

REPUBLIC OF SOUTH AFRICA

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# HIGHER EDUCATION AMENDMENT BILL

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*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill published in Government Gazette No 21461 of 7 August 2000) (The English text is the official text of the Bill)*

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(MINISTER OF EDUCATION)

[B 55—2000]

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REPUBLIEK VAN SUID-AFRIKA

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# WYSIGINGSWETSONTWERP OP HOËR ONDERWYS

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*(Soos ingedien in die Nasionale Vergadering as 'n artikel 75-wetsontwerp; verduidelikende opsomming van Wetsontwerp in Staatskoerant No 21461 van 7 Augustus 2000 gepubliseer) (Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)*

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(MINISTER VAN ONDERWYS)

[W 55—2000]

ISBN 0 621 29570 1

**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.

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## **BILL**

**To amend the Higher Education Act, 1997, so as to define certain expressions; to extend the power of the Minister of Education with regard to the determination of higher education policy; to provide that vacancies in the Council on Higher Education are filled for the unexpired term of office of the predecessor; to provide for the nominations to fill vacancies in the Council; to provide that a public higher education institution may not without the approval of its full council and, under certain circumstances, without the concurrence of the Minister, enter into a loan or overdraft agreement or develop infrastructure; to make further provision for information a council has to furnish to the Minister; to make further provision for the registration of private higher education institutions, the requirements for their registration and the determination of applications for their registration; to provide afresh for the change of the name of a public higher education institution; and to make further provision for the repeal of laws; and to provide for matters connected therewith.**

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:

**Amendment of section 1 of Act 101 of 1997**

**1.** Section 1 of the Higher Education Act, 1997 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion after the definition of “financial year” of the following definition:

“ ‘foreign juristic person’ means a person—

(i) registered or established as a juristic person in terms of a law of a foreign country; and

(ii) recognised or registered as an external company in terms of the Companies Act, 1973 (Act No. 61 of 1973);”;

(b) by the insertion after the definition of “institutional statute” of the following definition:

“ ‘local juristic person’ means a person established as a juristic person in South Africa in terms of the Companies Act, 1973 (Act No. 61 of 1973);”;

(c) by the insertion after the definition of “this Act” of the following definition:

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“to provide higher education’ means—

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| <p>(a) the registering of students for—</p> <p style="padding-left: 20px;">(i) complete qualifications at or above level 5 of the National Qualification Framework as contemplated in the South African Qualifications Authority Act, 1995 (Act No. 58 of 1995) ; or</p> <p style="padding-left: 20px;">(ii) such part of a qualification which meets the requirements of a unit standard as recognised by the South African Qualifications Authority at or above the level referred to in subparagraph (i);</p> <p>(b) the taking of responsibility for the provision and delivery of the curricula;</p> <p>(c) the assessment of students regarding their learning programmes; and</p> <p>(d) the conferring of qualifications,</p> | <p>5</p> <p>10</p> |
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- in the name of the higher education institution concerned.”.

**Amendment of section 3 of Act 101 of 1997** 15

2. Section 3 of the principal Act is hereby amended by the addition of the following subsection:

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| <p>“(3) The Minister may, in terms of the policy contemplated in subsection (1) and in the interest of the higher education system as a whole, determine the scope and range of operations, including the size and institutional configuration, of—</p> <p>(a) public higher education institutions;</p> <p>(b) private higher education institutions; and</p> <p>(c) individual public or private higher education institutions.”.</p> | <p>20</p> |
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**Amendment of section 11 of Act 101 of 1997**

3. Section 11 of the principal Act is hereby amended by the addition of the following subsections, the existing section becoming subsection (1): 25

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| <p>“(2) A member nominated in accordance with subsection (1) serves for the unexpired term of office of the predecessor.</p> <p>(3) Notwithstanding section 8(3), the Minister must in writing invite nominations to fill a vacancy contemplated in subsection (1) from—</p> <p>(a) national organisations representing—</p> <p style="padding-left: 20px;">(i) students;</p> <p style="padding-left: 20px;">(ii) academic employees;</p> <p style="padding-left: 20px;">(iii) employees other than academic employees;</p> <p style="padding-left: 20px;">(iv) university principals;</p> <p style="padding-left: 20px;">(v) technikon principals;</p> <p style="padding-left: 20px;">(vi) principals of higher education colleges;</p> <p style="padding-left: 20px;">(vii) principals of private higher education institutions;</p> <p style="padding-left: 20px;">(viii) organised business; and</p> <p style="padding-left: 20px;">(ix) organised labour; and</p> <p>(b) <u>research and science councils.”.</u></p> | <p>30</p> <p>35</p> <p>40</p> |
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**Amendment of section 40 of Act 101 of 1997**

