EXECUTIVE SUMMARY
REVIEW OF THE DRAFT AMENDMENT REGULATIONS FOR THE REGISTRATION OF PRIVATE HIGHER EDUCATION INSTITUTIONS 2014[1]

1 INTRODUCTION

The purpose of this document is to provide a concise overview of the legislative framework regulating private higher education in order to make a number of findings, conclusions and recommendations, as well as to identify a number of key risks to private higher education institutions (hereafter HEIs), which might potentially also be made applicable – if not now, possibly in future – to public HEIs

2 HIGHER EDUCATION ACT 101 OF 1997

It should be noted that the legal framework regulating private HEIs consists of principal legislation (the Act) and subordinate legislation (regulations for private higher education institutions issued in terms of the Act). The relevant parts of the Act are the Preamble (which is in principle applicable to both public and private HEIs), the definition in section 1, and Chapter 7 (and section 75) (which deals specifically with private HEIs), as well as two general sections dealing with delegations and the making of regulations (both of which are applicable to public and private HEIs).

3 FINDINGS, CONCLUSION AND RECOMMENDATIONS

A comprehensive report will be submitted to HESA. The said report provides an extensive and systematic overview of differences between the Original Regulations and the 2014 Draft Amendment Regulations, as well as a number of comments relating to the content and acceptability of the proposed amendments.

The analysis of the various proposed 2014 amendments indicates that a number of the proposed amendments are fully acceptable. However, in a significant number of instances, specific proposed 2014 amendments are not acceptable (or partially acceptable) and should be reconsidered. In addition, in some cases, specific proposed 2014 amendments need to be redrafted for purposes of clarity and/or on account of non-compliance with drafting conventions.

[1] 5 February 2015.

3.1 It should be noted that the 2014 Draft Amendment Regulations (which were published in the *Government Gazette*) do not comply with current drafting conventions, e g:

3.1.1 The numbering of the 2014 Draft Amendment Regulations is incorrect in a number of instances (e.g. the numbering of the amendment regulations, and the renumbering of some of the Original Regulations).

3.1.2 The presentation of the 2014 Draft Amendment Regulations deviates in many respects from the drafting conventions required and applied by the Office of the Chief State Law Adviser (e g terminology used in the introductory parts as well as in the contents of the amendment regulations; the use of punctuation marks (e g quotation marks before and after the amendments); the inconsistent use of capital letters; and the correct use of words (e g "must" instead of "shall", "may not" instead of "must not", and "must" instead of "will", etc.).

3.1.3 Terminology such as "*the shifting of* regulation 30 to regulation 20" and "*the movement of* Regulation 15 to Chapter 6" is never used in legal drafting.

3.1.4 Consequential amendments need to be explicitly stated by means of draft amendment regulations (e g the draft regulation that inserts regulation 23(1)(g) must be followed by draft regulations that amend the numbers of the existing regulations that follow the new inserted regulation – in other words, regulation 23(1)(a), (b), (c), (d), (e) and (f) remain the same, followed by a draft regulation that inserts regulation 23(1)(g) and the current 2002 sub-regulation (1)(g) must be renumbered to (1)(h) by means of a new draft sub-regulation).

3.1.5 A number of cross-references are incorrect – regulations that were not amended still refer to original regulation numbers.

3.1.6 Regulation title numbers were not specifically amended in all instances.

3.2 General recommendations include the following:

3.2.1 An additional regulation must be inserted to provide that intellectual property rights relating to the content of applications for registration vest in, and remain with, the private HEI concerned, irrespective of whether the application is granted or not.

3.2.2 An additional regulation must be inserted to provide that all information provided by a private HEI to the registrar or Department of Higher Education and Training (hereafter the DHET), as the case may be, must be treated as confidential and may not be made available to third parties.

3.3 Issues identified in the 2014 Amendment Regulations that require urgent consideration, include the following:

3.3.1 By replacing the definition of "accreditation", the 2014 Amendment Regulations do not provide for preliminary accreditation of a programme to be offered by a Private HEI. The DHET should provide the background to the policy decision that the HEQC may no longer award preliminary accreditation.

