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Honourable September CC, MP
Chairperson: Portfolio Committee on Higher Education
and Training
P.O. Box 15
Cape Town
8000

Dear Chairperson

URGENT NATIONAL QUALIFICATIONS FRAMEWORK AMENDMENT BILL [B20-2018]

INTRODUCTION

1. The Portfolio Committee on Higher Education and Training ("Committee"), is in the process of considering public submissions received during the public hearings in the amendment of the National Qualifications Framework Amendment Bill [B20-2018] ("Bill").

2. In compliance with section 59¹ of the Constitution of the Republic of South Africa, 1996, the Committee on 17 August 2018 called on interested organisations

¹ Public access to and involvement in National Assembly

59. (1) The National Assembly must—
- (a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
 - (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in

and members of the public to submit written comments on the Bill, by no later than 28 August 2018. On 5 September 2018 public hearings were held on the Bill. The Committee has given the Department of Higher Education and Training ("Department"), an opportunity to respond to these submissions.

3. However, in respect of a few of these submissions legal issues have been raised. We have been requested by the Chairperson of the Committee to urgently consider and prepare a legal opinion on the legal issues raised in the submissions. We have perused the submissions² as received from the Secretary to the Committee and we have identified the following legal issues:

- (a) the Bill's legality in light of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013); and
- (b) the Bill's legality in light of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

4. In order to address the above legal questions we have considered the Bill in view of the discussions that took place at the public hearings on 5 September 2018.

5. In dealing with this matter we have considered the following legal prescripts:

- (a) Constitution of the Republic of South Africa, 1996 ("Constitution");
- (b) The National Qualifications Framework Act, 2008 (Act No. 67 of 2008) ("the Act");
- (c) The Bill;
- (d) Protection of Personal Information Act, 2013 (Act No. 4 of 2013) ("POPI Act");
- (e) Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) ("PAJA"); and
- (f) applicable case law.

public, but reasonable measures may be taken—

- (i) to regulate public access, including access of the media, to the Assembly and its committees; and
- (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

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Submissions: SAQA, Universities of South Africa, Council on Higher Education, Umalusi, Independent Institute of Education, ABSA, University of Johannesburg, Chartered Secretaries Southern Africa, COSATU, Davinci, Durban University of Technology, FISHSA, Institute of Directors Southern Africa, Quality Council for Trades and Occupations, Financial Planning Institute of Southern Africa and A Barnard.

BACKGROUND

6. The Bill seeks to amend the National Qualifications Framework Act, 2008 ("the Act"), in order to strengthen the Act by rectifying inconsistencies and closing gaps currently in the Act.³ In the main the Bill seeks to amend the Act in order to provide for:

- (a) The verification of all qualifications or part-qualifications referred to the South African Qualifications Authority ("SAQA"), in terms of section 32A;
- (b) maintenance of a separate register for professional designations;
- (c) the establishment and maintenance of separate registers for misrepresented and fraudulent qualifications or part-qualifications;
- (d) the verification of foreign qualifications, if appropriate, the issuance of a SAQA Certificate of Evaluation and the formulation and publication of criteria to be used for the evaluation of a foreign qualification;
- (e) an open list of characteristics to be considered by SAQA in the verification and evaluation of qualifications and part-qualifications;
- (f) the referral of qualifications and part-qualifications to SAQA for verification and evaluation; and
- (g) the creation of offences and penalties in respect of fraudulent qualifications.

DISCUSSION

7. The legal issues as raised in the public submissions will be discussed hereunder:

Legality of Bill in light of POPI Act and PAJA

Ad Clauses 4 and 7

8. In this instance the main issue relates to whether the Bill is consistent with the provisions of the POPI Act and PAJA.

9. Clause 4 of the Bill seeks to amend section 13 of the Act which deals with the functions of SAQA by inserting additional functions of SAQA. In this regard, the

³ Paragraph 1 objects memo.

Chairperson's attention is drawn specifically to clause 4(a) which requires SAQA to verify all qualifications or part-qualifications referred to it in terms of section 32A (clause 7) and make a decision thereon.