4. Section 40 of the principal Act is hereby amended—

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| <p>(a) by the substitution for paragraph (d) of the following paragraph:</p> <p style="padding-left: 20px;">“(d) money raised by means of loans <u>and overdrafts;</u>”; and</p> <p>(b) by the addition of the following subsections, the existing section becoming subsection (1):</p> <p style="padding-left: 20px;">“(2) (a) <u>Subject to paragraph (b), a public higher education institution</u> may only with a resolution of its full council, not taking into account any vacancy that may exist, enter into a loan or an overdraft agreement.</p> <p style="padding-left: 40px;">(b) An agreement contemplated in paragraph (a) must be approved by the Minister if the agreement, or the sum of loans and overdrafts to be raised in any financial year, exceeds—</p> | <p>45</p> <p>50</p> |
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- (i) such amount as the Minister had determined for such institution; or
  - (ii) in the absence of such determination, five per cent of the average income of that public higher education institution received during the two years immediately preceding such agreement.
- (3) (a) Subject to paragraph (b), a public higher education institution may only with a resolution of its full council, not taking into account any vacancy that may exist, embark on any—
- (i) construction of a permanent building or other immovable infrastructural development;
  - (ii) purchasing of immovable property; or
  - (iii) long-term lease of immovable property.
- (b) Any action contemplated in paragraph (a) must be approved by the Minister if the value of such development or property exceeds five per cent of the average income of that public higher education institution received during the two years immediately preceding such action.”

#### **Amendment of section 41 of Act 101 of 1997**

5. Section 41 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

- “(3) The council of a public higher education institution must provide the Minister with [—
- (a) **the information that must be provided in terms of the Reporting by Public Entities Act, 1992 (Act No. 93 of 1992); and**
  - (b) such [additional] information, in such format, as the Minister may reasonably require.”

#### **Substitution of section 51 of Act 101 of 1997**

6. The following section is hereby substituted for section 51 of the principal Act:

##### **“Registration of private higher education institutions**

51. No person other than a public higher education institution or an organ of state may provide higher education unless that person is—
- (a) in the prescribed manner, registered or conditionally registered as a private higher education institution in terms of this Act; and
  - (b) registered or recognised as a juristic person in terms of the Companies Act, 1973 (Act No. 61 of 1973), before such person is registered or conditionally registered as contemplated in paragraph (a).”

#### **Amendment of section 53 of Act 101 of 1997, as amended by Act 55 of 1999**

7. Section 53 of the principal Act is hereby amended—

- (a) by the substitution for the words preceding paragraph (a) of subsection (1) of the following words:
 

“The registrar [**must**] may register an applicant as a private higher education institution if the registrar has reason to believe that the applicant—”;
- (b) by the deletion of subparagraph (iii) of paragraph (b) of subsection (1); and
- (c) by the addition to subsection (1) of the following paragraph:
 

“(c) complies with any other reasonable requirement determined by the registrar which may include a requirement that none of the words or any derivatives of the words ‘university’ or ‘technikon’ may appear in the name of the applicant.”

#### **Amendment of section 54 of Act 101 of 1997**

8. Section 54 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:

- “(1) The registrar [**must**]
- (a) must consider any application for registration as a private higher education institution and any further information, particulars or documents provided by the applicant; [**and**]
  - (b) may, when considering the application, differentiate between a foreign juristic person and local juristic person with regard to matters such as its scope and range of operations, its size and its institutional configuration; and
  - (c) may register the applicant as a private higher education institution if the requirements for registration contemplated in section 53 are fulfilled.”;
- (b) by the substitution for subsection (3) of the following subsection:
- “(3) Notwithstanding subsection (1), the registrar may conditionally register an applicant who does not fulfill the requirements for registration, other than a foreign juristic person if the registrar believes that the applicant will be able to fulfill the relevant requirements within a reasonable period.”; and
- (c) by the addition of the following subsection:
- “(7) No independent school as defined in the South African Schools Act, 1996 (Act No. 84 of 1996), or other private education institution may call itself a university or a technikon or confer a professorship or an honorary degree or use the title of rector, vice-chancellor or chancellor, unless it is registered as a private higher education institution in terms of Chapter 7 and the word “university” or “technikon” appears in its name.”.

