The Independent Institute of Education – submission on HE Act Amendment Bill

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Introduction

The Independent Institute of Education (Pty) Ltd is a registered private provider of Higher Education under the Higher Education Act. This submission focuses on those provisions that will impact on the private higher education while noting with caution that many of the other amendments extend the power of the Minister in particular in relation to public higher education institutions and while some of these are welcomed there are several that could have significant impact on institutional autonomy. We are of the opinion that public higher education institutions in general and specifically are in a better position to make submissions on these amendments.

This submission concludes with a reference to the November 2014 call for submissions in relation to the proposed Amendments to the Regulations for the Registration of Private Providers – a key theme in that submission was that it was not possible to comment on the proposed amendments without access to the proposed amendments to the Act. Having now seen the proposed amendments to the Act is clear that further amendments to the Regulations will be required and that the Act has not in fact dealt with all the areas required as per the submissions on the Regulations. The submission seeks to detail these concerns.

The left column of the table below points to the amendment proposed including the text for ease of reference while the right column contains our commentary.

Submission on proposed amendments

Amendment	**Submission of The IIE**
Clause 1: Amendment to Section 1 (h) as per page 3, line 25 – new definition of higher education includes reference to a part qualification. *by the substitution for the definition of ''higher education'' of the following definition:* *'' **'higher education'** means all learning programmes which must be registered in accordance with the provisions of the National Qualifications Framework Act, 2008 (Act No. 67 of 2008), as a qualification or part-qualification on the HEQSF, regardless of whether such programmes are in fact registered or not on the sub-framework;'';*	There is no provision in the HEQSF for part qualifications and therefore this part of the amendment cannot be implemented. This amendment extends the definition of higher education to programmes not registered on the HEQSF within the ambit of the statement that all programmes that must (should?) be registered are covered whether or not they are registered. What it does not indicate is a connection to the provision that any qualification as contemplated in the sub framework MUST be registered but this is covered later. However, the concern remains that the reference to part qualification does not make sense in the context as the sub framework under discussion does not provide for part qualifications and in turn the term is not defined.

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Clause 1: Amendment to Section 1 (i) as per page 3, line 30 – definition of a higher education college ***'higher education college'*** *means an institution providing higher education, but with a limited scope and range of operations, and which meets the criteria for recognition as a higher education college as prescribed by the Minister in accordance with sections 3(3)(a) and 20(5)(b), and established, deemed to be established, converted, or declared as a higher education college under this Act;'';* And Chapter 1 (u) (page 4, line 30) definition of a university college *(u)* by the insertion after the definition of *''university'' of the following definition:* *'' **'university college'** means an institution providing higher education, but with a limited scope and range of operations and which meets the criteria for recognition as a university college as prescribed by the Minister in accordance with sections 3(3)(a) and 20(5)(b) and established, deemed to be established, converted or declared as a university college under this Act.''.*	The inclusion of an institutional types of an HE college and a university college are welcomed on the understanding that the criteria will be published in reasonable time and are attainable for institutions of limited scope in terms of qualification levels and range of disciplines taught.
Clause 1: Amendment to Section 1 (o) as per page 3, line 60 – definition of provide private higher education ***provide higher education'*** *means the performing of any or all of the following functions—* *(a) registering of students for higher education;* *(b) taking responsibility for the provision and delivery of a higher education curriculum;* *(c) assessing a student's performance in a higher education programme; and* *(d) conferring a higher education qualification*	In terms of the Government Gazette of 7 July 2014 (5.4.1) the decentralised support centres of UNISA and NWU should continue to be used and similar centres established and co-operation (5.4.2) between institutions in establishing, staffing, equipping and running such centres is required. In fact, such shared learning and support centres are considered by section 5 of the Distance Education policy as being one of only five issues of strategic importance. The amendments to the Act in no way provide for actualising this policy intention and can in fact be taken to suggest that such co-operation should not happen. It is strongly recommended that the following be defined in the Act and provision then be made for how these are to be regulated and quality assured: a) Support centres b) Shared support centres
Clause 3: Amendment of Section 3 (page 4, line 53) related to the scope and range of operations	The term "scope and range of operations" is used here and again in the definition of institution type yet the terms themselves (that is "scope" and "range of operations") are not

