

Friday, 9 December 2016

To: The Director General
Department of Higher Education and Training
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Dear Sir,

RE: Comment on the Draft National Qualifications Framework Amendment Bill, 2016 (hereinafter referred to as the Bill)

Managed Integrity Evaluation(Pty) (Ltd) (hereinafter referred to as MIE), hereby wishes to make comment in terms of the written call for public comment on the draft Bill issued on the 18th of November 2016.

1) Introduction and Support for the Bill's objective to combat, detect and prevent educational qualification fraud

It is common cause that educational qualification information is highly significant to the overall profile of an employee's ability and competence to perform a particular job. Accordingly, there is need for developing systems with integrity that can verify and validate such qualifications, to ensure that organizations' that employ for purposes of delivering goods and services to society, and society that consumes such goods and services do not fall victim to educational qualification fraud, and sub-standard products and services delivered by employees who misrepresented their abilities and qualifications to perform the job.

The general public perception in South Africa is that the demand and supply of fraudulent educational qualification information is increasing. Against this background government has resolved to implement measures that ensure that educational qualification information is subjected to adequate verification and scrutiny, and employers and society are adequately protected from educational qualification fraudsters who misrepresent their educational and academic qualifications.

The value, credibility and overall regard for qualifications emanating from South Africa will be severely undermined if the issue of educational qualification fraud and misrepresentation is not properly addressed and dealt with.

As such government's objective, which is clearly apparent from the Bill, namely, to combat, detect and prevent educational qualification fraud in South Africa is wholly supported by MIE.

2) Specific Provisions of the Bill in respect of which MIE wishes to make comment:

In order to achieve its objective of combatting, detecting and preventing educational qualification fraud, the Bill proposes to introduce a system of processing educational qualification information by the South African Qualifications Authority (SAQA). In particular the Bill proposes to amend section 13 of the principal Act, by making provision for SAQA to:

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- Establish and maintain a national learners' records database comprising registers of: national qualifications; part qualifications; learner achievements; recognised professional bodies; associated information; qualifications and part qualifications requirements and related information; and the details of the individuals that an institution awarded qualifications or part qualifications to, as well as supporting source documents.
- Establish and maintain registers for professional designation; fraudulent qualifications and misrepresented qualifications/part qualifications.
- Verify all qualifications and part qualifications referred to in terms of section 32B (which the Bill introduces), and make a finding as to whether the qualification/part qualification is authentic/valid, or fraudulent or misrepresented, and provide reasons therefor.

Section 32B introduced by the Bill makes it mandatory through the use of the word "must" for all employers to refer qualifications of employees to SAQA for validation and verification.

It is in relation to the aforesaid provisions of the Bill that MIE wishes to make comment. Over more than twenty years MIE has developed the requisite infrastructure, systems, and processes to maintain a national register of educational qualifications as well as a register of fraudulent educational qualifications. Further MIE's core business activity is the verification and validation of educational qualification information on behalf of employers and recruitment agencies. As the Bill appears to be proposing a relocation of the services provided by MIE to SAQA, MIE is justifiably concerned that the said proposals will significantly impact the business activities of MIE.

3) Why MIE's existing sophisticated and mature educational qualification information processing systems, can assist government in effectively achieving its objective, to combat, detect and prevent educational fraud, at no cost to government or the taxpayer

(A) MIE's Educational Qualification Processing Systems are compliant with applicable laws:

Relevant Definitions and Laws Applicable to the Processing of Educational Qualifications Information:
"personal information" as defined by the Protection of Personal Information Act No.4 of 2013 (POPIA), means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person including, but not limited to— (b) information relating to the education or the medical, financial, criminal or employment history of the person....

Educational qualification or part qualification information is therefore a type of personal information as defined by POPIA , the processing of which is regulated in terms of POPIA.

"processing" as defined in POPIA, means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—

(a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;

(b) dissemination by means of transmission, distribution or making available in any other form; or

(c) merging, linking, as well as restriction, degradation, erasure or destruction of information;

Having regard to the definitions of **"processing"** and **"personal information"** in terms of POPIA, the establishment and maintenance of the aforesaid registers of educational qualification information by SAQA, as well as the verification and

validation of educational qualifications, will amount to the processing of personal information under POPIA which must comply with the conditions of lawful processing prescribed in POPIA.

