

REPUBLIC OF SOUTH AFRICA

HIGHER EDUCATION LAWS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 34435 of 6 July 2011)
(The English text is the official text of the Bill)*

(MINISTER OF HIGHER EDUCATION AND TRAINING)

[B 14—2011]

ISBN 978-1-77037-859-9

No. of copies printed 1 800

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 regulate the conduct of members of the council and staff of a public higher education institution engaging in business with the relevant public higher education institution; and to adjust the period within which an independent assessor appointed by the Minister must finalise an investigation; to amend the National Student Financial Aid Scheme Act, 1999, so as to empower the Minister to intervene in the case of poor or non-performance or maladministration by the board of the National Student Financial Aid Scheme; to provide for the dissolution of the board, as well as the procedure for such dissolution; to provide for the appointment of an administrator to temporarily take over the management, governance and administration of the board; and to repeal the provisions placing an obligation on the employer of a borrower to make deductions from the remuneration of the borrower; 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, as amended by section 8 of Act 23 of 2001 and section 7 of Act 63 of 2002

1. Section 27 of the Higher Education Act, 1997, is hereby amended— 5
- (a) by the substitution for subsection (7) of the following subsection:
- “(7) [**The members**] A member of a council—
- (a) must be [**persons**] a person with knowledge and experience relevant to the objects and governance of the public higher education institution concerned; [**and**] 10
- (b) must participate in the deliberations of the council in the best interests of the public higher education institution concerned;
- (c) must, before he or she assumes office, declare any business, commercial or financial activities undertaken for financial gain that may raise a possible conflict of interest with the public higher education institution concerned; 15
- (d) may not place himself or herself under any financial or other obligation to any individual or organisation that might seek to influence the performance of any function of the council; and

- (e) (i) may not have a conflict of interest with the public higher education institution concerned;
- (ii) may not have a direct or indirect financial, personal or other interest in any matter to be discussed at a meeting and which entails or may entail a conflict or possible conflict of interest with the public higher education institution concerned;
- (iii) must, before the meeting and in writing, inform the chairperson of that meeting of that conflict or possible conflict of interest.”; and
- (b) by the insertion after subsection (7) of the following subsections:
- “(7A) Any person may, in writing, inform the chairperson of a meeting, before the meeting, of a conflict or possible conflict of interest of a member of the council with the public higher education institution concerned of which such person may be aware.
- (7B) A member referred to in subsections (7)(e) and (7A) is obliged to recuse himself or herself from the meeting during the discussion of the matter and the voting thereon.”.

Amendment of section 34 of Act 101 of 1997

2. Section 34 of the Higher Education Act, 1997, is hereby amended by the addition of the following subsections:
- “(4) A member of staff may not conduct business directly or indirectly with the public higher education institution at which he or she is employed that entails or may entail a conflict of interest with that public higher education institution.
- (5) Business referred in subsection (4) relates to conduct that is aimed at receiving any direct or indirect financial personal gain that does not form part of the employment relationship contemplated in subsection (1).”.

Amendment of section 47 of Act 101 of 1997

3. Section 47 of the Higher Education Act, 1997, is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:
- “An independent assessor appointed under section 44 must, within **[30 days]** a period determined by the Minister, but not exceeding 90 days and on the terms of reference specified by the Minister—”.

Insertion of sections 4A and 4B in Act 56 of 1999

4. The following sections are hereby inserted in the National Student Financial Aid Scheme Act, 1999, after section 4:

“Intervention by Minister

- 4A.** (1) The Minister may direct the board to take any action specified by the Minister if the NSFAS—
- (a) is in financial difficulty or is being otherwise mismanaged;
- (b) is unable to perform its functions effectively due to dissension among board members;
- (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.
- (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 taking any action under subsection (1) the Minister must, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)—
- (a) give notice to the board of the intention so to act;
 - (b) give the board a reasonable opportunity to make representations; and
 - (c) consider such representations.
- (4) (a) If the board fails to comply with the direction within the stated period, the Minister may appoint an administrator to take over the relevant function of the board.
- (b) For the purposes of paragraph (a), sections 17A, 17B and 17C apply with the changes required by the context.
- (5) If the Minister appoints an administrator in terms of subsection (4) to take over a function of the board—
- (a) the administrator may do anything which the board might otherwise be empowered or required to do by or under this Act, to the exclusion of the board;
 - (b) the board may not, while the administrator is responsible for that function, exercise any of its powers or perform any of its duties relating to that function; and
 - (c) an employee or a contractor of the board must comply with a directive given by administrator.
- (6) Once the Minister is satisfied that the board is able to perform its functions effectively again, the Minister must terminate the appointment of the administrator.
- (7) The costs associated with the appointment of an administrator shall be for the account of the NSFAS.

Failure to perform function

- 4B.** (1) If the board fails to perform any function in terms of section 4, or fails to perform any function assigned to it by the Minister in terms of section 4(g) within the specified period set by the Minister, the Minister may appoint an administrator to rectify the failure of the board.
- (2) The administrator contemplated in subsection (1), must build the necessary capacity and introduce any reasonable corrective measures to remedy the situation and to provide continuity when the board resumes the function in terms of this Act after the appointment of the administrator is terminated.
- (3) For the purposes of subsection (1), sections 4A(3), 17A, 17B and 17C apply with the changes required by the context.”.

