

REPUBLIC OF SOUTH AFRICA

HIGHER EDUCATION AND TRAINING LAWS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 35401 of 30 May 2012)
(The English text is the official text of the Bill)*

(MINISTER OF HIGHER EDUCATION AND TRAINING)

[B 23B—2012]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Higher Education Act, 1997, so as to provide afresh for the establishment of a national institute for higher education; to extend the functions of a national institute for higher education; to provide for the appointment of an administrator for a national institute for higher education; to provide for the closure of a national institute for higher education; to extend the powers and functions of an independent assessor; to give the Minister the power to intervene in the case of poor or non-performance or maladministration by a public higher education institution; to provide for the dissolution of the council as well as procedure for such dissolution; and to extend the powers of an administrator to temporarily take over the management, governance and administration of the council of a public higher education institution; to amend the National Qualifications Framework Act, 2008, so as to change the date on which the annual report of the South African Qualifications Authority must be submitted to the Minister; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 27 of Act 101 of 1997

1. Section 27 of the Higher Education Act, 1997, is hereby amended by the insertion after subsection (5) of the following subsections:

“(5A) The eligibility criteria for nomination and election as a member of a council of a public higher education institution referred to in subsection (4) must be determined by the institutional statute.

(5B) Any person who has been a member of a council of a public higher education institution under circumstances contemplated in sections 49A(4)(a) and 49E and who is implicated in the report of the independent assessor contemplated in section 47(1)(b), is not eligible for reappointment as a member of a council of a public higher education institution.”.

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Substitution of section 38A of Act 101 of 1997, as inserted by section 3 of Act 38 of 2003

2. The following section is hereby substituted for section 38A of the Higher Education Act, 1997:

“Establishment of national institute for higher education 5

38A. (1) The Minister may, after consultation with the Council on Higher Education, establish a national institute for higher education as a juristic person [in Mpumalanga and in the Northern Cape] with a specific scope or application.

(2) A national institute for higher education is managed, governed and administered by a board.

(3) If the Minister establishes a national institute for higher education in terms of subsection (1), the Minister must prescribe particulars of the establishment of the national institute for higher education, its board and its specific scope or application in the Government Gazette.”. 15

Substitution of section 38B of Act 101 of 1997, as amended by section 3 of Act 38 of 2003

3. The following section is hereby substituted for section 38B of the Higher Education Act, 1997:

“Functions of national institute for higher education 20

38B. (1) The functions of a national institute for higher education relate to its specific scope or application and are to—

- (a) provide services to higher education within its specific scope or application;
- (b) advance learning within its specific scope or application by ensuring collaboration, co-ordination or collaboration and co-ordination of the work of higher education institutions and national institutes for higher education; and
- (c) advise the Minister on matters relating to its specific scope or application, or to higher education generally. 25

(2) Subject to subsection (1), the Minister must prescribe the functions of each national institute for higher education.”. 30

Amendment of section 38C of Act 101 of 1997, as inserted by section 3 of Act 38 of 2003

4. Section 38C of the Higher Education Act, 1997, is hereby amended by the insertion of the following subsection after subsection (1): 35

“(1A) The majority of members contemplated in subsection (1) must have specific knowledge and experience—

- (a) in higher education, generally; and
- (b) in the scope and application of the institute established in terms of section 38A(1), specifically.”. 40

Substitution of section 38H of Act 101 of 1997, as inserted by section 3 of Act 38 of 2003

5. The following section is hereby substituted for section 38H of the Higher Education Act, 1997: 45

“Annual audit

38H. The Auditor-General must audit the books of account and financial statements of a national institute for higher education and submit an audit report to the Minister within three months of receipt of the financial statements.”. 50

Substitution of section 38I of Act 101 of 1997, as inserted by section 3 of Act 38 of 2003

6. The following section is hereby substituted for section 38I of the Higher Education Act, 1997:

“Annual report 5

38I. (1) The board must, within three months after the end of each financial year, submit a report to the Minister which includes a financial statement on the performance of its functions during the preceding financial year.