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*''(3) The Minister may, in terms of the policy contemplated in subsection (1) and in the interest of the higher education system as a whole**[,]**—* *(a) determine the scope and range of operations of—* ***[(a)]** (i) public higher education institutions;* ***[(b)]** (ii) private higher education institutions; and* ***[(c)]**(iii) individual public or private higher education institutions;*	defined and it is therefore not possible to determine what the Minister is going to be able to determine particularly in relation to private institutions where the least generous interpretation of this would suggest the possibility of limiting of qualification types or campus locations or areas of study.
Clause 5: Amendment of Section 20 by the insertion of provisions after subsection 1 on page 5, line 20ff *''(2) The Minister may, after consultation with the CHE and with the concurrence of the governance body of a private education institution, by notice in the Gazette and from money appropriated for this purpose by Parliament, declare an institution, or subdivision of an institution to be a public university, public university college or public higher education college.'';*	This provision is welcomed in the long term interest of the development and growth and integration of the two dimensions of the higher education sector while continuing to support the diversity of general provision in the sector.
Clause 30: Amendment Section 50 (page 20, line 36) clarifying the role of the Registrar ***30.** Section 50 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:* *''(1) The Director-General is—* *(a) the registrar for; and* *(b) responsible for registering, private higher education institutions in terms of section 53 as contemplated in section 29 of the Constitution.''.*	The simplification of this section is welcomed.
Clause 31: Amendment to Section 51 as per page 20, line 43 related to the authority to provide higher education ***31.** Section 51 of the principal Act is hereby amended—* *(a) by the substitution for the heading of the following heading:* *''**Authority to provide private higher education**'';* *(b) by the substitution for subsection (1) of the following subsection:* *''(1) No person **[other than a public higher education institution or an organ of state]** may perform one or more of the functions to provide*	While the intention is clearly to link the heading better with the authority below the heading and content are still not connected – the content refers to authority to provide any of the functions of higher education as defined and not only private higher education as per the heading. The amendment also does not as already stated provide any direction for any functions not listed and does not deal in any manner with the support centres that the Distance Education Policy in fact requires.

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higher education unless that person is— *(a)* ***[in the prescribed manner, registered or conditionally registered as a private higher education institution in terms of this Act; and]*** *an organ of state with the statutory responsibility to provide higher education;* *(b)* ***[registered or recognised as a juristic person in terms of the Companies Act, 1973 (Act 61 of 1973), before such person is*** **registered or conditionally registered in** ***accordance with paragraph (a)]*** *a public higher education institution merged, established or deemed to be established as a higher education institution under this Act;* *(c) declared as a public higher education institution under this Act; or* *(d) registered or provisionally registered as a private higher education institution under this Act.'';*	
Clause 31: Amendment to Section 51 as recorded on page 21, line 8 related to the deletion of the provisions related to foreign juristic persons and the registration of qualifications (but not entities) *(c) by the deletion of subsection (2).*	The clarity provided in this amendment is acknowledged. This has serious implications for the amendments to the Regulations which do not perhaps deal in sufficient detail with the requirements for registration of a juristic person. It should also be noted that the restriction to functions as per the new definition of provision means that the advertising of distance provision by a foreign juristic person with or without writing of examinations within SA remains unregulated. This is considered sensible.
Clause 32: Amendment to Section 53 as recorded on page 21, line 11 to 20 ***32.*** *Section 53 of the principal Act is hereby amended—* *(a) by the substitution for the heading of the following heading:* *''****Requirements for registration of private higher education institutions****'';* *and* *(b) by the substitution in subsection (1) for paragraph (b) of the following paragraph:* *''(b) is able to provide higher education that will—*	The requirement in terms of b (ii) are clear whereas the requirements in terms of b (i) remain unclear as it is not stipulated what is meant by standards and what areas of scope and range (also not defined) are to be compared or how it is to be determined whether these undefined standards are in fact being met. The latitude for subjective interpretation that remains in this paragraph is noted with regret.

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(i) maintain acceptable standards that are not inferior to standards at a comparable public higher education institution; and *(ii) comply with the requirements of the CHE.''.*	
Clause 33: Amendment to Section 54 as recorded on page 21 line 24 ***33.*** *Section 54 of the principal Act is hereby amended—* *(a) by the substitution for subsection (7) of the following subsection:* *''(7) No independent school as defined in the South African Schools Act, 1996 (Act No. 84 of 1996), and no other private education institution may call itself a university, university college or higher education college, or use such wording in its name, unless it is registered—* *(a) in terms of Chapter 7; and* *(b) in the particular category of institutions which, in accordance with the Regulations, may call themselves universities, university colleges or higher education institutions, as the case may be*	The Principal Act (Section 54 (7)) has similar provisions using the old nomenclature which has been in place for 16 years and yet in that period the regulations which may have made it possible for a private higher education institution to include any of those terms has never been published. It would follow that there are similar concerns that a further 16 years may pass before the Regulations to give effect to this amendment are written. Thus while the amendment is undoubtedly positive it will have no impact without the regulations and without the scope and range of operations issue already addressed being dealt with.
Clause 33: Further amendment to section 54 as provided for on page 21 line 35 (b) by the addition of the following subsection: ''(8) Only a private higher education institution registered as a university or university college in accordance with subsection (7)(b) may confer a professorship or an honorary degree, or use the title of chancellor and vice-chancellor for its titular head and its principal, respectively.''	This clarity is appreciated subject to the caveat above.
Clause 34: Amendment of Section 57 as recorded on page 21, line 41 *34. Section 57 of the principal Act is hereby amended by the substitution in paragraph (b) of subsection (1) for the words preceding subparagraph (i) of the following words:* *''(b) prepare financial statements within [three] six months of the end of the financial year, including at least—''***.**	This amendment is noted with appreciation – the impact on the submission date for annual reports will need to be clarified.
Clause 35: Insertion of Section 65 AB as recorded on page 21, line 47 *''**Change of type and scope of higher education institution*** ***65AB.*** *(1) The Minister may after consultation with the CHE and at the request of the council*	This amendment refers to higher education institutions (taken to mean both private and public) initially and then goes on to refer to public higher education institutions only – this would suggest that the Minister may not amend the scope and type of private higher