10. Clause 4(a) must thus be read with clause 7. Clause 7 seeks to insert a new section 32A which requires all employers, education institutions, skills development providers and Quality Council's (unless exempted), to check if the qualification or part-qualification which are presented to SAQA for purposes of study, employment, appointment or any other related purpose, is registered on the national learners' records database and if not, refer such qualification or part-qualification to SAQA for verification or evaluation.

11. After verification or evaluation SAQA is required to do the following:
- (a) Record the qualification or part-qualification on the national learners' records database if SAQA is of the opinion that the qualification or part-qualification is in line with all the requirements and standards of the national learners' records database.
 - (b) Should the qualification or part qualification be a misrepresented qualification or a fraudulent qualification then SAQA must record the information on either the misrepresented register or the fraudulent register and the information must also be referred to such relevant professional body as may be prescribed.

12. Clause 4(e) amends section 13 of the Act by the insertion of subsection 1B which provides that the following information must be recorded in the appropriate register:

- (a) Name of the holder of the qualification or part-qualification;
- (b) description of the document concerned;
- (c) status or reclassification of the document to be recognised as a qualification at a lower level on the National Qualification Framework ("NQF");
- (d) nature of the offence and sentence on receipt of details from the relevant clerk of the court;
- (e) name of the education institution, foreign institution or skills development provider who issued the qualification or part-qualification;
- (f) details of a degree, diploma or certificate mill;
- (g) date of confirmed misrepresentation by SAQA or date of a finding by a court of law; or

(h) any other relevant information.

POPI Act

13. The concern with regard to the POPI Act appears to revolve around the issue of the recordal, dissemination or processing⁴ of personal information by SAQA as a public body⁵. In this regard we note that the Universities of South Africa in its submission⁶ state as follows:

"USAf is concerned about the implications of privacy legislation (the Constitutional provision and the Protection of Personal Information Act, which inter alia defines a data subject's educational qualifications as private information) for qualification verification. If this Bill is to become law, the law will need to ensure that those mandated to check qualifications claimed by data subjects have access to the NLRD without having to seek the informed consent of the data subject in terms of the POPI Act." [Sic] [Our emphasis]

14. Also the Independent Institute of Education ("IIE"), has in its submission stated that the registers lack clarity with regards to the confidentiality of information, the access to information and the removal of information from the registers.⁷

15. The preamble to the POPI Act provides that the POPI Act recognises section 14 of the Constitution which provides that everyone has the right to privacy and it includes a right to protection against the unlawful collection, retention, dissemination and use of personal information. The POPI Act in its preamble also recognises the constitutional values of democracy and openness and the need for economic and social progress, within the framework of the information society which requires the

⁴ "processing" means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—

(a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval,

alteration, consultation or use;

(b) dissemination by means of transmission, distribution or making available in any other form; or

(c) merging, linking, as well as restriction, degradation, erasure or destruction of information;

⁵ "public body" means—

(a) any department of state or administration in the national or provincial sphere of government or any

municipality in the local sphere of government; or

(b) any other functionary or institution when—

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation;

⁶ Universities of South Africa Comments on the National Qualifications Framework Amendment Bill, 2018 Submitted to the Parliamentary Portfolio Committee on Higher Education and Training, dated 28 August 2018.

⁷ Independent Institute of Education Submission to call for comment, dated 28 August 2018.

removal of unnecessary impediments to the free flow of information, including personal information.

15. Section 2 of the POPI Act provides for the purpose of the Act. Section 2 provides as follows:

"2. Purpose of Act. *The purpose of this Act is to—*

(a) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at—

(i) balancing the right to privacy against other rights, particularly the right of access to information;

and

(ii) protecting important interests, including the free flow of information within the Republic and across international borders;

(b) regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information;

(c) provide persons with rights and remedies to protect their personal information from processing that is not in accordance with this Act; and

(d) establish voluntary and compulsory measures, including the establishment of an Information Regulator, to ensure respect for and to promote, enforce and fulfil the rights protected by this Act.

16. Section 3 further provides for the application and interpretation of the POPI Act. In terms of section 3 the POPI Act applies to the exclusion of any provision of other legislation that regulates the processing of personal information which is materially inconsistent with an object or a specified provision of the POPI Act. Further the POPI Act must be interpreted in a manner that gives effect to the purpose of the Act and that does not prevent a public or private body from exercising or performing its powers, duties and functions in terms of the law as far as such powers, duties and functions relate to the processing of personal information and such processing is in accordance with the POPI Act or any other legislation that regulates the processing of personal information.

