

1. TERMS OF REFERENCE AND APPROACH

1.1 OBJECTIVES, SCOPE AND DEFINITIONS

This investigation of the governance of merger in South African higher education has three primary objectives.

The first objective is to develop a conceptual and contextualised framework for merger governance in South Africa. An understanding of the governance of restructuring South African higher education needs to be embedded in a review and interpretation of the trajectory followed by national higher education policy, an interrogation of the prevailing policy environment, and an analysis of early experiences of mergers and reactions to restructuring proposals. Given that South African higher education is itself situated in a global higher education environment, some review and interpretation of international experience in the restructuring arena adds dimension to this line of enquiry. In particular, it is important to develop an understanding of the evolving balance between state steering and institutional autonomy in South Africa's higher education system, and how this is given expression or effect through governance in the context of mergers.

The second objective is to interrogate the state of preparation – with respect to governance capacity in place, as well as grasp of the needs of governance – of South Africa's higher education system and institutions for the highly complex processes of mergers and incorporations on which they have embarked. The Ministry and Department of Education (DoE), higher education institutions themselves, as well as their coordinating bodies, have applied their minds to some extent to issues of merger governance during the period following the publication of the 2001 National Plan on Higher Education (NPHE). Ideas and questions put forward during this period of reflection, as well as during the more intensified period of preparation for implementation of restructuring decisions announced on 9 December 2002, have been analysed for any key indications they may give of directions to be followed for successful restructuring at both system and institutional levels. Attention in this report ranges from actions and support required of the state; to considerations regarding the governance structures and processes required at the institutional level in merging institutions; the implications of merger for governance in the academic and operational spheres; and the path to be followed by merging institutions to ensure that interim governance progresses appropriately towards steady-state governance.

The third objective is to make proposals regarding system-wide and institutional-level governance in South Africa's restructuring higher education system. The intention is to identify structures, processes and mechanisms of governance that will facilitate effective and efficient restructuring and at the same time enable a continued transformation focus in the higher education sector and its institutions, respect the principles of co-operative process in higher education transformation, and support high-quality academic delivery. In essence, the key purpose of this study is to determine whether 'ideal' governance conditions are achievable under prevailing conditions of policy, law, state-sector relationships and institutional capacity, and to make proposals that will support an ideal outcome.

As stated, the focus of this report is the governance of merger in South African public higher education. By *governance* is meant the structures and processes of policy design, decision-making and oversight of policy implementation. By means of these structures and processes, governance encompasses configurations of power, relationships, values and principles – since governance is about authoritative steering on the one hand, and about formal and informal interactions between stakeholders on the other hand. Higher education governance in this study is seen as incorporating these configurations in both the higher education system as a whole, and in individual institutions, with an intersecting terrain between these two spheres.¹ Given this definition, the report considers both system-level and institutional governance questions, although the predominant focus is institutional. In particular, this includes a focus on structures, processes and mechanisms of institutional governance at each phase of the merger process, including statutory governance structures (Council, Senate and Institutional Forum; the investigation does not include an in-depth focus on the Students' Representative Council and student governance issues).

In particular, the scope of this report is to consider governance in merging public higher education institutions (as defined in the Higher Education Act and dealt with in Section 23 of the Act)² and attention is given to governance needs in multi-campus institutions that will result from the merger process. The definition of *merger* adopted for the purposes of this study, which is widely used and consistent with Section 23 of the Act, is the one supplied by Leo Goedegebuure:

A merger in higher education is the combination of two or more separate institutions into a single new organisational entity, in which control rests with a single governing body and a single chief executive body, and whereby all assets, liabilities, and responsibilities of the former institutions are transferred to the single new institution.³

The Act states that merger is 'the process contemplated in Section 23 in terms of which two or more public higher education institutions lose their status as juristic persons on the date that they are merged into a new juristic person.'⁴ *Multi-campus* in this report is used to denote unitary institutions with geographically distant delivery sites – where geographically proximate delivery sites are being referred to, this is specified.