(2) The annual report contemplated in subsection (1) must— 10

- (a) fairly present the financial state of affairs of the national institute for higher education;
- (b) fairly present its business;
- (c) fairly present its financial results and financial position at year end;
- (d) fairly present its performance against predetermined objectives;
- (e) contain the audit committee’s report; and
- (f) contain any other prescribed information.”. 15

Insertion of sections 38J, 38K, 38L, 38M, 38N and 38O in Act 101 of 1997

7. The following sections are hereby inserted in the Higher Education Act, 1997, after section 38I: 20

“Intervention by Minister

38J. (1) The Minister may issue a directive to the board of a national institute of higher education to take such action specified by the Minister if the national institute of higher education—

- (a) is involved in financial impropriety or is being otherwise mismanaged; 25
- (b) is unable to perform its functions effectively;
- (c) has acted unfairly or in a discriminatory or an inequitable way towards a person to whom it owes a duty under this Act;
- (d) has failed to comply with any law;
- (e) has failed to comply with any directive given by the Minister under this Act; or
- (f) has obstructed the Minister or a person authorised by the Minister in performing a function in terms of this Act. 30

(2) A directive contemplated in subsection (1) must state—

- (a) the nature of the deficiency; 35
- (b) the steps which must be taken to remedy the situation; and
- (c) a reasonable period within which the steps contemplated in paragraph (b) must be taken.

(3) Before making a decision under subsection (1) the Minister must, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2002)— 40

- (a) give notice to the board of the intention to issue a directive;
- (b) give the board a reasonable opportunity to make representations; and
- (c) consider the representations contemplated in paragraph (b). 45

(4) (a) If the board fails to comply with the directive within the stated period, the Minister must dissolve the board and appoint an administrator to take over the functions of the board. 45

(b) For the purposes of paragraph (a), sections 38K, 38L and 38M apply with the changes required by the context.

(5) If the Minister appoints an administrator in terms of subsection (4), the administrator may perform all the functions of the board, and an employee of the national institute for higher education in question must comply with a directive given by the administrator. 50

(6) The costs associated with the appointment of an administrator shall be for the account of the national institute for higher education in question. 55

Appointment of administrator

38K. (1) Notwithstanding any other provision of this Act, the Minister may, after consultation with the board of a national institute of higher education, if practicable, appoint a person as administrator to take over the management, governance and administration of the national institute of higher education and to perform the functions of the national institute of higher education, if any of the following circumstances occur: 5

- (a) An audit of the financial records of the national institute for higher education or a report by a Ministerial Committee reveals financial or other maladministration of a serious nature or the serious undermining of the effective functioning of the national institute of higher education; 10
- (b) any other circumstances arising that reveal financial or other maladministration of a serious nature or the serious undermining of the effective functioning of the national institute of higher education; 15
- or
- (c) the board of the national institute of higher education requests such appointment.

(2) The Minister may only act in terms of subsection (1)(a) or (b) if the appointment of an administrator is in the interest of the national institute of higher education in question and of higher education and training in an open and democratic society. 20

(3) (a) The Minister appoints an administrator for such period as may be determined by the Minister, but such period may not exceed two years.

(b) The Minister may extend the period contemplated in paragraph (a) once for a period not exceeding six months. 25

Assistance to administrator

38L. An administrator appointed under section 38K may, with the approval of the Minister, appoint any other person with suitable knowledge and experience to assist him or her in the performance of his or her functions. 30

Remuneration and allowances

38M. The Minister, in consultation with the Minister of Finance, may determine the remuneration and allowances to be paid to the administrator and to any other person appointed in terms of section 38L. 35

Dissolution of board

38N. The board is dissolved from the date on which the Minister appoints the administrator in terms of section 38K.

Disestablishment of national institute for higher education

38O. (1) The Minister may, after consultation with the Council on Higher Education and by notice in the *Gazette*, disestablish any national institute of higher education. 40

(2) Before making a decision under subsection (1) the Minister must, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)— 45

- (a) give notice to the board of the intention to disestablish a national institute of higher education contemplated in subsection (1);
- (b) give the board a reasonable opportunity to make representations; and
- (c) consider such representations.”.

