



## higher education & training

Department:  
Higher Education and Training  
REPUBLIC OF SOUTH AFRICA

### QUESTIONS ASKED DURING THE SELECT COMMITTEE ON EDUCATION AND RECREATION MEETING OF 21 NOVEMBER 2012, ON THE HIGHER EDUCATION AND TRAINING LAWS AMENDMENT BILL, 2012 (HETLA Bill, 2012) [B23B]

#### INTRODUCTION

The Chairperson of the Select Committee on Education and Recreation requested the Department of Higher Education and Training (DHET) to respond in writing to the questions asked by the Honourable Members of the said Committee on the HETLA Bill, 2012, and therefore in addition to the oral response by Adv Eben Boshoff to clarify issues during the meeting, the DHET provides the following written response.

#### QUESTIONS

1. With regards to the intervention of the Minister, both clauses 7 and 11 make mention of the appointment of an administrator. What is the difference between the appointment of an administrator in clause 7 and the appointment in clause 11?

#### Answer:

Clause 7 seeks to amend the existing Higher Education Act, 1997 (Act No. 101 of 1997) (HE Act) by introducing new sections, amongst which is section 38J, which section provides for the intervention by the Minister if the board of the national institute for higher education (NIHE), for example is involved in financial improprieties or is being mismanaged and fails to comply with a directive given by the Minister to rectify the situation within a stated period. First of all, one must distinguish between the types of entities and their respective governance

structures. The NIHE is an **institute** governed by a **board**, whereas a public higher education institution, a University, is an **institution** which has a **council** as a governance structure. The current HE Act already provides for these two types of entities and their different governance structures. Thus, within the context of the HE Act, when mention is made of a board, one instinctively knows that it refers to the board of an institute (NIHE), whereas a council refers to the governance structure of an institution, namely a public higher education institution or University.

Therefore, clause 7 of the HETLA Bill, 2012 deals with matters concerning an institute (NIHE), whereas clause 11, by way of inserting new sections 49A to 49E, deals with matters concerning institutions, which means all the public higher education institutions (Universities) which are all governed by councils.

2. Why is there not consistency in the Bill with regards to terminology? In one instance mention is made of a board and then another reference is made to a council. Please explain.

**Answer:**

The NIHE is an **institute** governed by a **board**, whereas a public higher education institution, in other words a University, is an **institution** with a **council** as governance structure. The current HE Act already provides for these two types of entities and their different governance structures. Different terminology was deliberately used in order to distinguish between the two different governance structures. One of the reasons for the differentiation between the two governance structures is the composition of a board (NIHE) (section 38 of the existing HE Act) which differs from that the composition of a council of a public higher education institution (PHEI),(University) as contemplated in section 27 of the HE Act.

3. What is the relationship between an independent assessor and an administrator? Furthermore what is the meaning of “independent”?

**Answer:**

The HE Act provides for matters connected with an independent assessor in sections 43 to 49, whilst section 41A deals with administrator related issues. Section 43 of the HE Act provides

for the Council on Higher Education (CHE) to appoint an independent assessment panel consisting of at least three suitable persons who have knowledge and experience of higher education; are not members of the CHE and comply with any other requirements determined by the CHE. From this independent assessment panel, the Minister may appoint an independent assessor to conduct an investigation at a public higher education institution (PHEI) in circumstances mentioned in section 45 of the HE Act, such as in the case where the council of a PHEI requests the appointment; or where circumstances arise at a PHEI that involve financial or other maladministration of a serious nature; or seriously undermine the effective functioning of the PHEI; or the council of the PHEI has failed to resolve such circumstances; and the appointment is in the interests of higher education in an open and democratic society. Furthermore the council of the PHEI and any person affected by the investigation must assist and co-operate with the independent assessor in the performance of his or her functions in terms of section 47. Therefore the independent assessor appointed, must within a period determined by the Minister, but not exceeding 90 days and on the terms of reference specified by the Minister, conduct an investigation at the PHEI concerned; report in writing to the Minister on the findings of his or her investigation; and suggest appropriate measures. Clause 9 introduces two new sections 45A and 45B to make provision for specific detail regarding the investigation by the independent assessor (IA).

The purpose of appointing an IA is to conduct an independent investigation, free from any undue influence, whether from the DHET or any other party, in order to identify the substantive facts to justify and warrant an intervention by the Minister by appointing an administrator or not. The Minister has a statutory obligation to ensure that at all times, governance and management functions of a University are optimally and effectively performed.