Consumer credit information bears the meaning ascribed to it in section 70(1) of the National Credit Act No.34 of 2005 (NCA), and includes as per section 70(1)(c) of the NCA:

a person's education, employment, career, professional or business history, including the circumstances of termination of any employment, career, professional or business relationship, and related matters;

Credit Bureau in terms of section 43 of the NCA means a person who engages for payment in the business of – (a) receiving reports of or investigating... (iv) consumer credit information as defined by section 70(1); (b) compiling and maintaining reports of data contemplated in subparagraph(a); and (c) issuing reports concerning consumers or other natural persons based on information or data referred to in this paragraph

Therefore, educational qualification information is defined as consumer credit information in terms of the NCA, and any person who receives, compiles, and maintains educational qualification information, and further issues reports based on such information for payment is a credit bureau as defined by the NCA.

MIE's systems and processes are compliant with all applicable laws.

MIE is registered as a credit bureau in terms of the NCA and complies with the NCA in so far as it processes educational qualifications information, particularly with respect to the maintenance of records of educational qualifications and the prescribed purposes for reporting such information.

MIE is in the business of assisting employers and recruitment agents with screening employees and prospective employees within the employment context. In this regard MIE reports information for the following purposes prescribed in the NCA:

- a. Considering a candidate for employment in a position that requires honesty in the handling of cash or finances(18(4)(c));
- b. Verifying educational qualifications and employment (18(4)(g));
- c. Fraud detection and fraud prevention in the employment context (18(4) (b)).

In addition MIE's systems and processes are also compliant with POPIA, and subject to the conditions of lawful processing of personal information prescribed in POPIA, including but not limited to: processing for lawful purposes; implementing adequate security safeguards in accordance with international best practices; implementing reasonable steps to ensure the quality and integrity of the data; as well as implementing systems to address complaints from the data subject/person to whom the information belongs.

(B) MIE's Educational Qualifications Processing Systems are Reliable and Mature

MIE's systems, and processes relating to the processing, verification and validation of educational qualifications information have evolved over more than 20 years, and has resulted in a mature and reliable educational qualification information processing system, that is efficient and allows for integration with other systems, essential to achieving its business objectives.

Systems, rules and processes that ensure a high quality register of information, as well as a high quality successful educational qualifications validation and verification system, evolved over time through trial and error and lessons learned. The level of efficiency that MIE has achieved can only be achieved through the evolution of the requisite systems over time.

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Further, MIE has established constructive and mutually beneficial working relationships with key stakeholders in the industry and within the educational qualifications information life cycle. These stakeholders include: sources of educational qualifications information such as universities and other credible sources; users of educational qualifications information such as recruitment agencies, and employers; the department for higher education and training and the data subject or persons to whom the information belongs to. The market, namely recruitment agencies and employers have confidence in the services provided by MIE and the reliability of the information reported by MIE in relation to educational qualifications. The market has tested the systems and services provided by MIE over time and found them to be reliable. Once again it is only through the testing and use of systems and services over time that market confidence can be earned.

For a full overview of MIE and the level of professionalism it has achieved see **Annexure "A" hereto.*

4) As per the recently introduced "socio-economic impact assessment (SEIA)" requirement the drafters of the Bill must explore the most cost effective ways of effectively achieving the government's objective of combatting, detecting and preventing educational fraud, by subjecting its policies and proposed legislative interventions to a valid SEIA.

According to the website of the Department of Planning, Monitoring and Evaluation (DPME), the implementation of a socio-economic impact assessment (SEIA) system, applicable to all government policies, laws and regulations is a key focus area of the DPME. The website further states that:

"In South Africa, Cabinet decided on the need for a consistent assessment of the socio-economic impact of policy initiatives, legislation and regulations in February 2007. The approval followed a study commissioned by the Presidency and the National Treasury¹ in response to concerns about the failure in some cases to understand the full costs of regulations and especially the impact on the economy.

To implement the Cabinet decision, from 1 October 2015 Cabinet Memoranda seeking approval for draft policies, Bills or regulations must include an impact assessment that has been signed off by the body responsible for the assessment. Cabinet Memoranda have been reviewed for departments to include information generated by the SEIAS in the recommendations. In addition, the Memoranda provide for a summary of the main findings of the final impact assessment as well as annexing a full report (refer to the Presidency Guide for the Drafting of the Cabinet Memoranda²)."