Amendment of section 41A of Act 101 of 1997, as inserted by section 6 of Act 55 of 1999 and amended by section 15 of Act 23 of 2001 and section 11 of Act 63 of 2002

8. Section 41A of the Higher Education Act, 1997, is hereby amended by the deletion of subsections (1) and (2).

Insertion of sections 45A and 45B in Act 101 of 1997

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9. The following sections are hereby inserted in the Higher Education Act, 1997, after sections 45:

“Investigation by Independent Assessor

45A. (1) (a) The independent assessor has the power on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 45, to conduct an investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with. 10

(b) The format and the procedure to be followed in conducting any investigation shall be determined by the independent assessor with due regard to the circumstances of the case. 15

(c) The independent assessor may direct that any category of persons or all persons whose presence is not desirable shall not be present at any proceedings pertaining to any investigation or part thereof. 20

(2) Notwithstanding anything to the contrary contained in any law, no person may disclose to any other person the contents of any document in the possession of the independent assessor or the record of any evidence given to the independent assessor during an investigation, unless the independent assessor determines otherwise. 25

(3) The independent assessor may, at any time prior to or during an investigation, request any person contemplated in section 48 to assist him or her in the performance of his or her functions with regard to a particular investigation or investigations in general.

(4) (a) For the purposes of conducting an investigation the independent assessor may direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person. 30

(b) The independent assessor or any person contemplated in section 48 and duly authorised thereto by the independent assessor may request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being or to be investigated. 35

(5) A direction referred to in subsection (4) must contain particulars of the matter in connection with which the person is required to appear before the independent assessor and shall be signed by the independent assessor and served on the person either by a registered letter sent through the post or delivered by a person contemplated in section 48. 40

(6) The independent assessor may require any person appearing as a witness before him or her under subsection (4) to give evidence on oath or after having made an affirmation. 45

(7) The independent assessor or any person contemplated in section 48 may administer an oath to or accept an affirmation from any such person.

(8) (a) If it appears to the independent assessor during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse recommendation pertaining to that person may result, the independent assessor must afford such person or the council an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances. 50

(b) If such implication forms part of the evidence submitted to the independent assessor during an appearance in terms of the provisions of 55

subsection (4), such person must be afforded an opportunity to be heard in connection therewith by way of giving evidence.

(9) The independent assessor may allow a legal representative to assist a person contemplated in subsection (8), in accordance with section 3(5) of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

Entering upon premises by Independent Assessor

45B. The independent assessor shall be competent to enter, or to authorise another person contemplated in section 48 to enter, any building or premises of the public higher education institution under investigation in terms of section 45 and to make such investigation or assessment as he or she may deem necessary, and to copy any documents on those premises which in his or her opinion has a bearing on the investigation.”

Amendment of section 47 of Act 101 of 1997

10. Section 47 of the Higher Education Act, 1997, is hereby amended by the substitution in subsection (1) for paragraphs (b) and (c) of the following paragraphs, respectively:

- “(b) report in writing to the Minister of the findings of his or her investigation together with the reasons upon which the findings are based; and
(c) suggest appropriate measures and the reasons why the measures are needed.”

Insertion of sections 49A to 49E in Act 101 of 1997

11. The following sections are hereby inserted in the Higher Education Act, 1997, after section 49:

“Intervention by Minister

49A. (1) The Minister may issue a directive to the council of a public higher education institution to take such action specified by the Minister if the public higher education institution—

- (a) is involved in financial impropriety or is being otherwise mismanaged;
(b) is unable to perform its functions effectively;
(c) has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under this Act;
(d) has failed to comply with any law;
(e) has failed to comply with any directive given by the Minister in terms of section 42; or
(f) has obstructed the Minister or a person authorised by the Minister in performing a function in terms of this Act.

(2) A directive contemplated in subsection (1) must state—

- (a) the nature of the deficiency;
(b) the steps which must be taken to remedy the situation; and
(c) a reasonable period within which the steps contemplated in paragraph (b) must be taken.

(3) Before making a decision under subsection (1), the Minister must subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2002)—

- (a) give notice to the council of the intention to issue a directive;
(b) give the board a reasonable opportunity to make representations; and
(c) consider the representations contemplated in paragraph (b).

(4) (a) If the council fails to comply with the directive within the stated period, the Minister must dissolve the council and appoint an administrator to take over the functions of the council.