Depending on the outcome and specific content of the independent assessor's report and whether the IA recommend the appointment of an administrator, supported with justifiable evidence and justifiable reasons, the Minister will apply his mind and decide whether the situation necessitates the appointment of an administrator as contemplated in section 49B as expounded in clause 11. The administrator is appointed to take over both the functions of governance and management if these structures are dysfunctional. Therefore the administrator

replaces the dysfunctional council as a temporary measure, until a new council can be constituted.

Therefore there is no relationship between the IA and the administrator. Both persons are independent in performing their respective functions. Furthermore, the very name “independent assessor” is indicative of the nature of the work, namely independent and as such is not compatible with the work of an employee. Both the IA and the administrator perform their respective functions within the scope and ambit of the applicable terms of reference and legislation, but not under the control of the DHET.

4. Universities are situated in provinces, so why is this Bill introduced as a “75” Bill? What does it mean?

**Answer:**

The national legislative process is prescribed by the Constitution. For example, sections 74 deals with Bills amending the Constitution; section 75 deals with ordinary Bills not affecting provinces; section 76 deals with ordinary Bills affecting provinces (such as the Further education and Training Colleges Amendment Bill, 2012) and section 77 deals with Money Bills. Furthermore, Schedule 4, Part A of the Constitution lists the functional areas of concurrent national and provincial legislative competence. In Part A of this Schedule “education at all levels, **excluding tertiary education**” is listed and since higher education is regarded as tertiary education, it means that higher education is excluded and falls outside the functional areas of concurrent national and provincial legislative competence, hence the introduction in Parliament, in terms of the procedures prescribed by section 75 of the Constitution, of the Higher Education and Training Laws Amendment Bill, 2012 (HETLA Bill), which proposes to amend the Higher Education Act, but as a Bill not affecting provinces.

5. Why is it still necessary to have a NIHE, whilst new Universities will be established in both Mpumalanga and the Northern Cape?

**Answer:**

A national institute of higher education (NIHE) is not the same as a public higher education institution (PHEI) (University). The functions of a NIHE differ from that of a University. The functions of a NIHE are expounded in clause 3. This statutory body serves as an interface between the Universities; the quality council for this sub framework on the NQF, namely the CHE; the DHET and amongst others must advise the Minister on matters relating to its specific scope or application, or to higher education generally. The Minister has the authority to prescribe the functions of each NIHE by publishing Regulations. In the interest of higher education, there is a need for both Universities and NIHE to enhance higher education in this country.

6. The current legislation makes NIHEs applicable to the Mpumalanga and Northern Cape Provinces. How will this Bill extend the NIHE to other Provinces?

**Answer:**

The Bill seeks to repeal the references in the existing legislation which link the current NIHE to the two Provinces. This Bill has a different approach. If the Bill is enacted, the focus of the NIHE in future will relate to a specific scope and application, as identified in the establishment of the NIHE. The scope and application of such an institute will accommodate the specific needs within the University sector to focus on the area or discipline that needs development, for example a NIHE specifically for Human Resources Sciences. Such a NIHE will be responsible to co-ordinate the delivery of the specific scope and application through the system as a whole at a national level. The NIHE will provide a service to the Minister and Universities by assisting the implementation of the specific scope and application within Universities and to advise the Minister on implementation matters related to its specific scope and application. University education is so diverse, especially with regards the offering of qualifications that necessitate the need for more than one NIHE. The Bill provides for the Minister to determine the specific scope and application of a NIHE according to Government Policy needs as well as work place needs.

7. What precisely are the functions of NIHE that makes its existence necessary?

**Answer:**

The general functions of a NIHE are expounded in clause 3. This clause proposes to substitute section 38B of the existing principal Act for this new section 38B. The functions of a NIHE relate to its specific scope or application and are to provide services to higher education within its specific scope or application; advance learning within its specific scope or application by ensuring collaboration, coordination or collaboration and coordination of the work of higher education institutions and NIHEs; and amongst others must advise the Minister on matters relating to its specific scope or application, or to higher education generally. These functions differ from the functions of higher education institutions.

In essence the NIHE is a statutory body which serves as an interface between the Universities; the CHE and the DHET. Amongst other functions it has an advisory function to advise the Minister on matters relating to its specific scope or application, or to higher education generally. Therefore the co-existence of both NIHE and Universities in the domain of higher education are needed. Furthermore, the Minister has the authority to prescribe the specific functions of a NIHE by way of Regulations. Those Regulations will furnish more detailed functions.