3.3.2 The 2014 Amendment Regulations replaced the term “registered” programmes with “approved” programmes. Consolidated amended regulation 6 obliges applicants applying for registration to submit the official report proving that its programmes are registered on the NQF issued by SAQA to the registrar. The link between programmes accredited by the HEQC and programmes approved by the registrar (and included in the registration certificate concerned) needs to be clarified by means of a specific (sub-) regulation. Within this context, consolidated amended regulation 6 requires that programmes need to be registered on the NQF and that an official report in this regard needs to be provided by SAQA to the applicant (which official report needs to be submitted as part of the application). The DHET should take a policy decision on the sequencing of steps as regards the involvement of the HEQC, SAQA and the registrar, and that all regulations and sub-regulations dealing with this matter be reviewed and redrafted to provide an inclusive and comprehensive sequential process.

3.3.3 The term “Conversion of provisional registration” to (final) registration has been deleted from the Regulations (see also consolidated amended regulation 17). It is unclear why this definition has been deleted, as regulations dealing with provisional registration still exist. The 2014 Amendment Regulations will result in an institution being unable to apply for conversion of a provisional registration. The DHET should provide a valid reason why the right that is vested in private HEIs to apply for the conversion of a provisional registration (e g when, in the opinion of the private HEI concerned, it has fully complied with the outstanding requirements for full registration and/or conditions, and the registrar has not yet issued the certificate of (final) registration) (e g on account of administrative delays within the DHET). The acceptance of the 2014 amendment (consolidated amended regulation 17), would mean that private HEIs would lose a right conferred on them by the 2002 Regulation. It is recommended that the 2002 provisions relating to the application to convert a provisional registration be retained. Within this context, it must also be noted that both the 2002 Original Regulations and the 2014 amendments require a period of at least 18 months between the submission of the application for registration and the commencement of operations by the institution concerned.

3.3.4 The original regulation 12(3), which deals with the maintenance of appropriate qualifications of academics, academic standards, infrastructure and records was deleted, and was not replaced by a new sub-regulation. It is unclear why a substitute sub-regulation was not provided for. The wording of the original regulation 12(3) is still important and necessary. It would appear that the deletion of the original regulation 12(3) was an oversight on the part of the drafter of the amendment regulations. It is recommended that regulation 12(3) be retained.

3.3.5 An applicant is obliged to submit its most recent audited annual financial statements, an audited financial forecast and proof of financial surety or guarantee (consolidated amended regulation 15). This regulation is more detailed than the original regulation, which only required proof that the applicant has sufficient income and that it will have a stable financial position. Requirements for the financial surety or guarantee are set out in detail. It is recommended that the wording of the consolidated amended regulation be checked by a financial expert in HE matters.

3.3.6 Consolidated amended regulation 15 also adds that the registrar may request any additional relevant financial information. The term “relevant” is too vague and needs to be more specific. Some financial information should not be provided to the state, e g salaries of individual lecturers etc.

3.3.7 As regards the existing (2002) provision (original regulation 15) relating to evaluations of individual private HEIs by the registrar, it is recommended that the principles of good governance and of M&E require the drafting of a uniform M&E framework that would be applicable to all private HEIs. This framework must be included as an annexure to the consolidated amended regulations. In addition, it is recommended that the period between evaluations be uniform for all private HEIs. Furthermore, it is recommended that the periodic evaluations be done by a special subcommittee established for this purpose by the HEQC (which is responsible for the periodic evaluation of public HEIs). It is strongly recommended that this consolidated amended regulation 31(6) be redrafted in its totality to provide for all of the above, and that a comprehensive M&E framework be developed jointly by DHET, CHE and the private HEI sector, which framework must be included in the consolidated amended regulations as an annexure.

3.3.8 The Act vests a discretion in the registrar to cancel any registration or provisional registration (s 62 and& 63). Consolidated amended regulation 19 must be redrafted in order to effect alignment with sections 62 and& 63 of the Act. The Act only allows for discretion on reasonable grounds, whilst the consolidated amended regulation 19 provides for a duty to cancel, in specific instances (not provided for in the HE Act).

3.3.9 Instead of obliging the registrar to review an institution’s programmes after the HEQC withdraws accreditation of programme(s), consolidated amended regulation 19 provides the registrar with a power to cancel the institution’s registration (but only after reviewing the institution’s registration or provisional registration). The DHET should provide a valid reason for the deviation from the current, well-established process. The removal of the compulsory review process affects the existing rights of private HEIs in the sense that a specific administrative step is removed.

