

HESA POSITION ON HIGHER EDUCATION AND TRAINING LAWS AMENDMENT BILL [B23-12]: NEW AMENDMENTS

1 BACKGROUND

In our reading, the amendments aim to consolidate provisions relating to assessors and administrators (so that there will be a single set, not parallel sets, one for Institutes for National Higher Education and one for Higher Education Institutions.) This makes sense for HESA, and we support the principle. However, the amendments go further and amend the existing provisions. We have identified four areas of the new amendments for comments.

2 COMMENTS

2.1 On the appointment of the Independent Assessor:

- a. Investigation by an independent assessor: The proposed S45A(1) allows an assessor to respond to all manner of (untested and anonymous) complaints, allegations or information. It is our view that such complaints, allegations or information should be qualified in the Act.
- b. Sub-section b(ii) of the proposed S45A(1) which reads “The Independent Assessor may direct that any category of persons or all persons whose presence is not desirable, shall not be present at any proceedings pertaining to any investigation or part thereof” may be problematic. At issue for HESA is how the Assessor shall determine that the presence of a category of persons is not desirable – that test is an objective one rather than a subjective one. We propose that the proposed sub-section b (ii) be deleted.
- c. Sub-section 8 of the proposed S45 needs to be redrafted, both because it needs to be clear as to: what a “potentially implicated person” is to respond to; and what a Council’s role is in this regard. The specific sub-section in question is: “If it appears to the Independent Assessor during the course of an investigation that any person is implicated in a matter being investigated and that such implication may be to the detriment of that person or that an adverse recommendation pertaining to that person may result, the Independent Assessor must afford such a person or the Council an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.”

2.2 On the Intervention of the Minister:

In our view, the Act as it currently exists allows the Minister to intervene and set specific terms and conditions for the HEI. S42 of the Act (Action or failure of council to comply with [the] Act or certain conditions), provides for the following:

- (1) If the Council of a public higher education institution fails to comply with any provision of this Act under which an allocation from money appropriated by Parliament is paid to the institution, or with any condition subject to which any such allocation is paid to such an institution, **the Minister may call upon such Council to comply with the provision or condition within a specified period.**

- (2) If such Council thereafter fails to comply with the provision or condition, the Minister may withhold payment of any commensurate portion of any allocation appropriated by Parliament in respect of the public higher education institution concerned.
- (3) Before taking action under subsection (2), the Minister must –
 - (a) Give notice to Council of the public higher education institution concerned of the intention so to act;
 - (b) Give such Council a reasonable opportunity to make representations; and
 - (c) Consider such representations.
- (4) If the Minister acts under sub-section (2), a report regarding such action must be tabled in Parliament by the Minister as soon as reasonably practicable after such action.

The provisions in the above section allow the Minister to “intervene”, if a public higher education fails to comply with the conditions prescribed by the Minister. Against this background, HESA would like to comment specifically on the proposed new reasons (i.e. reasons for a directive beyond those in S41(A)(1) and S41(A)(2) of the Act), in particular the following sub-sections:

- a) is in a financial difficulty or is being otherwise mismanaged – Although we support the first part of the reason, we feel the second part, i.e. “**or is being otherwise mismanaged**” is too wide-ranging and vague for application in the context of Higher Education Institutions. We propose that the second part of the sentence in bold above should be deleted.
- b) is unable to perform its functions effectively due to dissension among Council members – although we agree that “dissension” can paralyse the governance of the university at council level, we are not convinced that strong disagreement, a contention or quarrel should be the basis upon which the Minister may issue a directive to intervene in the affairs of the university. The situation at the university council must have deteriorated to a level of “dis-functionality” for the Minister to intervene, and conditions for this purpose should be clarified. Again, S42 of the Higher Education Act, does make provisions for such an “intervention”.
- c) has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under this Act – again the words “unfairly”, “discriminatory”, and “inequitable” are used vaguely in this sub-section, and specific conditions under which the intended meaning obtains should be included in the Act. In its current form, the formulation is open to a number of interpretations, and can therefore be applied inconsistently to the detriment of Higher Education Institutions.
- d) has failed to comply with any law –HESA endorses this.
- e) has failed to comply with any directive given by the Minister under this Act – This sub-section is too vague and in our view sufficient safeguards exists in the current regulatory framework to allow institutions to account to the public through the Minister as an Executive Authority. We propose that given its vagueness, and wide-ranging scope of application, the sub-section be deleted. S42 of the Act already provides for an intervention by the Minister.
- f) has obstructed the Minister or a person authorised by the Minister in performing a function in terms of this Act – HESA endorses this sub-section.

2.3 On the appointment of an Administrator:

It should also be noted that this new proposal goes beyond what is in S41A(1), (2) and (3). There is a conflict, given the proposed subsection 49A(4)(b), between 49(A)(4)(a) and 49B(1) as:

- The former provides for the administrator to take over the functions of Council, and
- The latter for the administrator to take over control of the Council, management and administration.

S49B(1) provides for an administrator to take over both functions (the governance role of a council and the management and administration role of the Vice-Chancellor as CEO). Though in some cases this may be necessary, HESA believes that the provision should be “to take over the governance, and/or management and administration”. S49B(1) must be read with the proposed S49E which deals with the status of Council. HESA believes that the provision should provide for the Minister to:

- a. **suspend** the Council for a period of up to 1 year, if the Minister has reason to believe that this is in the best interests of the HEI (a subjective test); or
- b. **dissolve** the Council, if the Minister finds that the Council is no longer capable of functioning (an objective test).

S49B(1)(a) provides for the appointment of an administrator if there is “serious undermining **[by?]** of the effective functioning of the HEI. While the first clause of this section requires an audit finding and the second requires an assessor’s report, this third clause is not qualified. HESA proposes that a qualification should also be considered for the third clause, i.e. “Council of the public higher education... requests such appointment.”

If the Council requests an administrator, the Council should be able to ask for:

- (a) the administrator to take over only the governance function of the university, replacing Council, where the Council accepts that it has become dysfunctional; or
- (b) the administrator to take over the management and administration function of the HEI replacing the Vice-Chancellor, where the Council has been unable to resolve a dysfunctional executive; or
- (c) both?

Clarity should be given in this regard.

A number of sections refer to public higher education and training institution”, the words “and training” should be deleted. Again, S49B(1)(c) relies on “circumstances arising” but gives no indication how or when such arise. It may even be void of vagueness.

The use of the phrase “reasonable period”, in some sections and sub-sections is a matter of concern to HESA. It is our view that “reasonable period” should be described for each of the provisions under which it was used.

2.4 On dissolution of Council:

Section 49E seems to be inconsistent with section 49B(1)(c).

3 CONCLUSION

At all times, the most important principle to be remembered and adhered to is that Council as the governing authority bears ultimate responsibility for, and has ultimate authority over, all the activities of the institution it governs. HESA is in full support of any reasonable measures aimed at achieving greater levels of public accountability. Such public accountability should, however, be circumscribed by a framework which ensures satisfactory levels of institutional autonomy as enshrined in our current regulatory framework. On the new provisions relating to the **Intervention of the Minister**, HESA believes that the provisions in the current Act provides sufficient safeguards for both the objectives of institutional autonomy and public accountability to be simultaneously pursued.

Ends

5 October 2012