17. Section 1 of the POPI Act defines what is mean by personal information. In terms of section 1 of the POPI Act personal information means:

"personal information" *means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to—*

- (a) *information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;*
- (b) *information relating to the education or the medical, financial, criminal or employment history of the person;*
- (c) *any identifying number, symbol, email address, physical address, telephone number, location information, online identifier or other particular assignment to the person;*
- (d) *the biometric information of the person;*
- (e) *the personal opinions, views or preferences of the person;*
- (f) *correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;*
- (g) *the views or opinions of another individual about the person; and*
- (h) *the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person." [Our emphasis]*

18. It is apparent that any information concerning qualifications or part-qualifications would be regarded as being information relating to education and in respect of fraudulent qualifications that would appear to be information relating to the criminal history of a person.

19. In this regard the Chairperson's attention is drawn to section 4 of the POPI Act, which provides for the lawful processing of personal information. Section 4 sets out the conditions that must be met in order for a responsible party⁸ to lawfully process personal information. The conditions for the lawful processing of personal information are:

- (a) accountability, as referred to in section 8;
- (b) processing limitation, as referred to in sections 9, 10, 11 and 12;
- (c) purpose specification, as referred to in sections 13 and 14;
- (d) further processing limitation, as referred to in section 15;
- (e) information quality, as referred to in section 16;
- (f) openness, as referred to in sections 17 and 18;
- (g) security safeguards, as referred to in sections 19 to 22; and
- (h) data subject participation, as referred to in sections 23 to 25.

20. It therefore appears that, the fact that information relating to education and criminal history can be classified as personal information in terms of POPI Act does not mean that there is an ultimate ban on the processing of personal information, in

⁸ "responsible party" means a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information;

terms of the provisions of this Bill provided that the prescribed eight conditions as contemplated in sections 8-25 of the POPI Act are met in the implementation of the verification and evaluation process, the referral of the information to the relevant professional body and the recordal in the registers for misrepresented and fraudulent qualifications or part-qualifications.

PAJA

21. The PAJA concerns raised relate to the process that will be followed when SAQA conducts the evaluation and verification process described above. In this regard we note that the IIE has stated as follows:

- "iii. The contemplated SAQA process in relation to misrepresented qualifications or part qualifications is arbitrary. It does not consider the audi alteram partem principle of natural justice. The process is not in line with requirements of a just administrative action embedded in South African law which includes procedural fairness.
- iv. Once SAQA has determined that a particular qualification is misrepresented in terms of its own process, it should not proceed to record the details in the register without providing a right to reply to the other party, to present their case and to challenge the SAQA decision.
- v. The IIE believes that the establishment of the register of misrepresented qualifications and part qualification will have adverse consequences if the above issues are not addressed in the Bill. Individuals and education institutions will end up in the register(s) without a recourse to be removed from it or remedy if entered erroneously in the register(s) or an opportunity for a review of the SAQA decision or to challenge such a decision." [Our emphasis]

22. The University of Johannesburg has also questioned the legality of publishing the names of individuals who have become unwilling victims.

23. Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. It is trite law that PAJA was enacted in order to give effect to section 33 of the Constitution. The preamble of PAJA reads as follows:

"To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996...."

24. PAJA in summary makes provision for—
- (a) procedurally fair administrative action; this encompasses areas such as requiring adequate notice, reasonable opportunity to make representations and notice of the right to review or appeal⁹;
 - (b) the right to be provided with reasons for any administrative action¹⁰; and
 - (c) the judicial review of administrative action¹¹.

Laws of General Application

25. In view of the principles stated above we do however wish to advise that in terms of legislative drafting prescripts, it is unnecessary to duplicate or repeat provisions of the above mentioned Acts in the Bill because these Acts are automatically applicable to the provisions of the Bill. The aforementioned Acts lay down the standard and unless the Department's intention is to amend or introduce a new standard, the Bill should not legislate on what is already contained in our statute books. Consequently PAJA and the POPI Act apply to the provisions of the Bill in so far as procedurally fair administrative action and the protection of personal information is concerned.

26. In view of the concerns raised above we do further propose that clause 4(e) be redrafted as follows:

"...