1 References underpinning this concept and definition of governance include Marginson, S. and Considine, M (2000). *The Enterprise University: Power, Governance and Reinvention in Australia*. Cambridge, Cambridge University Press; and Hyden, G. and Hoon, P (In Press). 'Governance and Sustainable Livelihood' in W. Rosenbaum and H. Bressers (eds): *The Politics of Sustainable Development*. Praeger Publishers, Westport, Connecticut, USA. Available at http://sustsci.harvard.edu/ists/TWAS_0202/hoon_hyden_in_press.pdf (31 March 2003).

2 Republic of South Africa (1997). Higher Education Act No. 101 of 1997. *Government Gazette* No. 18515, Notice 1655, 19 December 1997. Pretoria: Government Printers: Section 23. Hereafter referred to as HE Act 1997. Section 23 has been amended by the following Higher Education Amendment Acts: Republic of South Africa (2001). Higher Education Amendment Act No. 23 of 2001. *Government Gazette* No. 22808, Notice 1104, 02 November 2001. Pretoria: Government Printers: Section 6 – hereafter referred to as HE Amendment Act 2001; Republic of South Africa (2002). Higher Education Amendment Act No. 63 of 2002. *Government Gazette* No. 24187, Notice 1598, 19 December 2002. Pretoria: Government Printers: Section 5 – hereafter referred to as HE Amendment Act 2002.

3 Goedegebuure, L. (1992). *Mergers in Higher Education*. Utrecht: Centre for Higher Education Policy Studies: p 16. Hereafter referred to as Goedegebuure 1992.

4 HE Act 1997: Section 1, as amended by HE Amendment Act 2002: Section 1(c).

Another related, but subsidiary focus is on governance needs in those instances where a subdivision of one institution is being incorporated (as defined in the Higher Education Act and dealt with in Section 24 of the Act)⁵ into another public higher education institution. The Act states that ‘incorporation of a subdivision’ refers to the situation when

An identified subdivision, faculty, school, department, section or component of a public higher education institution or education institution becomes part of another public higher education institution while the latter institution’s legal personality ... is not affected.⁶

In this instance, ‘the assets, liabilities, rights and obligations of the subdivision concerned devolve upon the public higher education institution with which the subdivision has been incorporated.’⁷ It is difficult to find a good general definition of *incorporation* as envisaged in the South African context. One definition that might be applicable in principle, given the broad transformation intent of current higher education restructuring, is Daniel Lang’s notion of ‘transformative acquisition’ in which ‘one partner absorbs the other but changes substantially as a result.’⁸ However, while this definition might express an intention, it would need to be tested in practice.

The report excludes from its focus the following:

First, the report does not revisit first principles to the extent that it does not contend the wisdom of the decisions that have been made with respect to restructuring higher education in South Africa. It takes as its starting point the fact that decisions have been made in line with the strategic goals of the 2001 National Plan, and that institutional mergers will occur, and will require conditions of good governance to attain their objectives.

Second, the report does not trace the detail or development of proposals for specific institutions in the context of restructuring the South African higher education landscape. It restricts itself to an overview of the key documents in this regard, highlighting what they have to say about governance in a restructuring system.

Third, the report does not focus on the operational complexity of mergers and incorporations. Many of the concerns within affected South African institutions at present – understandably – are on detailed aspects of implementation. While this report alludes to these aspects in so far as they have implications for governance, it is not within the ambit of the report to make detailed proposals on operational issues. Thus, for example, while the report addresses governance mechanisms to facilitate a proper focus on the intricate and often vexed questions of human resources and labour relations that inevitably arise from a merger process, it does not propose how an institution should handle human resources and labour relations questions operationally.

⁵ HE Act 1997: Section 24, as substituted by HE Amendment Act 2002: Section 6.

⁶ HE Act 1997: Section 1, as amended by HE Amendment Act 2002: Section 1(b).

⁷ HE Act 1997: Section 24(2), as substituted by HE Amendment Act 2002: Section 6.

⁸ Lang, D.W. (2002). There Are Mergers, and There Are Mergers: The Forms of Inter-institutional Combination. *Higher Education Management and Policy* Vol. 4 No. 1:42. Hereafter referred to as Lang 2002.

