COUNCIL ON HIGHER EDUCATION

Submission on the Higher Education and Training Laws Amendment Bill to the Portfolio Committee on Higher Education and Training

October 2012

1. Introduction

1.1 The Council on Higher Education (CHE) has not had the opportunity to formally discuss the proposed amendments to the Higher Education Act due to the short notice period for public comment. However, given the substantive nature of the new amendments, which go well beyond the amendments as originally introduced relating to the establishment and functioning of a National Institute of Higher Education, the Executive Committee of Council agreed that the CEO should prepare a submission and to participate in the public hearings on the new amendments scheduled by the Portfolio Committee on Higher Education and Training.

1.2 The amendments seek to address perceived inadequacies in the efficacy of the existing intervention mechanism, namely, the independent assessor process, as well as the limitations on the powers of the Minister, for addressing governance and management challenges in higher education. It is submitted that any amendments to rectify inadequacies – perceived or otherwise, should be preceded by a detailed analysis both of the underlying factors that contribute to the ongoing governance and management challenges in higher education, as well as the effectiveness of the existing intervention mechanisms in practice. The absence of such an analysis results in ad-hoc amendments to address perceived rather than real inadequacies.

1.3 The amendments are substantive in two senses; (i) the role of the independent assessor and the nature of the investigation undertaken by the independent assessor is fundamentally changed from that contemplated in Higher Education Act currently; (ii) the powers of the Minister to intervene in public higher education institutions is extended beyond the limitations imposed by the Higher Education Act currently.

1.4 Given the substantive nature of the amendments and the implications for public higher education institutions, in particular, the balance between institutional autonomy and public accountability, it is suggested that a broader consultative process with stakeholders is necessary and, in particular, the CHE in line with its statutory responsibility, should be afforded the opportunity to advise the Minister of Higher Education and Training on the merits and implications of the amendments for the governance of public higher education institutions.

1.4.1. It is against this background that the concerns relating to the amendments are outlined below.

2. New Clauses 5, 6 and 7

2.1 The three clauses detail the powers of the independent assessor in terms of procedures and access to information in pursuance of an investigation. These clauses fundamentally change the nature of the

role of an independent assessor as contemplated in the Higher Education Act currently.

2.2 In terms of section 43 of the Higher Education Act, the CHE must appoint an independent assessment panel from which, in terms of section 44, the Minister may appoint an independent assessor to "conduct an investigation at a public higher education institution". The key criterion for appointing the independent assessment panel in terms of section 43 (1) (a) is that the panel members must "have knowledge and experience of higher education". This suggests that the role of an independent assessor is to investigate in general terms, based on an understanding of the workings of a higher education institution, whether, in terms of section 45 (b) (i) and (ii), there is evidence either of financial or other maladministration and/or that the governing structures of the institution are not functioning effectively. And if so, to recommend the measures or interventions required to remedy the defects, which could include the appointment of an administrator by the Minister.

2.3 The independent assessor process, in the sense outlined above, is not a legal process. The role of the independent assessor is to undertake a general investigation of the circumstances obtaining in an institution and in a manner that enables individuals and institutional constituencies to express their views freely without the constraints associated with a legal process such as the right of legal representation and the right not to provide information that may be incriminatory. It does not therefore have to meet the attendant standards associated with legal processes such as subpoena powers, the submission of affidavits, the giving of evidence under oath and so on.

2.3.1 The new amendments have the effect of changing the independent assessor process into a legal process, without any clarification as to why this is necessary. This is inappropriate and contrary to the intention of the Higher Education Act currently.

3. New Clauses 8 and 9

3.1 New clauses 8 and 9 substantively extend the power of the Minister to intervene in public higher education institutions beyond the limitations imposed by the Higher Education Act currently.

3.2 The extension of the Minister's power is both in relation to the circumstances, as well as the process for determining whether the circumstances warrant Ministerial intervention.

3.2.1 In the Higher Education Act currently, ministerial intervention through the appointment of an administrator is the outcome "if an audit of the financial records of a public higher education institution, or an investigation by an independent assessor…….reveals financial or other

maladministration of a serious nature at a public higher education institution or the serious undermining of the effective functioning of a public higher education institution".