- (1B) If after verification or evaluation, a qualification or part qualification is found to be a misrepresented qualification or is declared by a court of law to be a fraudulent qualification, the SAQA must refer such a finding or information to the relevant professional body, as may be prescribed, and must record in the register of misrepresented qualifications or part-qualifications or fraudulent qualifications or part-qualifications, the following information:
- (a) Name of the holder of the qualification or part-qualification;
 - (b) description of the document concerned;
 - (c) status or reclassification of the document to be recognised as a qualification at a lower level on the NQF;
 - (d) nature of the offence and sentence on receipt of details from the relevant clerk of the court;
 - (e) name of the education institution, foreign institution or skills development provider who issued the qualification or part-qualification;

⁹ See section 3 of PAJA.

¹⁰ See section 5 of PAJA.

¹¹ See section 6 of PAJA.

- (f) details of a degree, diploma or certificate mill;
 - (g) date of confirmed misrepresentation by the SAQA or date of a finding by a court of law; or
 - (h) any other relevant information.
- (1C) The verification and evaluation processes referred to in subsection (1)(h) must conform to the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) and Protection of Personal Information Act, 2013 (Act No. 4 of 2013)”.”

Rationality and legality

27. It is required under our law that the exercise of legislative power be subject to constitutional constraint which in turn requires that there must be a rational connection between the proposed legislation and the achievement of a legitimate government purpose.¹² The law that is ultimately made must be connected to that legitimate government purpose.

28. In *Affordable Medicines Trust and Others v Minister of Health and Others*¹³, the Constitutional Court indicated that the exercise of all legislative power is subject to at least two constitutional constraints. First there must be a rational connection between the legislation and the achievement of a legitimate government purpose and second the legislation must not infringe any of the fundamental rights enshrined in the Constitution. Rights may be limited by law of general application, but only to the extent provided for in section 36(1) of the Constitution.

29. In *United Democratic Movement v President of the RSA and Others*¹⁴ at paragraph 55, the Constitutional Court also stated that even where an Act of Parliament does not affect fundamental rights, the legislation must be rationally related to a legitimate governmental purpose in order to be valid.

30. The principle of rationality was also endorsed by the Constitutional Court in *Glenister v President of the Republic of South Africa*¹⁵, as follows:

"[55] Under our Constitution, national legislative authority vests in Parliament. However, in the exercise of its legislative authority, —Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution. But like all

¹² *Affordable Medicines Trust and Other v Minister of Health* 2006 (3) SA 247 (CC) at paragraph 74.S v Lawrence, S v Nega, S V Solberg 1997 (4) SA 1176 (CC) at paragraph 44.

¹³ Paragraphs 74 and 76.

¹⁴ (1) [2002] 11 BCLR 1179 (CC).

¹⁵ (CCT 48/10) [2011] ZACC 6.

exercise of public power, there are constitutional constraints that are placed on Parliament. One of these constraints is that —there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Nor can Parliament act capriciously or arbitrarily. The onus of establishing the absence of a legitimate governmental purpose, or of a rational relationship between the law and the purpose, falls on the objector...".

31. The rational connection constraint also entails that all legislation must comply with the principle of legality, which is the core element of the rule of law on which our Constitution is founded. It was indicated by the Constitutional Court in *Fedsure and Others v Greater Johannesburg Metropolitan Council*¹⁶ that the legality principle requires that the executive and all organs of state exercise no power and perform no function beyond that conferred upon them by law. Where legislation is arbitrary or capricious, it offends the principle of legality as there is no rational connection between the legislation and the legitimate government purpose it seeks to achieve.¹⁷

32. We are satisfied that the provisions of the Bill do not infringe any fundamental rights contained in the Constitution. We are also satisfied that there is a rational connection between the proposed legislation and a legitimate government purpose namely to provide for SAQA to deal with misrepresented and fraudulent qualifications.

CONCLUSION

33. In light of the information provided to us and the applicable legal principles we hold the view that both PAJA and the POPI Act are applicable to the Bill, but that these provisions need not be reproduced in the Bill.

Yours sincerely



**FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
A ARNOLD/ G HOON/ T HERCULES**

¹⁶

(CCT7/98) [1998] ZACC.

¹⁷

At paragraph 58.