1.2 METHODOLOGY

A range of considerations informed the development of a methodology for this study.

First, the project marks the second phase of a broad investigation by the Council for Higher Education (CHE) into South African higher education governance, undertaken in order to advise the Minister of Education. As a 'phase two' study, the current investigation is broadly informed by the phase one work and needed to establish explicit links with it, without being unduly constrained by its terms of reference or its methodology. The first phase of the work was carried out from October 2001 to May 2002 under the auspices of the CHE Governance Task Team. The investigation set out to describe and analyse the prevailing state of governance in South African public higher education institutions; to establish whether, how effectively and with what consequences the specific concept of 'co-operative governance' has been implemented in these institutions; and to make proposals on how to improve efficiency, effectiveness and accountability in higher education governance. The study resulted in the publication of a research report, as well as a policy report which formulated specific recommendations with respect to Councils, Senates, Institutional Forums and broader recommendations for the promotion of effective governance in higher education.⁹ The research study further proposed a matrix of governance as a means to understanding the prevailing state of institutional-level governance and to interpreting the requirements of effective higher education governance. In this study, the matrix is used as a basis for developing a normative analytical framework for merger governance.

A second consideration to be taken into account in designing the methodology of the current (phase two) study was timing. The National Working Group (NWG) was still at work during the early months of the phase one study, and no formal merger proposals had been put forward by the conclusion of the study. For this reason, merger governance did not form a part of the investigation's focus. However, it became clear in the course of the study that if mergers were to be implemented, then the mergers themselves, and multi-campus institutions established as a consequence of mergers, would require specific attention at the level of governance. Furthermore, there was a significant gap in attention to issues of governance in South African policy documents and other reports (such as the report of the NWG)¹⁰ that dealt with restructuring, and that had appeared by late 2002. Policy advice to the Minister in these areas would need to be timeous, but could not be pre-emptive. The CHE Secretariat commissioned the researchers to begin phase two project research in November 2002. This was shortly after the deadline for institutional submissions to the Minister regarding restructuring proposals as gazetted in June 2002, and a few weeks before

9 Hall, M., A. Symes and Luescher, T.M. (May 2002), *Governance in South African Higher Education: Research Report* prepared for the Council on Higher Education. Pretoria: Council on Higher Education – hereafter referred to as Hall, Symes and Luescher 2002; Council on Higher Education (2002). *Policy Report: Promoting Good Governance in South African Higher Education*. Pretoria: Council on Higher Education.

10 National Working Group, (2001). *The Restructuring of the Higher Education System in South Africa: Report of the National Working Group to the Minister of Education*. *Government Gazette* No. 23549, 21 June 2002. Pretoria: Government Printers (Appendix 3 of the Notice). Hereafter referred to as NWG 2001.

the announcement of Cabinet-approved restructuring decisions on 9 December 2002 which led to the subsequent launch of the Department of Education Merger Unit in early 2003. Thus the project itself was launched at a time when in-principle theoretical positions became realities to be dealt with, interpreted and commented upon. In order to bridge this gap, the project had to include a review of policy and legislation from the mid-1990s to the present, a review of institutional responses to restructuring proposals, and an assessment of issues pertaining to merger governance uppermost in the minds of the higher education sector. It also had to take account of developing approaches to mergers, particularly from the Ministry and DoE. In April 2003, the Ministry published guidelines for mergers and incorporations. The study has included reference to these as appropriate and relevant in light of its concern with governance, without in any sense trying to encompass or replicate the guidelines, and without venturing into the operational territory they cover.