(b) For the purposes of paragraph (a), sections 49B, 49C and 49D apply with the changes required by the context.

(5) If the Minister appoints an administrator in terms of subsection (4), the administrator must perform all the functions of the council and an

employee of the public higher education institution in question must comply with a directive given by the administrator.

(6) The costs associated with the appointment of an administrator shall be for the account of the public higher education institution in question.

Appointment of administrator

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49B. (1) Notwithstanding any other provision of this Act, the Minister may, after consultation with the council of a public higher education institution, if practicable, appoint a person as administrator to take over the management, governance and administration of the public higher education institution and to perform the functions of the public higher education institution, if any of the following circumstances occur:

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- (a) An audit of the financial records of a public higher education institution or a report by an independent assessor reveals financial or other maladministration of a serious nature or serious undermining of the effective functioning of the public higher education institution;
- (b) any other circumstances arising that reveal financial or other maladministration of a serious nature or the serious undermining of the effective functioning of the public higher education institution;
- (c) the council of the public higher education institution requests such appointment.

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(2) The Minister may only act in terms of subsection (1)(a) or (b) if the appointment of an administrator is in the interest of the public higher education institution in question and of higher education in an open and democratic society.

(3) (a) The Minister appoints an administrator for such period as may be determined by the Minister but such period may not exceed two years.

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(b) The Minister may extend the period contemplated in paragraph (a) once for a period not exceeding six months.

Assistance to administrator

49C. An administrator appointed under section 49B may, with the approval of the Minister, appoint any other person with suitable knowledge and experience to assist him or her in the performance of his or her functions.

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Remuneration and allowances

49D. The Minister, in consultation with the Minister of Finance, may determine the remuneration and allowances to be paid to the administrator and to any other person appointed under section 49C.

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Dissolution of council

49E. The council is dissolved from the date the Minister appoints the administrator in terms of section 49B.”.

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Amendment of section 13 of Act 67 of 2008

12. Section 13 of the National Qualifications Framework Act, 2008, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The SAQA must submit, on or before **[30 June]** 31 August in each year, to the Minister an annual report which includes the financial statements and audit reports.”.

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Short title

13. This Act is called the Higher Education and Training Laws Amendment Act, 2012.

MEMORANDUM ON THE OBJECTS OF THE HIGHER EDUCATION AND TRAINING LAWS AMENDMENT BILL, 2012

1. MAIN OBJECTS OF BILL

- 1.1 The Bill seeks to amend the Higher Education Act, 1997 (Act No.101 of 1997), by extending the powers of the Minister to establish national institutes for higher education. At present the Higher Education Act, 1997, allows the Minister to establish national institutes for higher education in Mpumalanga and the Northern Cape. In terms of the proposal in the Bill, the Minister may establish an institute only after consultation with the Council on Higher Education. An institute must be established with a specific scope or application and the Minister must publish particulars of the establishment in the *Gazette*. The Bill also seeks to empower the Minister to intervene when an institute is financially mismanaged or unable to perform its functions. The Bill proposes the appointment of an administrator to take over the functions of an institute if necessary and the dissolution of the board of the institute if an administrator is appointed. The Bill lastly seeks to empower the Minister to disestablish an institute after consultation with the Council on Higher Education and by notice in the *Gazette*.
- 1.2 The Bill also seeks to amend the National Qualifications Framework Act, 2008 (Act No. 67 of 2008), by changing the date on which the annual report of the South African Qualifications Authority must be submitted to the Minister. The new date will be 31 August in each year and will therefore be in line with the prescripts of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

2. FINANCIAL IMPLICATIONS FOR STATE

None.

3. CONSULTATION

The Bill was published in *Gazette* No. 35113, Notice No. 181, of 2 March 2012, and all interested bodies, persons, stakeholders and the public were invited to submit comments on the Bill. Several comments were received and were accommodated in the Bill. The following stakeholders submitted comment: South African Qualifications Authority and the Office of the Premier of the Western Cape.

4. PARLIAMENTARY PROCEDURE

- 4.1 The State Law Advisers and the Department of Higher Education and Training are of the opinion that this Bill should be dealt with in terms of the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 4.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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