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c.1399 HE Portfolio Committee
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Mr Marius L Fransman
Honourable Chairperson
Portfolio Committee on Higher Education and Training,
3rd Floor, 90 Plein Street,
Cape Town
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Hand delivered to: Anele Kabingesi
Committee Secretary

Dear Mr Fransman

Representation in relation to the Higher Education Laws Amendment Bill B024-2010

Please accept this representation in relation to the Higher Education Laws Amendment Bill (B024-2010) (hereafter, the Bill) and please note that we would like to make an oral submission too. Our submission covers Section 2 and 3 of the Bill and the consequences of the proposed amendments for education generally and for private higher education service providers specifically. We believe it is manifest from the following points that the Bill is not merely technical and that it will bring about a clear policy shift which will have the effect of isolating South African education, and students in particular, from international developments and offerings. It will also possibly change other areas of the current environment.

On the face of it the purpose of the amendments appears to be an attempt to ensure that any higher education that is either provided or "offered" (this term is undefined in the Bill) in South Africa is subject to South African quality assurance and registration. Presumably the rationale behind this is to ensure that South African students are protected from questionable providers of higher education but if this is the rationale the Department is unfortunately proposing a strategy that will also have the additional, and we assume unintended, negative impacts as described in this representation. The Department has not made any definitive statement which explains the change in policy and has in fact suggested that no change in policy is encompassed in the proposed amendments. We disagree.

<u>Our interest in the Bill</u>

We are a public company listed on the JSE Securities Exchange and a leader in education, training, skills development and placement services. In

2009, our 3,800 staff across 79 sites (21 of these being Higher Education sites) delivered quality education and recruitment services to 61,000 students and 3,900 candidates were placed in jobs. We have been recognised for our ability to deliver excellent education, with numerous accolades and awards across all areas of our contribution to national education priorities.

Our Education arm comprises a nationwide network of school, tertiary, skills and learnership brands that cater for learning and development needs at every life stage across the spectrum of education. Focus areas include schooling (from pre-primary to grade 12), Higher and Further Education and Training (certificates, diplomas, undergraduate and postgraduate degrees), short learning programmes, skills programmes and Adult Basic Education and Training. Through our academic governance structure we have built an enviable reputation for academic leadership and quality.

To ensure that our programmes remain consistent with internationally recognised standards we remain in constant contact with colleagues in academic institutions worldwide. We attend and participate in international conferences and, where appropriate, we invite academics from recognised and reputable overseas institutions to participate in the teaching of our programmes. In this manner we follow the global internationalisation trend also supported by public providers in our country. Higher Education is, of necessity, internationally informed and integrated and cross pollination is in the best interest of all involved.

As part of our introductory remarks we confirm our commitment to ensuring that South African students are able to rely on the integrity and quality of, in particular, private higher education service providers in South Africa, whilst being afforded the broadest access to higher education.

Overview of representation

Our concerns are principally that the amendments to the Act may have the effect of isolating South African higher education from the rest of the world and that the amendments unreasonably impact on the relationships between local and international providers of higher education to the detriment of South Africans. The second concern is related to the general environment and how the drafting of this Bill may impact unintentionally.

There is already a rigorous process in place for overseas higher education providers who wish to provide (as defined in the Act) higher education in this country. It has had the effect both of limiting the activities of low quality or unscrupulous providers (local and foreign) alongside, regrettably, discouraging the presence of some high quality providers that could assist in meeting the national education agenda. It is our contention that there is no need for further restrictions in this space and that the Bill will go beyond the protection of students towards protectionism and isolationism within the overall system that will harm the system as a whole.

We say this in view of the fact that the amendments contemplate only a tolerance of overseas higher education programmes subject to the overseas academic institution submitting itself to South African registration and accreditation (a very rigorous set of processes) irrespective of their standing in their own countries or the mode of delivery they propose (distance or contact).

An overseas institution which does submit itself to that process will almost certainly face the question of what to do when the requirements of the South African process conflict with the

requirements of regulators at the seat of that institution. This will inevitably have a chilling effect on overseas participation in higher education generally in South Africa and specifically will discourage overseas higher education institutions from offering their qualifications to South African students.

Unintended broad consequences

We understand and indeed champion the very legitimate agenda of the Department of Education (now the Department of Higher Education and Training - "the Department") in ensuring that South African students are protected as far as possible from questionable higher education providers, substandard qualifications or misleading practices; and are provided with redress in the event of legitimate disputes with private higher education service providers both local and foreign.