A third consideration to be borne in mind in designing the project approach was sensitivity to the position of institutions directly affected by restructuring proposals. Institutions were variable in their reactions to the proposals – some positive, some negative; some placing their comments in the public domain, some regarding their views on the matter as completely confidential; sometimes prospective merger partners were at different ends of these scales. The methodological approach needed to situate an enquiry into specific institutional viewpoints within an objective and neutral investigative framework. The phase one work had demonstrated the inestimable value of speaking to institutions directly in their own institutional environments, and it was decided to carry this aspect of the methodology into the second phase of the project. In this case, interviews could not (with one exception) delve into the ‘lived experience’ of institutions engaged in mergers, but rather had to seize upon the ‘anticipated experience’ of these institutions. This was not always an easy exercise, and institutions who ultimately agreed to be in the study sample experienced some unease with it. At the same time, they welcomed an opportunity to explore the territory of merger governance which they were about to negotiate – or were beginning to negotiate – in reality. In almost all cases, the researchers in this study were the first people to engage the institutions on these issues. This, together with the fact that the research had already accumulated learnings from its first phase – with which many of the institutions in the sample were familiar – appeared to add a developmental value to the interviews for some institutions. A further consequence of investigating ‘anticipated experience’ is that the study has not been in a position to generate ‘thick descriptions’¹¹ of merger cases. First, any such ‘thick description’ as could possibly have been made was confined to details of experience of institutional and joint governance structures in the early stages of the merger process. These forms of governance were, of necessity, still finding their feet – and in some cases, their rightful shape – at the time of the interviews. Any attempt to generate detailed descriptions of potential directions and arrangements beyond this point would have required

¹¹ ‘Thick description’ is a term borrowed from ethnography and is ‘like trying to read (in the sense of ‘construct a reading of’) a manuscript – foreign, faded, full of ellipses, incoherencies, suspicious emendations, and tendentious commentaries, but written not in conventionalised graphs of sound, but in transient examples of shaped behaviour.’ Geertz, C. (1973). *Thick Description: Toward an Interpretative Theory of Culture* in *The Interpretation of Cultures*. New York: Basic Books: 10.

revealing viewpoints that had been shared in confidence by individual institutions with researchers, at a stage when merger negotiations were sensitive and ongoing. In addition and for obvious reasons, data provided was in large part conjectural or at least embedded in a shifting reality. This – while indicating fascinating possibilities – did not allow for a clear reading of the merger as a whole. Instead the study used interview material as an essential basis for highlighting key themes for investigation and development, and for formulating recommendations.

A fourth methodological consideration was how to hone the focus of the study, as the restructuring of the South African higher education system ranges widely across mergers, incorporations, the creation of new institutional forms – such as comprehensive institutions (mergers of universities and technikons)¹², and unitary institutions with widely dispersed delivery sites (multi-campus institutions) – and regional-level programme collaboration and rationalisation. A decision was taken to focus primarily on merger governance, with a subsidiary focus on incorporation and multi-campus governance. The motivation for doing so was the particular complexities posed by unitary mergers, including those resulting in multi-campus institutions, as well as the desire to achieve a sharp and manageable focus. For the same reason, a decision was taken to focus narrowly on governance and not to stray too far into the associated territories of management, administration and complicated operational and implementation issues.

Specific efforts were made to engage South African institutions in the study. A request was sent to all institutions to forward their submissions regarding restructuring proposals, with a guarantee to review these on a confidential basis. Ultimately, institutional submissions and/or commentaries from 26 institutions (out of a possible 35) were reviewed. Approximately 85% of these were institutional submissions made to the Minister in response to merger proposals gazetted in June 2002, and most were the official Council responses. The remaining 15% were public statements made by institutions in response to the merger proposals of June 2002, including comments published on institutional websites and press releases.

Eleven institutions – or approximately one third of the pre-restructuring universe of institutions – were invited to form part of the study sample and to participate in institutional interviews. The ‘invitation sample’ was structured around creating a balance between universities and technikons, historically advantaged and disadvantaged institutions,¹³ geographical locations of institutions, and different types of merger (horizontal or vertical/comprehensive merger, merger with accompanying incorporation or without, proximate campuses or multi-campus

¹² Technikons in South Africa are the equivalent of universities of technology, technological universities, technical universities or institutes of technology found in countries such as the USA, Britain, Australia, New Zealand and Hungary; the Hogescholen in Belgium and the Netherlands; or the Fachhochschule in Germany. Technikons are administered along with universities, by the Higher Education branch of the national Department of Education.