A SEIAS unit presently in the Department of Planning, Monitoring and Evaluation will provide oversight and training, and generally support government departments in implementing SEIAS. The National Treasury can also provide technical assistance, when required.

SEIAs apply too new or amended primary legislation, such as the Bill. It is therefore recommended that the Bill's proposed interventions be subjected to a valid SEIA in accordance with the guidelines published by the DPME.

¹ The detailed background study on impact assessments and their relevance for South Africa (2005) is available on www.thepresidency.gov.za.

² The full Guide for the Drafting of the Cabinet Memoranda is available from the Cabinet Secretariat at 012 300 5518/323 8292 or 021 464 2161/464 2162/3

According to the DPME's guidelines for SEIAs (herein after referred to as the Guidelines), SEIAs aim:

- To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.
- To anticipate implementation risks and encourage measures to mitigate them.

The guidelines require a cost benefit assessment of all proposed policies, laws and regulations designed to address a specific social problem. With respect to costs it provides that costs may be incurred through the following unintended consequences of the proposed intervention and needs to be considered in a SEIA:

a. Through inefficient implementation mechanisms

With respect to the consideration of implementation costs, the Guidelines require that drafters identify the costs of the implementation process, and explore more efficient ways to achieve regulatory objectives or change behaviour. For example, the guidelines point out that it may be costly to design a system that provides for the imposition of sanctions, and it may be less costly and more effective to incentivise groups other than the state to monitor and support compliance. In other words, if there are effective implementation mechanisms available without cost to government these must be considered. The Guidelines, in accordance with international practice, demand consideration of alternative responses to perceived problems. They require an analysis of "different regulatory options". SEIAs must describe the alternatives considered and say how they compare. Reasons have to be given for accepting or rejecting a particular option.

Turning to the Bill's proposals requiring SAQA to establish and maintain registers of educational qualifications, fraudulent qualifications and misrepresented qualifications, the drafters of the Bill must consider existing mechanisms that have the capability of meeting the regulatory objective prior to deciding that this be implemented by SAQA at a cost to the state. As the guidelines correctly point out, drafters should not ignore entities outside the state that are capable of monitoring, supporting or ensuring compliance or assisting government in achieving regulatory objectives at no cost to government.

If a solution to a social problem already exists, then the adequacy of the solution must first be addressed before simply proposing a new solution or duplicating the existing solution at a cost.

In this regard It is respectfully submitted that the status quo, that the educational qualifications registers already is in existence, and the qualifications validation and verification services currently provided by entities such as MIE, must be considered, from a cost saving perspective. In other words, the status quo, in so far as it makes provisions for infrastructure, systems and services, to establish and maintain the educational qualifications registers that the Bill proposes to introduce, as well as the verification and validation of educational qualifications, cannot simply be ignored by the drafters as per the guidelines for SEIAs made available by the DPME.

According to the guidelines, a SEIA should require change to the status quo based on credible evidence that it is flawed, it should explain why the desired objectives of establishing and maintaining the proposed qualifications registers, as well as the verification and validation of educational qualification information cannot be successfully achieved by the existing system. The Guidelines ask specifically what it is about the status quo ante that could not solve whatever defined problem is envisaged.

Sound reasons as to why the functions should be relocated from entities such as MIE who have been providing those services over many years to SAQA, would need to be provided. In fact, if the drafters are proposing a new system to replace the existing system, the drafters would be obliged to identify the flaws in the existing system and describe how they will be addressed in a cost effective manner by the new proposed system. The SEIA would need to state what is not working in the existing system, whether it can be easily fixed without proposing a new system. If the finding is that the problems with the existing system cannot be fixed, necessitating the introduction of a new system then the SEIA must provide credible evidence as to why the new system will succeed where the old system failed, and will be better equipped to meet the regulatory objectives. In other words, there must be a proper justification in a SEIA, for the relocation of functions/services from entities such as MIE to SAQA, at a cost to the state.

To compare the status quo with an imaginary ideal without a SEIA in this scenario would be foolhardy, because it would mean drawing the conclusion that the existing tried and tested system generally regarded as reliable is flawed, and an untested new system will be an improvement. Particularly because the reliability and efficiency of an educational qualifications verification processing system is mainly dependent upon it evolving from an infant to a mature system, through trial and error.