3.2.2 In the Bill in section 49B (1), in addition to the conditions in 49B (1) (a), which are outlined in 3.2.1, the Minister may also appoint an administrator for the following reasons:

> "(b) any other circumstances arising that reveal financial or other maladministration of a serious undermining or the serious of the effective functioning of the pubic higher education institution (sic); or
> (c) the Council of the public higher education and training institution requests such an appointment".

3.2.2.1 Clause 49B (1) (b) is broad and open-ended and does not specify what circumstances would justify the appointment of an administrator. As it stands, for example, information provided by disaffected individuals and/or constituencies or if the functioning of the institution is impacted on by the actions of disaffected constituencies, irrespective of the veracity of the information or of the merits of the action, could result in the appointment of an administrator. This could result in the levelling of unsubstantiated allegations and/or mobilisation to destabilise the governing structures of an institution by disaffected individuals and/or constituencies bent on eroding the authority of the existing management and governance structures of an institution.

3.2.2.2 Clause 49B (1) (c) is similarly broad and open-ended and does not specify the circumstances under which it would be appropriate for the Minister to consider the appointment of an administrator at the request of the Council of a public higher education institution. As it stands, for example, internal disagreements and differences between the Council and management for instance, which cannot be resolved amicably or where the Council may choose to intervene in matters that are outside of its authority such as academic matters, which are the prerogative of the Senate of the institution, could result in the Council unjustifiably requesting the appointment of an administrator.

3.2.2.3 The broad and open-ended nature of Clauses 49B (1) (b) and (c) without recourse to due process, either in the form of a formal audit and/or investigation by an independent assessor, as provided for in the Higher Education Act currently, could impinge on institutional autonomy.

3.3 New Clause 8 – 49A (1) is even more broad and open-ended and provides the Minister with the power to intervene and to issue directives on a range of matters and the power to appoint

an administrator if an institution does not comply. The nature of the directives that the Minister can issue and the steps that institutions would be expected to take in response are not defined, nor are there any limits placed on ministerial action. Furthermore, given that the Higher Education Act currently provides, in section 42, for the Minister to take action against a Council, which fails to comply with the Higher Education Act, and/or any conditions set by the Minister, it is not clear what purpose is served by new Clause 8.

3.3.1 The fact that the Minister can act without recourse to due process either in the form of a formal audit and/or investigation by an independent assessor, as provided for in the Higher Education Act currently, is problematic for the reasons outlined in 3.2.2.3 above.

3.3.2 Furthermore, what is more worrying, is that the grounds for ministerial intervention go beyond financial mismanagement and dysfunctional governance structures, which are the limiting grounds for ministerial intervention in the Higher Education Act currently.

3.3.2.1 Thus clauses 49A (1) (c) – (f) provide for ministerial directives, which could directly impinge on institutional autonomy. For example, in terms of 49A (1) (c), the Minister can issue a directive if a public higher education institution “has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under this Act”. Aside from the fact that there is no definition of what constitutes “unfair”, “discriminatory” or “inequitable” practice, the decision as to what constitutes “unfair”, “discriminatory” or “inequitable” practice cannot be determined by ministerial diktat but must be interpreted by the courts in the context of the Constitution and the relevant legislation.

3.3.2.2 Similarly, in terms of 49A (1) (d), the Minister can issue a directive if any institution “has failed to comply with any law”. This seems excessive as it could lead to the Minister issuing directives for minor breaches of, for example, health and safety laws. It is also debatable whether the Minister of Higher Education and Training can issue directives on breaches of laws that do not fall within his/her executive authority such as health and safety laws.

3.2.2.3 Clause 49A (1) (e) is an omnibus clause, which allows the Minister to issue directives on any matter relating to higher education, which could impinge on institutional autonomy.

4. Conclusion

4.1 In the preamble to the Higher Education Act, it is stated that it is "**DESIRABLE** for higher education institutions to enjoy freedom and autonomy in their relationship with the State within the context of public accountability and the national need for advanced skills and scientific knowledge".

4.2 It is submitted that the proposed amendments are contrary to the spirit and letter of the stated desire in the preamble and require further consultation with stakeholders to ensure that the appropriate balance is maintained between institutional autonomy and public accountability.