That agenda, however, can be addressed very successfully using existing laws and the provisions of the Act itself if applied properly, consistently and with vigour. Our argument is that these amendments do not, as argued before the Committee, represent only technical amendments related to the Act as a result of the reconfiguration of the Department and that these amendments have broad consequences in excess of those we believe would be intended by the Department.

We must assume that other consequences are inadvertent and ancillary to the narrower and legitimate agenda. In certain instances these consequences seem to flow from the use of new and undefined terms or conflicting language in the Bill. Those broad consequences cannot be ignored however, and whether intended or not they evidence a substantial and dramatic change in policy. The Bill cannot be promoted in its current form if there is any likelihood that its effect would be either to deprive or discourage students from access to a range of education opportunities and relationships just on the grounds of their being international.

In the event, albeit unlikely, that the broad consequences were designed, the Committee is urged to recognise and address the very real threat that the amendments pose to South Africa's international relationships and its image as an enlightened and progressive nation.

For instance, the amendments will raise the legitimate question of consistency in our dealings with foreign states. If overseas institutions will be required to register themselves and their qualifications before even offering (a term which is not defined in the Bill and thus a term on which the common understanding is employed) those qualifications to South African students, is it intended that South African institutions such as UNISA will be required to seek registration in every jurisdiction in which their qualifications are offered? The risk of retaliation exists.

Secondly, there is also the reality that due to the ubiquitous nature of the internet/ worldwide web there is no way that the Department can police the provision of higher education by anyone (scrupulous or otherwise) to students using this medium as an example. In fact, this is a growing means of providing international distance education. Furthermore, the growing internationalisation of education and the increased availability of knowledge and information on the world wide web are changing the nature of Higher Education (HE). Traditional thinking about the nature of teaching and learning and the increased availability of high quality material and new methods of teaching and learning enable students to make progress more independently of the direct link to individual teachers without any sacrifice of support and supervision. These developments have important positive implications for South Africa. Given South Africa's leading role in

Southern Africa, SADEC and the AU, there are many advantages to the Department pursuing an agenda that reflects that role and fosters a regulatory climate that encourages cross border programmes and particularly distance learning programmes using technology. It is common cause that there is a need to increase the output of highly skilled graduates, not only in South Africa itself but also to meet our commitment to support our African neighbours, and that the public system cannot do this alone and indeed, should not be expected to do so.

Policy change

It is our contention that the amendments do in fact represent a change in policy although the Department indicated in both the Gazette and the first portfolio committee meeting on the matter that the Bill contains technical amendments only and that these are designed to achieve clarity in the Higher Education Act ("the Act") and to deal with the division of the Department into a department of Basic Education and a department of Higher Education and Training.

The current law

The current law is that the delivery of higher education by a foreign institution which is facilitated by a local education institution (on condition that the local institution does not itself confer qualifications) is legal; and a local institution is entitled to offer courses on behalf of a foreign institution on condition that the local institution does not confer these qualifications.

Section 51 of the Act provides that no person (other than a public higher education institution or organ of state) may provide higher education unless that person is registered as a private higher education institution and registered or recognised as a juristic person in terms of the Companies Act.

Currently then, an institution is only providing higher education if it is registering students for higher education, taking responsibility for the provision and delivery of the curricula, assessing students in regard to their learning programmes and conferring qualifications all in the name of the higher education institution concerned.

This brings us logically to the position under the current law of foreign higher education institutions and of local institutions that provide supplementary tuition to students registered with the foreign providers.

Foreign institutions, in these circumstances, are not higher education institutions as defined in the Act nor do they provide higher education as defined. They do not therefore fall within any of the registration or accreditation requirements of the Act.

Likewise, higher education service providers in South Africa who are supplementing the tuition of students registered for distance learning qualifications offered by overseas higher education institutions do not provide higher education in relation to these qualifications.

The proposed amendment to Section 51 of the Higher Education Act

The proposed amendment to Section 51 of the Act will still provide, as before, that no person (other than a public higher education institution or an organ of state) may provide higher education unless that person is registered as a private higher education institution and registered or recognised as a juristic person in terms of the Companies Act.

The amendment is to the effect that where the person offering a qualification is a foreign juristic person, that person must ensure that any qualification or part-qualification offered within the Republic is registered on the sub-framework for higher education on the National Qualifications Framework ("NQF") contemplated in the National Qualifications Framework Act. (Please note the shift in the proposed amendment to the word “offer” from the already defined word “provide”).