In fact, the SEIA, would require drafter to explain, how or why the proposed “reforms” might more effectively “address” the problem than existing powers and functions.

Notwithstanding the general perception that educational qualifications fraud in South Africa is on the increase, a SEIA would also require a proper quantification and assessment of the problem prior to determining any interventions. To simply say that there is an escalating social problem pertaining to the fraudulent qualifications would amount to a bald assertion, meaningless, the size of the problem would need to be stated if the cost of the intervention is to be justified.

A SEIA would need to give concrete information as the numbers of transactions involving fraudulent qualifications, the proportion of them that result in complaints, the proportion of complaints that are valid, the size of the problem, the flaws in the existing system fueling the problem, and then the suggested, justified intervention/solution. In other words, in the absence of a clearly stated and defined problem, and an evaluation of the existing systems developed to address such problem, it would not be possible for the government to assess net benefits of any proposed legislative intervention.

Another implementation cost the Guidelines point out, is the “less easily identified cost (which) arises when an implementation mechanism opens the door to corruption”. This means that where officials are given discretion, there must be clear and objective criteria to guide such decision-making, together with the requirement that officials publish their decisions with written reasons, and the provision of an accessible appeals system.

The Bill clearly entrusts the function of determining whether an educational qualification is authentic, fraudulent or misrepresented to officials within SAQA, save for the definitions of fraudulent and misrepresented qualification, the bill provides no objective rules and criteria with reference to which such officials should properly apply their discretion. This raises the risk of the cost of corruption, and is further dealt with under the heading “substantive shortcomings of the Bill”.

b. Where stakeholders face an excessive cost from complying with the regulation

Further the guidelines point out that cost to stakeholders in complying with the proposed measure must also be considered, both the general regulatory burden and the cost of the behavioural change required.

In this regard a SEIA must consider how the existing systems of entities such as MIE, universities/sources of educational qualification information, employers and recruitment agencies, that have been developed to “talk to each other” for

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the purpose of sharing educational qualification information, as well as verifying and validating such information will need to change and at what cost to the various stakeholders.

c. By over- or underestimating the benefits associated with the new rule's aims

There is a risk that the drafters may over-or underestimate the costs of successful implementation of the measure. Particularly where costs are underestimated, the result will be inadequacies and deficiencies in the system/measure implemented. As such drafters are encouraged to make a reasonable assessment of the proposed costs of successful implementation.

d. By underestimating the risks involved – in other words, by overestimating the likelihood of success in achieving the anticipated benefits

The likelihood of success of the measure in achieving the regulatory objective should not be concluded without an adequate assessment of potential risks, whether economic, social, or political factors outside the control of the state. The SEIA must anticipate implementation risks and encourage measures to mitigate them according to the guidelines.

Conclusion:

In addition to a SEIA, considering the aforementioned unintended consequences from which costs may flow as a result of the proposed intervention provided in the Bill, the drafters must specifically, include in a SEIA a cost analysis addressing:

- administrative and compliance costs to SAQA;
- human and non-human cost to government and society of duplicating existing systems for the provision of educational qualifications registers, dealing with requests from employers, recruitment agents, universities, other stakeholders; addressing complaints, responding to enquiries etc.
- Costs to entities such as MIE, whose core business activity may be severely undermined, warranting, restructure, retrenchments, and a loss in annual turnover.
- Costs to all stakeholders (universities/sources of educational qualifications data; employers, recruitment agencies, and service providers such as MIE), within the educational qualifications processing life cycle, who will need to develop new systems to comply with the Bill's requirements

The SEIA should be published and be suitable for public consumption in line with the provisions of the Promotion of Access to Information Act, 2000 (taking into consideration updates and amendments to the Act). Where an assessment cannot be published because it requires or generates classified information, the drafters must state their reasons.