#### **Substitution of section 65 of Act 101 of 1997**

9. The following section is hereby substituted for section 65 of the principal Act:

##### **“Name change of public higher education institution**

(1) [A] Notwithstanding anything to the contrary contained in any other law, a council of a public higher education institution [**other than a council of a university established or incorporated by a private Act of Parliament**] may, with the approval of the Minister and by notice in the *Gazette*, change the name of such higher education institution.

(2) Any change of name contemplated in subsection (1) does not affect any right, duty, liability or obligation of the public higher education institution in question.”.

#### **Amendment of section 66 of Act 101 of 1997**

10. Section 66 of the principal Act is hereby amended by the substitution for subsection (3) for the following subsection:

“(3) Any person who contravenes section 51(1)(a), 54(7) or 55(2) is guilty of an offence and is liable on conviction to a fine or to imprisonment not exceeding five years or to both such fine and imprisonment.”.

#### **Amendment of section 76 of Act 101 of 1997**

11. Section 76 of the principal Act is hereby amended by the addition of the following subsection:

“(5) The University Staff (Education and Training) Act, 1984 (Act No. 91 of 1984), is hereby repealed in its entirety.”.

#### **Short title**

12. This Act is called the Higher Education Amendment Act, 2000. 50

## MEMORANDUM ON THE OBJECTS OF THE HIGHER EDUCATION AMENDMENT BILL, 2000

### BACKGROUND AND OBJECTS OF BILL

1. The implementation of the Higher Education Act, 1997 (Act No. 101 of 1997 — hereinafter referred to as “the Act”), has exposed some problem areas. This Bill seeks to remedy the problems experienced. The areas of concern and the main provisions proposed are mentioned hereunder.

2 In terms of section 51 of the Act, higher education may only be provided by public higher education institutions (as defined in the Act), organs of state and private higher education institutions registered in terms of the Act. In order to ensure compliance with this provision, the words “provide higher education” are amplified by way of a definition (clause 1(c)).

3.1 The procedure for the filling of a vacancy in the Council for Higher Education, which resulted from a member who vacates his or her office before the expiry of his or her term of office, is too complicated, time-consuming and costly.

3.2 It is proposed in clause 3 that the long process of filling of vacancies be shortened by means of authorising the Minister to write directly to the role players inviting for nominations. This approach will also save costs as no publications costs will be incurred to fill casual vacancies.

4.1 In terms of section 20(4), every public higher education institution is a juristic person. This in effect means that it can sue and be sued in its own name and that it can enter into agreements, including loan agreements and overdrafts in its own name. A number of institutions are now in dire financial situations and have run into huge overdrafts. Furthermore, financial risks exist where higher education institution developed infrastructure without proper planning and budgeting.

4.2 It is therefore advisable that the conclusion of any loan agreement or request for an overdraft or the development of any infrastructure be entered into or made in concurrence with the Minister.

5. Our country has during the recent years experienced an influx of foreign private education institutions. If left uncontrolled, this might be to the detriment of our local higher education institution system. In terms of the proposed amendment of sections 52, 53 and 54 the registrar of private higher education institutions is allowed discretionary powers in terms of the registration of private higher education institutions. Furthermore, the registrar is authorised, if it is in the best interest of the higher education system as a whole, to differentiate between foreign private higher education institutions and local private higher education institutions.

6. Other proposals in the Bill, which are of a technical nature, are to—
- (a) insert definitions necessitated by the proposed amendments;
  - (b) determine the type of juristic personality needed to qualify for registration as a private higher education institution (clause 6);
  - (c) reserve the name “university” and “technikon”, and the titles “rector”, “vice-chancellor” and “chancellor” for private higher education institutions registered in terms of the Act (clause 8(c)) and create an offence prohibiting the use of such names or titles (clause 10);
  - (d) authorise a council of a public higher education institution to change its name, if the Minister so approves (clause 9); and
  - (e) provide for the repeal of an obsolete Act (clause 11).

### CONSULTATION

7. The following institutions were consulted:  
 Council on Higher Education;  
 South African Universities Vice-Chancellors Association;  
 Committee of Technikon Principals

**IMPLICATIONS FOR PROVINCES**

8. None

**FINANCIAL IMPLICATIONS FOR STATE**

9. None

**PARLIAMENTARY PROCEDURE**

10. The State Law Advisers and the Department of Education are of the view that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.