There is no definition of "offered" in the Act as amended and it is assumed that it will bear its ordinary meaning of "to present for acceptance or rejection". That could mean in the narrow sense advertisements or recruitment for overseas qualifications either on a direct or distance model would now be included. Alternatively, it could have a broader meaning of including the provision of supplementary tuition services against such a qualification even if the supplementary tuition is currently not included in the concept of provision.

If this is indeed the intended definition, it is a significant change in the current law.

Given the clarity of the term provision (as defined in the Act) it is regrettable that the term "offered" is sought to be introduced into the Act without there being any definition of the term as this adds additional uncertainty and lack of clarity. A solution may be to revert to the defined term of provision and to then ensure that the legal definition is applied consistently. An explanation of policy change would also assist the sector to understand the intentions.

Concerns with the proposed provisions – circular argument

The new provision is circular in that the definition of higher education and, flowing from that, also the definition of provision of higher education, refer to qualifications that meet the requirements of the Higher Education Qualifications Framework ("HEQF") which framework is an integral part of the NQF and the requirements of which include registration on the NQF. In other words a foreign juristic person will not be providing higher education until their qualifications meet the requirements of the HEQF and are registered on the NQF. The corollary is that until their qualifications have met the requirements of the HEQF and are registered on the NQF they will not be providing higher education.

Accordingly a foreign juristic institution that is neither registered in South Africa as a private higher education institution nor registered or recognised as a juristic person in terms of the Companies Act may offer qualifications or part qualifications despite those qualifications or part qualifications not being registered on the NQF.

The amendment appears also then to seek to regulate foreign higher education service providers which are registered in South Africa as private higher education institutions and registered or recognised as juristic persons in terms of the Companies Act. Those persons who have complied with the registration criteria would then be precluded from “offering” unregistered qualifications.

The proposed addition of Section 65D to the Higher Education Act

The new Section 65D introduced by Section 3 of the Bill repeats the provision of Section 51(2) but extends the prohibition on offering unregistered qualifications to all persons. This is the catch-all provision designed to ensure that no qualifications (or part qualifications) are offered to South African students, either in the narrower or the broader sense of the word offering unless those qualifications are registered on the NQF. The reality is that part

qualifications (if by this is meant short learning programmes) cannot currently be registered on the NQF so even if reasonable this is not enforceable.

The further statement that no certificate or diploma (or degree) can be offered by a private higher education institution unless it is registered on the HE subframework of the NQF could be read to mean that ALL certificates or diplomas are higher education qualifications and this is currently not the law. While these are all terms employed in the HEQF they are not restricted to qualifications on the NQF and are in fact terms in use at lower levels of the NQF and may be terms that would be used in terms of the trade and occupations subframework. There is no current legal argument for restricting the use of these terms to qualifications on the HE subframework. In addition, registered private higher education institutions (which may also carry registration as further education providers) must be allowed to continue to offer qualifications on other sub-frameworks of the NQF and to use the names for such qualifications that are used by the public providers – this includes at least the term "certificate". There is no argument for restricting this right to public providers only.

The consequences of the amendments

The current law described above will be altered so that whether foreign institutions are higher education institutions or not they will not be permitted to offer any qualifications or part qualifications in South Africa that are not registered on the NQF.

Examples of offers (on a common sense definition of offer, as the Act does not provide one) that may become unlawful include:

- notice boards at South African universities carrying advertisements for overseas postgraduate study;
- offers of sponsored higher education at overseas universities whose qualifications are not registered on the NQF, such as the Rhodes scholarship and the Fulbright programmes;
- offers of distance learning higher education programmes from renowned overseas universities, such as the Open University in the United Kingdom; and
- offers of overseas direct higher education or postgraduate courses (in respect of which there will be no registration) whether offered by foreign institutions registered in South Africa or other foreign institutions.

Higher education service providers in South Africa which currently supplement the tuition of students registered for distance learning qualifications offered by overseas higher education institutions may become accessories to offences under the Act and may not be in a position to continue providing supplementary tuition to the detriment of the students registered for the foreign qualifications. We have already argued that it is impossible to control the registration of any South African student, on a distance basis, for the qualification of any provider anywhere in the world because the internet cannot be controlled in this manner. These students have made a free will decision to register on this basis – their success and thus their ability to make a contribution at a high skill level in South Africa is improved if they are able to access local supplementary tuition to assist in their preparation for the assessments of the conferring institution. These amendments seem to have the potential effect of limiting even this – a limit which cannot be in the best interests of students.

