confirmation that a qualification might, indeed, have been awarded erroneously or fraudulently, can take more than two years from the date of conferment of the qualification. Thus, it is the view of the CHE that the unintended consequence of the two year time limit, would be that some qualifications awarded erroneously or fraudulently, are going to be 'condoned' for the simple reason that they did not come to light within the allowed window of two years.

The draft policy on misrepresented qualifications, which SAQA and the Quality Councils are developing on the directive of the Minister, advocates total zero tolerance of individuals holding and using qualifications that are awarded erroneously or fraudulently. It is the view of the CHE that the two year time limit does not render full support to the total zero tolerance advocated by the draft policy. The CHE therefore urges a re-think on the two year time limit on this matter, for pragmatic reasons. Cases of plagiarism for example, take some time to finalise especially when they involve legal defences.

- 4.6 The CHE notes that Section 65D(1) has not been amended, and thus the acronym HEQF has not been substituted by HEQSF, as it should. The HEQSF replaced the HEQF in 2013, and the Act and the Bill should no longer refer to HEQF, but rather to the HEQSF.
- 4.7 The Act and the Bill centre on higher education. The 2013 White Paper<sup>2</sup>, on the other hand, is all encompassing of the post school education and training system, which is considerably broader than higher education. The two therefore need not be conflated. The CHE has noted that the focus, in the last insertion in the amendments to Section 3 of the Act, is on post school education and training system. The CHE believes that the focus should remain higher education in the absence of any other compelling justification.
- 4.8 The amendments in the 'Private Higher Education Institutions' chapter of the Act would, no doubt, necessitate concomitant amendments to the regulations for the registration of private higher education institutions. Ironically, the Department of Higher Education and Training is currently finalising a process that it started in 2014, to amend the regulations.

## 5. CONCLUSION

- 5.1 The CHE, a statutory body established under the provisions of the Act, has a legitimate interest in the amendments to the Act. It is an 'interested and/or affected party' (I&AP) in the amendments, and it is in this context that it makes this submission to the Portfolio Committee.

---

<sup>2</sup> Department of Higher Education and Training (2013) *White Paper for Post-School Education and Training: Building an Expanded, Effective and Integrated Post-School System*. DHET: Pretoria

- 5.2 The CHE agrees with the main objects of the Bill, and welcomes a number of the specific amendments that have been effected. These are discussed above in 3.1 to 3.5.
- 5.3 The CHE, however, also has concerns with some of the amendments. These concerns are presented above, in 4.1 to 4.9.
- 5.4 The CHE's hope is that the Portfolio Committee will consider its submission seriously, and engage with it, where necessary.

*Prof Narend Baijnath*

*Chief Executive Officer*

*0836793107*

*Baijnath.n@che.ac.za*

*12 February 2016*