5) Substantive shortcomings of the Bill

- (a) The Bill wholly ignores the status quo, and the existence of infrastructure, systems, processes in place, between all stakeholder in the industry, that currently enable the collection, maintenance, and reporting of educational qualifications information, including fraudulent and misrepresented qualifications, with the objective of minimising educational fraud through the verification and validation of qualifications.
- (b) The Bill only make provision for findings of authentic, fraudulent or misrepresented in relation to the validation of educational qualifications. Other scenarios regarding the status of educational qualifications, such as, results withheld due to fees not being paid; or the person is still in the process of completing the qualification are not fully considered or provided for. Further as mentioned above there is a failure to prescribe objective rules and criteria

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applicable to determining whether a qualification is authentic, fraudulent or misrepresented, and how officials should address scenarios other than authentic, fraudulent or misrepresented. In this regard, the Bill may open the door to corruption, which is the natural consequence of giving officials subjective discretion. It is important to ensure that the Bill provides adequate controls on the discretion of individual officials. These controls typically should take the form of clear, objective rules and criteria for official decisions; requiring officials to publish their decisions and justify them in terms of the criteria provided; and establishing an easily accessible and fair appeals route, as per the SEIAs guidelines.

- (c) There are no indications that the implications of POPIA and the NCA which will both apply to the processing of educational qualifications information by SAQA were considered by the drafters of the Bill. A valid SEIA would need to consider impact of other laws on the legislative intervention or proposals.
- (d) It is unclear from the Bill whether employers will need to pay a fee for verifying and validating qualifications against the proposed registers or if the service will be provided free of charge, if a fee is payable, this should be stated in the Bill, subject to regulations prescribing the fee. If the fee ultimately prescribed is higher than what employers currently pay, market impact will need to be assessed. Finally, if a fee will be charged, SAQA would need to register as a credit bureau in terms of section 43 of the NCA read with section 70(1)(c).
- (e) There is no provision in the Bill suggesting that rule and standards will be prescribed for the collection, maintenance and reporting of educational qualifications information by SAQA, addressing important matters such as turn-around times for validating qualifications, and required stakeholder service level agreements.

6) **Constructive and cost-effective recommendations**

In addition to recommending that the drafters of the Bill subject its proposals to a valid SEIA, in accordance with the guidelines provided by the Department of Planning, Monitoring and Evaluation, it is recommended that the drafters consider making provision in the Bill for the appointment of suitably qualified service providers to assist SAQA with the establishment and maintenance of educational qualifications registers, as well as the validation of educational qualifications. In this regard it may be useful for the drafters to consider the Consumer Protection Act No.68 of 2008 (CPA), in particular section 11 which prohibits direct marketing under certain conditions, and make provision in section 11(3), for the Commission which is the regulatory authority, to establish or recognise a registry allowing for consumers to pre-emptively block direct marketing communication. The important point to note is that the law creates the option for the regulatory authority to recognise a third party registry, this provision was included as the drafters of the CPA were aware that such a registry already existed within the Direct Marketing Association. In fact, as per section 11(3) of the CPA, regulations issued in terms of the CPA, stipulate principles that are required as a minimum for the operation of a registry that may be recognised by the Commission. In other words, learning from the implementation mechanism provided in the CPA in relation to a direct marketing registry, the Bill could provide that SAQA recognise a registry of educational qualifications information, including fraudulent and misrepresented qualifications, provided the registry meets certain prescribed minimum standards. Such an arrangement will ensure a cost effective and reliable implementation mechanism.

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The NCA, further, may be regarded as an example of a law that requires credit providers to consult private credit bureaux registries prior to extending credit, similarly the Bill could require that all employers and their recruitment agents validate and verify educational qualification information against registries recognised by SAQA. SAQA could recognise registries on the basis that the registry:

- Has adequate internal quality assurance systems and processes in the context of educational qualifications.
- Devised effective detection and investigation strategies to determine whether a qualification is valid, fraudulent or misrepresented as per the relevant definitions in the Bill, and further report on any other status of the educational profile of the person.
- Work with stakeholders in developing standards and codes of practice that promote academic, and educational qualifications integrity.
- Submits annual reports to SAQA, and be subject to audits if necessary based on reports submitted.

To close all gaps, the Bill should further require that both sources and users of educational qualifications information develop effective quality assurance systems applicable to educational qualifications information.

Conclusion:

We trust that our comments, recommendations and proposals will be favourably received by the drafters, and in the constructive spirit they are intended. In light of the 30day deadline provided for comment on the Bill, with part of that period falling within the December period, MIE requested an extension in order to properly assess the impact of the Bill on its business. Notwithstanding such application, for purposes of complying with the 30day time period allocated for comment, MIE is submitting this comment, but reserves the right to provide any relevant additional information should its application for postponement be granted or a further opportunity be provided.

Yours Faithfully

Kind Regards,



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