The amendment requires foreign providers to register any qualification they wish to offer (no matter the mode in which they make this offer) on our NQF, which would seem to have a backwash effect in consequently requiring accreditation and registration as local programmes and perhaps also local registration as external companies. The overwhelming probability is that the majority of reputable foreign providers currently providing education to South Africans would prefer not to go through an expensive and prolonged regulatory process, but rather to focus their energies on the rest of world, where no such red tape blocks the cross border provision of education – particularly distance education.

In the event that overseas institutions decide to the contrary and make application for accreditation of their qualifications the administrative implications of such applications for the Department will be considerable and may create an unmanageable burden for a Department and the associated quality assurance agencies which may require additional resources. A system – criteria and regulations – would be needed as the current system does not contemplate the inclusion of these qualifications.

It is also not clear how the Department intends to implement and enforce the Act once amended. The amendment contains no administrative structures to handle this additional burden.

A further risk presents itself for South African institutions which draw students from abroad both for direct and distance learning, in that the attitude of foreign governments may harden to South African higher education institutions, both private and public, which could see this country further isolated from the international academic community.

The inclusion of the terms “certificate, diploma or degree” and the connection of these exclusively to the HE sub-framework seems to take the overall restrictions on both provision and naming conventions far further than the current legislation allows or anticipates, particularly in terms of private providers.

The manifest change in policy evidenced by the amendments

The Minister has issued no statement of policy in terms of section 3 of the Bill which deals either with the position of foreign higher education service providers or with the offering of foreign higher education qualifications to South African students or with the other issues as detailed in this submission.

It is not our position to work out the intention of the Department of Education (now the Department of Higher Education and Training) but we would welcome an interaction to understand the intention so as to engage in offering solutions or suggestions that would meet the legitimate agenda referred to earlier if this is indeed under threat.

The amendments currently proposed appear to have the effect of sweeping in all foreign distance learning providers and all foreign qualifications and by implication, all giving of tuition in support of such qualifications, whether or not any of these elements constitute provision as defined. The amendments herald a radical change of direction for the Department in regard to overseas higher education institutions as well as in terms of the overall definition of providing higher education. It is now being suggested that tuition on its own (which is not provision) is read to have the same meaning as the properly defined term “provision”– which is logically fallacious given the clear and complete existing definition of provision. The suggestion that the proposed amendments do not contain any change in the policy of the Department is manifestly untrue.

- From a constitutional point of view, the amendments bring a material extension of enabling legislation passed to give effect to section 29(3) of the Constitution. We are very pleased the Committee has now called for representations but it does not reduce our concerns about the process to date as we believe the Department should have done so already before this even reached the Committee stage.

- If the intention of the Department is to ensure that as far as possible only quality higher education from reputable institutions is offered to South Africa students we repeat that we believe that these proposed provisions are excessive. There is no doubt that the Department ought to be consulting with the sector as to how best to provide for this properly and responsibly, based on a policy which should accept as valid foreign programmes and foreign qualifications of acceptable standard. Indeed, this concept is already enshrined in the foreign qualification equivalency processes we already have and the overall recognition of learning encouraged in much of our education and training legislation. In addition, any policy should recognise that an attempt at this level to control the support of students registered on distance qualifications of a foreign provider is unnecessary and counterproductive.

If the foreign provider, wherever it has its seat, has its programmes and qualifications accredited and registered with the relevant authorities in an country recognised by the Minister (for example on the basis that the country is a member of the OECD), then on application, with relevant details and appropriate documents supplied, it could enjoy reciprocal accreditation and registration in South Africa, without becoming a local organisation, having its programme registered on our NQF, being accredited for these and seeking local registration with our Department. Alternatively, the amendment could have been drafted to permit local providers to give supplementary additional services to students legitimately registered with foreign providers for distance qualifications as long as the nature of those services and the role of the local provider are explicit and not misleading. It could be required that it is made clear to the students and public that the qualification being undertaken is not a SAQA registered one, notwithstanding the fact that tutorial support may be provided in South Africa.

The issues related to the new section 56d have already been canvassed in this submission.

The proposed amendments are not, as suggested, simply adjustments to clarify existing legislation and will have a substantial and long lasting negative impact on higher education in South Africa. As such we submit that they should not be enacted. We would welcome the opportunity to work with the Department to understand the agenda. With that understanding we would be able to contribute to the design of a framework to achieve a regulatory environment that assures South African students of the integrity of, in particular, private higher education service providers in South Africa whilst affording them the access to the broadest possible range of quality higher education.

Yours sincerely

Frank Thompson.

Mr Frank Thompson
CHIEF EXECUTIVE OFFICER: ADVTECH