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of the institution concerned, by notice in the Gazette, change the type of a higher education institution concerned or amend or remove any restrictions on the scope and operations of a public higher education institution contemplated in sections 3(3) and 20(5)(b).	education institutions. Scope is used again without definition. Type is taken to mean university or university college or higher education college.
Clause 36: Insertion of Section 65BA as recorded on page 22 from line 5 which provides for revoking of qualifications by public higher education institutions **36.** *The following section is hereby inserted in the principal Act after section 65B:* *''**Withdrawal and revocation of degree, diploma, certificate or other qualification*** ***65BA.** (1) Subject to the provisions of subsection (2), the council of a public higher education institution may, in consultation with the senate, withdraw and revoke any degree, diploma, certificate or other qualification that was awarded—* *(a) on the basis of a material error on the part of the public higher education institution concerned: Provided that such withdrawal and revocation may only take place within a period not exceeding two years after the conferment concerned; or* *(b) as a result of a fraudulent or dishonest act in connection with the obtaining of such degree, diploma, certificate or other qualification.* *(2) (a) Prior to the council of a public higher education institution withdrawing and revoking the conferment of a degree, diploma, certificate or other qualification, the council must—* *(i) notify the recipient of the qualification concerned that a revocation and withdrawal is being considered;* *(ii) provide the recipient with relevant information justifying the intended action;* *(iii) provide the recipient with an opportunity to obtain assistance and to present his or her case; and* *(iv) consider the submissions and representations of the recipient.* *(b) In the event that the withdrawal and revocation relates to circumstances*	This provision should be extended to private institutions

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contemplated in subsection (1)(b), the higher education institution must report the matter for criminal investigation as contemplated in section 66(2).''.	

Cross reference to proposed amendments to the Regulations

The *italics* additions to this submission below (which is the one that was made in 2014 in relation to the proposed amendments to the Regulations) are our commentary on whether or not the proposed amendments to the HE Act itself resolve the issues listed in relation to the Regulations or not.

P5, definition g – new definition of a programme	This definition of a programme, which does not appear in import and meaning to be different from the original, still limits the definition of a programme to the context of a qualification. From this we are inferring that the regulations do not intend to and indeed have not, dealt in any way with short learning programmes – sets of learning experiences that are not qualifications, do not qualify to be qualifications (as they do not meet the requirements) and do not lead to qualifications. *The proposed amendments to the Act however refers to learning programmes (not programmes) and also to part qualifications. Neither give any attention to short learning programmes*
P6, definition I – amendment to definition of site	The term "tuition" has been inserted which would indicate that it has some specific and important meaning for the Department but no definition is provided. It is therefore unclear what the impact of this addition is. *The act does not define any of these terms including tuition*
P9, Insertion of regulation 6 – provision of SAQA report by applicant	It is not clear whether the SAQA report needs to be provided prior to registration as if this is the case then the impact could be severe as SAQA and the CHE and DHET do not coordinate their timelines and receipt of a report from SAQA can be significantly delayed as a result. It is assumed that as the regulation refers to applicants it is intended that the SAQA report be provided prior to the programme or institution being registered by DHET and it must be reiterated that this results in unreasonable administrative delays because SAQA, DHET and CHE in no way coordinate timelines and processes and the report itself from SAQA often comes out several months after a number has been issued which can in turn be several months after an accreditation outcome is communicated.
P9 and P10, substitution of Regulation 9 – amendment to name under which application must be done	The amendment to Regulation 9 does not clarify the position and distinction between an entity's incorporated name in terms of the Companies Act, 2008, and a trading name. Is the intention of this amendment to prevent institutions from trading as a name other than their incorporated name? If so the reason for this needs to be understood and the fact needs to be clarified.