8. Why is a new date proposed for section 13 of the National Qualifications Act, 2008 (Act No. 67 of 2008 (NQF Act))?

**Answer:**

Clause 12 proposes the amendment of section 13 of the NQF Act. Previously the South African Qualifications Authority (SAQA) was obliged in terms of the principal Act to submit on or before 30 June in each year, an annual report which includes the financial statements and audit reports to the Minister.

SAQA requested this amendment, because it found it difficult during previous years to adhere to the tight timeframes. The Public Finance Management Act, 1999 (Act No.1 of 1999)

(PFMA) requires that audits must be finalized and annual reports published by 31 August each year. Thus in this regard, the existing section 13 of the NQF is in conflict with the prescripts of the PFMA. In the event of conflict between the provisions of the NQF and the PFMA with regards to financial and auditing matters, the provisions of the PFMA prevail over the provisions of the NQF. Conflicting provisions can give rise to legal uncertainty. The amendment to section 13 therefore seeks to align this responsibility of SAQA in terms of the NQF Act, with the prescripts of the PFMA, thereby providing legal certainty.

9. Why are NIHEs not established in Provinces other than the Northern Cape and Mpumalanga?

**Answer:**

The references to the Northern Cape and Mpumalanga are deleted precisely because a NIHE should not be territorial, but serve the whole country. The need for the NIHE is not to steer the provisioning of University education in the two Provinces that currently are without Universities, but rather to focus on a specific scope and application, to ensure sustainability in the production of professionals in areas identified by the Minister through Policy measures.

10. Why must the council be dissolved when an administrator is appointed?

**Answer:**

An administrator can not co-exist with a council, because the administrator is appointed to replace governance and/or management, depending on the factual scenario of each case. It would be untenable and counterproductive to allow a council which was found to be involved in financial impropriety or mismanagement and who failed to comply with a directive given by the Minister to rectify the situation within a stated period, to continue to co-exist with the appointment of an administrator. To suspend a council and to allow that specific council to continue once the problem is solved by the administrator, would also be counterproductive as the very same council that created the problem and who was not capable of resolving and rectifying the problem, can not be allowed to continue as a council.

11. Clause 11, section 49A(4)(a) states that “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”, whilst in section 49B(1), it states that “the Minister, may after consultation with the council, if practicable, appoint an administrator...” Why is the appointment of an administrator a **must** in section 49A(4)(a), but a **may** in take section 49B(1)?

**Answer:**

The Minister **must** appoint an administrator when a situation, as expounded in section 49A arises where for example, the **council** is found to be involved in financial impropriety or mismanagement and failed to comply with a directive given by the Minister to rectify the situation within a stated period. In this situation the appointment of an administrator will only affect governance and not management. The Minister has a statutory obligation to ensure the effective functioning of the Universities. If the council of an institution, where millions and millions of rand of public money are invested, fails to govern the institution effectively, it is neither in the interest of that institution nor in the interest of higher education for that council to continue to govern the institution.

Section 49B states “**Notwithstanding any other provisions 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, if any of the following circumstances occur:** Different circumstances than those mentioned in section 49A, are mentioned in section 49B, which may necessitate the Minister to appoint an administrator. It is important to note that the section specifically states “**Notwithstanding any other provisions of this Act, the Minister may, ....**”. In this scenario the administrator may take over the **management, governance and administration** of the public higher education institution, **depending on the relevant facts and provided the appointment of the administrator is in the best interest of the public education institution in question and of higher education in an open and democratic society.**

This answer is similarly applicable to Clause 7 of the Bill in relation to the new section 38J(4)(a) and section 38K(1).



12. Why must the administrator be appointed for a period of two years? What if he/she finalises the work earlier? Is it possible to consider a shorter period of appointment?

**Answer:**

Section 49B(3) (clause 11) provides for the Minister to appoint an administrator “**for such period as may be determined by the Minister but such period may not exceed two years**”. Therefore it is possible, depending on the factual situation, as well as the extent of the problem at the PHEI in question, for the Minister to determine that the administrator can be appointed for a period of time, shorter than two years. Furthermore, section 49B(3)(b) provides that the Minister **may** extend the period of that the administrator was appointed, once for a period **not exceeding six months**.