3.3.10 The obligation on the registrar to publish the intention to cancel by notice, with reasons; consider any representation from the institution or an interested person in relation to such action; and publish the final determination, with reasons, has been deleted (see consolidated amended regulation 19). The Regulation refers to section 63 of the Act, which states the following:

> ***“63 Steps before amendment or cancellation***
>
> *The registrar may not act under section 61 or 62 unless the registrar–*
> *(a) has informed the private higher education institution of the intention so to act and the reasons therefor;*
> *(b) has granted the private higher education institution and other interested persons an opportunity to make representations in relation to such action; and*
> *(c) has considered such representations.”*

However, the publication requirements have fallen away in the 2014 amendment regulations. The 2014 replacement with references to section 63 of the Act ("Steps before amendment or cancellation") is in order. However, the deletion of the obligation (contained in 2002 regulation 19(3)(b) and (d)) to publish (i) the intention to cancel and (ii) the final determination with reasons, in the *Government Gazet*te, is not acceptable. It is recommended that consolidated amended regulation 19(3) be redrafted so as to include the 2002 regulation 19(3)(b) and (d)) to publish (i) the intention to cancel and (ii) the final determination with reasons. This is necessary for purposes of transparency and open government, and to inform the public at large.

3.3.11 Consolidated amended regulation 24(i)(vii) provides for the compulsory reporting to the registrar of agreements for the joint use of facilities with a public/private institution/provider. The DHET must clarify the meaning of public/private institution/provider in consolidated amended regulation 24(i)(vii) by inserting appropriate definitions in consolidated amended regulation 1.

3.3.12 2002 regulation 28(3) which allows private HEIs to advertise programmes of recreational or general public interest has been deleted *in toto*. The DHET must provide valid reasons why the current situation (which allows for, amongst others, winter schools, summer schools, recreational programmes etc.) should not be allowed to continue. This affects the current rights of private HEIs. In addition, the DHET must also indicate if this new approach would apply henceforth to public HEIs. It would probably be unconstitutional to make this applicable only to private HEIs.

3.3.13 Owing to the vagueness of the wording contained in consolidated amended regulation 31(4), which deals with the provision of copies of partnership agreements between private HEIs, and between private HEIs and public HEIs, it is unclear whether the current system that allows for such partnerships will be changed. This might also affect public HEIs.

3.3.14 As regards appeals to the Minister (against decisions of the registrar), consolidated amended regulation 32 is unclear, and explicitly excludes so-called new information which might be directly relevant to the appeal. In addition, the record of decision by the registrar and all related supporting documentation must also form part of the appeal documentation.

3.3.15 2002 regulation 32 (dealing with conflict of interest of DHET officials as regards their involvement in matters pertaining to private HEIs) has been deleted *in toto*. It should be retained in its entirety so as to exclude any possibility of personal interest and/or related improprieties. It is not sufficient to rely in general on the provisions of the legislation that governs the public administration.

3.3.16 Consolidated amended regulation 34 (dealing with appendices) must refer to the appendices which should be included in the consolidated amended regulations. Furthermore, the specific consolidated amended regulations that form the basis of such appendices, must contain references to the appendices concerned.

4 RISKS FOR PRIVATE HIGHER EDUCATION INSTITUTIONS, AND, BY EXTENSION, POSSIBLE RISKS FOR PUBLIC HIGHER EDUCATION INSTITUTIONS

Based on the detailed analysis and the above overview, the following risks for private HEIs (which might potentially also be made applicable – if not now, possibly in future – to public HEIs) are identified:

4.1 The fact that, in future, a number of important administrative actions would no longer be published in the *Government Gazette*.

4.2 The fact that the registrar is responsible for effecting evaluations of private HEIs, instead of the CHE's HEQC being responsible. This is exacerbated by the absence of a prescribed uniform evaluation framework and of a prescribed uniform period between evaluations.

4.3 The uncertainty relating to the relationship between the CHE, SAQA and the registrar as regards the approval and registration of programmes.

4.4 The deletion of the right to apply for the conversion of a provisional registration to a final registration affects the existing rights of private HEIs.

4.5 The fact that the registrar may require any "relevant" financial information may be interpreted as meaning that e g financial information relating to a specific staff member may be requested by the registrar.

4.6 The fact that the wording of the original regulation 28(3) was deleted, may imply that private HEIs may no longer "advertise any programme of recreational or general public interest in the areas of its academic and professional competence" (this would in future exclude e g summer schools, winter schools, continuing education, etc.)

4.7 Owing to the ambiguous wording of consolidated amended regulation 31(4), the current system of partnership agreements between private HEIs, and between private HEIs and public HEIs, will be changed if the 2014 amendment regulations are assented to. This might also affect public HEIs.

END

11 February 2015

Submission made:

Dr Jeffrey Mabelebele, CEO of Higher Education South Africa (HESA)
Tel: 012 481 2842 and email: admin@hesa.org.za