P11, insertion of 15 (2) – amended definition of financial surety	Our comment on this one is parochial and may not apply to others in the sector. To date the surety provided by the Board of AdvTech Ltd which is the holding company for The Independent Institute of Education (copy attached) has been deemed sufficient but we are inferring from the new 15 (2) that this would no longer be the case?
P15, substitution of Regulation 19(3) - reduction of requirements to compliance with Section 63 of Act for cancellations	The proposed amendment to Regulation 19(3) deletes paragraphs (b), (c) and (d) of the existing regulation which require the registrar to publish the intention to cancel by notice with reasons, to consider any representations from the institution or an interested person and to publish the final determination with reasons. Section 63 of the Act does not currently provide for this process. How will the Act and/or the regulations provide for this process if the proposed amendment is effected? *Section 63 of the Act is not identified for amendment and therefore this proposed amendment to the regulations reduces information about the process to be followed and is thus not supported.*
P18, Chapter 6, insertion of 24(i)(iii) insertion of a sub point related to accreditation	This refers to the "loss of any accreditation criteria" – we assume that what is meant is if the institution no longer complies with any of the accreditation criteria for programmes or a programme no longer meets an accreditation criterion?
P18, insertion of 24 (i)(vii) related to joint use of a facility	The reference to joint use is taken to mean consistent or persistent or continuous use and is taken not to mean once-off or occasional use of lecture rooms or examination venues for instance. Please confirm if our understanding is correct.
P19, substitution of 26(1) for 25(1) references to approved programmes	For the avoidance of doubt, programmes as used here is taken to be as defined in the definitions and thus this substitution is taken to exclude short courses as there is no mechanism for their inclusion in registration certificates and as they in fact do not lead to qualifications they fall out of the ambit of the HEQSF.
P20, regulation 27 (new 27 – additions to old 26) – additions to information that needs to be provided with the annual report	The list now includes partnership agreements but partnership is not defined and it would be helpful to understand what is being referred to. Similarly references to policy on health and wellness would benefit from some guidance on what is to be covered in these.
P20, deletion of regulation 28(3) – recreational interest programmes	The implication of this amendment is not clear – we are inferring (and fully support if we are correct) that institutions may no longer advertise programmes that look like qualifications but are not registered qualifications under the guise of them being recreational or of general interest. What is not clear and is related to earlier points is what the meaning of this sort of amendment is for short courses/ short learning programmes that do not result in a qualification? We assume that they are not impacted but would be grateful for clarity.
P20, new regulation 29 (3) – related to offering	As quality councils do not register programmes we are not sure what is meant here. There is no definition of "offer" and therefore no further clarity on the import of this amendment. If this is intended to impact for instance on institutions offering voluntary additional tuition for UNISA

of other programmes	qualifications we do not believe that it provides any clarity in this regard as in these instances the offering of this tuition does not equate to the provision of the programme concerned (as defined in the Act). Again, the impact on short courses is not stated and we are assuming there is none, but would be grateful for clarity and further explanation. *None of the proposed amendments to the Act attend to our concerns here – still no definition of offer and the use of the term programme is again problematic because it is unclear what it is taken to mean.*
P21, insertion of regulation 30 (3) – keeping of records of complaints	This is taken to mean all formal complaints that students have lodged in accordance with the particular institution's procedures. It would be helpful to know how long this information needs to be kept. We are assuming no more than three years.
P22, insertion in to Regulation 29 of the provisions listed under the (new) 31(4) – related to partnerships	As there is no reference to whether or not these are and/or statements each one is currently being read on its own. If that is not the intention it would help to clarify this. In terms of (a) this is taken to mean that there is no need to provide copies of agreements between entities such as professional bodies and the higher education provider even if they related to (b). The meaning of (c) is unclear – if this is an attempt to make explicit that provision cannot be franchised we are fully in support of the amendment but are concerned that as currently structured this is not achieved. Again – if we assume that the definition of provision remains unchanged in the Act then this amendment seems only to clarify that an institution may only provide its own programmes with provision being as currently defined in the Act. If the definition is to be amended it would change the impact of this amendment. The same point applies to (e). If full responsibility is defined in the context of provision as currently defined and does not preclude another institution providing support for a public institution (such as by providing additional tuition) then this amendment is not of concern. If it intends to preclude tuition support arrangements it would be helpful to understand why this amendment is being made. *The proposed amendments to the Act do not clarify any of this – still no definition of partnerships, no attention given to support centres, no definition of an academic service which we would take to include supplementary tuition for example and we do not know why some clauses apply to public higher education only.*