Insertion of section 7A in Act 56 of 1999

5. The following sections are hereby inserted in the National Student Financial Aid Scheme Act, 1999, after section 7:

“Dissolution of board

- 7A.** (1) (a) The Minister may dissolve the NSFAS board if—
- (i) the conduct of the board members necessitates such action and if the dissolution of the board is in the best interest of higher education and NSFAS;
 - (ii) more than 75 per cent of the members of the board has resigned; or
 - (iii) less than 75 per cent of the members of the board has resigned and if the administrator recommends that the aim, and efficient and effective governance and management, of the NSFAS and purpose of this Act would be prejudiced if the board is not dissolved.
- (b) For the purposes of paragraph (a), section 4B(3) applies with the changes required by the context.
- (2) If the Minister dissolves the board in terms of subsection (1), the Minister must—
- (a) appoint an administrator if such administrator has not already been appointed; and

(b) appoint a new board in terms of section 5 before the expiry of the period for which the Minister has appointed the administrator concerned.

(3) For the purposes of subsection (2), sections 17A, 17B and 17C apply with the changes required by the context.”.

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Insertion of Chapter 2A in Act 56 of 1999

6. The following Chapter is hereby inserted in the National Student Financial Aid Scheme Act, 1999, after Chapter 2:

“CHAPTER 2A

Appointment of administrator

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17A. (1) Notwithstanding any other provision of this Act, the Minister may, after consultation with the board if practicable, appoint a person as administrator to take over the management, governance and administration of the NSFAS and to perform the functions of the NSFAS if—

(a) an audit of the financial records of the NSFAS 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 NSFAS;

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(b) any other circumstances arise that reveals financial or other maladministration of a serious nature or the serious undermining of the effective functioning of the NSFAS; or

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(c) the board requests such appointment.

(2) The Minister may only act in terms of subsection (1)(a) or (b) if the board has failed to resolve the maladministration or undermining contemplated in subsection (1)(a) or (b), as the case may be, within a period determined by the Minister and the appointment of an administrator is in the interests of the NSFAS and higher education in an open and democratic society.

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(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

17B. An administrator appointed in terms of section 17A 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

17C. The Minister, with the approval of 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 17B.”.

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Repeal of section 23 of Act 56 of 1999

7. Section 23 of the National Student Financial Aid Scheme Act, 1999, is hereby repealed.

Short title

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8. This Act is called the Higher Education Laws Amendment Act, 2011.

MEMORANDUM ON THE OBJECTS OF THE HIGHER EDUCATION LAWS AMENDMENT BILL, 2011

1. OBJECT OF BILL

The Bill seeks to amend—

- (a) the Higher Education Act, 1997 (Act No. 101 of 1997); and
- (b) the National Student Financial Aid Scheme Act, 1999 (Act No. 56 of 1999) (the NSFAS Act).

2. MAIN FEATURES OF BILL

2.1 Higher Education Act, 1997 (clauses 1 to 3)

The amendments proposed to the Higher Education Act, 1997, are to—

- (a) regulate the conduct of members of the council of a public higher education institution and staff relating to the conducting of business with the relevant public higher education institution; and
- (b) adjust the period within which an independent assessor appointed by the Minister in terms of section 44 of the said Act must conduct an investigation, report to the Minister and suggest appropriate measures.

2.2 The NSFAS Act (clauses 4 to 7)

The Bill seeks to empower the Minister to—

- (a) direct the board of the National Student Financial Aid Scheme (NSFAS) to take any action specified by the Minister if the NSFAS—
 - (i) is in financial difficulty or is being otherwise mismanaged;
 - (ii) is unable to perform its functions effectively due to dissension among board members;
 - (iii) has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under this Act;
 - (iv) has failed to comply with any law;
 - (v) has failed to comply with any directive given by the Minister under this Act; or
 - (vi) has obstructed the Minister or a person authorised by the Minister in performing a function in terms of this Act;
- (b) dissolve the board of the NSFAS under certain circumstances; and
- (c) appoint an administrator to take over the management, governance and administration of the NSFAS and to perform the functions of the NSFAS if—
 - (i) an audit of the financial records of the NSFAS 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 NSFAS;
 - (ii) any other circumstances arise that reveals financial or other maladministration of a serious nature or the serious undermining of the effective functioning of the NSFAS; or
 - (iii) the board requires such appointment.

The Bill also seeks to repeal section 23 of the NSFAS Act that deals with the obligation of an employer with regard to the recovery of loans. The repeal is proposed since the obligation is considered to be infringing the rights of an employer.

3. CONSULTATION

The Bill was published for public comment in Government Notice No. 228, published in *Gazette* No. 34222 of 15 April 2011. All stakeholders and the public were provided with an opportunity to submit comment. Several comments were received and were accommodated in the Bill. The following stakeholders submit comment:

- (a) Association of Private Providers of Education, Training and Development;
- (b) Centre for Further Education Policy Development;
- (c) South African Democratic Teachers' Union;
- (d) South African Qualifications Authority;
- (e) Umalusi; and
- (f) Witwatersrand University.

4. FINANCIAL IMPLICATIONS FOR STATE

Apart from publication costs, no extra financial implications are foreseen. The costs to appoint an administrator for the NSFAS will be accommodated in the budget of the NSFAS.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department of Higher Education and Training are of the opinion that this Bill must be dealt with in accordance with the procedure prescribed 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.

5.2 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.