¹³ These terms are generalisations; briefly ‘historically-advantaged institutions’ (HAIs) in South African parlance are institutions that under apartheid had exclusively or predominantly white student enrolments, and benefited from the resources of the state. ‘Historically-disadvantaged institutions’ (HDIs) are institutions that had black enrolments, were under-resourced, and were often set up to mirror the apartheid geography of separate development in urban townships, self-governing territories and homeland states.

institution as outcome of merger). Ultimately, two of the institutions approached declined the invitation. For them, as prospective merger partners, the merger in question was controversial and, at the time the request was made, the institutions felt they would be compromising their position by participating in the research. Ultimately, the study sample comprised:

- One medium-sized technikon in its first year of merger implementation – the merged institution was created from two small technikons with under 10 000 students, one historically-advantaged, and one historically-disadvantaged; the technikon now has two metropolitan campuses and the merger involved three small satellite campuses at some distance.
- One large historically-advantaged university (HAU), with more than 20 000 students, due to merge with a small historically-disadvantaged university (HDU), with less than 10 000 students; the merger was to involve five campuses of which two were at some geographical distance but of which all were metropolitan or urban.¹⁴
- One small HAU, with less than 10 000 students, due to incorporate a subdivision of a HDU (approximately 3 000 students) and then to merge with a small historically-advantaged technikon (HAT), with less than 10 000 students; the merger/incorporation was to involve two main metropolitan campuses and six satellite campuses, three within 25 kilometres, and three significantly further away; all campuses but one are metropolitan or urban.
- One small HAT with less than 10 000 students, due to merge with a small historically-advantaged university following the university's incorporation of a subdivision of another university; the merger was to involve the technikon's five satellite campuses – two within 25 kilometres, and three significantly further away; all satellite campuses but one are urban.
- One small HDU, with less than 10 000 students, due to merge with a medium-sized historically-advantaged university, with between 10 000 and 20 000 students; each institution has one main urban campus and one satellite urban campus – each of these is on average 200 kilometres apart from the next nearest campus.
- One medium-sized HAU, with between 10 000 and 20 000 students, due to merge with a small HDU; the merger was to involve the university's satellite urban campus about 200 kilometres away and this satellite campus was to incorporate the staff and students of a subdivision of a historically disadvantaged university.
- One large historically-advantaged distance-education university, with over 100 000 students, due to incorporate the distance-education subdivision of a historically-disadvantaged university (approximately 10 500 students), and to merge with a large historically-advantaged distance-education technikon of approximately 100 000 students.

¹⁴ The partner university was not included in the sample as it was in the midst of a leadership change at the time of the interviews.

- One large historically-advantaged distance-education technikon, with approximately 100 000 students, due to merge with a large historically-advantaged distance-education university, following the university's incorporation of a subdivision of another university.
- One large historically-disadvantaged university, with over 20 000 students of whom approximately two-fifths are distance students, and three-fifths are contact students at seven campuses across the country; the university is essentially being dismantled with its component subdivisions being incorporated into other universities and technikons.

In summary, this sample includes institutions involved in a total of five merger processes and three incorporation processes – to this extent, institutions in the sample ‘cluster’ into groups around these mergers and incorporations. The sample comprises six universities and three technikons, including five historically-advantaged institutions (HAI), three historically-disadvantaged institutions (HDI), and one institution that has already merged one historically-advantaged and one historically-disadvantaged partner; four regions (with an almost exclusively urban focus); three horizontal and two vertical/comprehensive mergers, and four mergers resulting in multi-campus institutions (i.e. with campuses at a significant geographical distance), at least one of which is an extreme example of this type.

Institutional interviews took the form of site visits by the researchers.¹⁵ Interviews were conducted in all instances with groups¹⁶ comprising members of one institution. The option of setting up joint group interviews, comprising members of two or more merging institutions, was offered but declined in all cases. Interviews were semi-structured in nature and revolved around four key themes. In some instances separate groups addressed each respective theme; in other cases, one group examined all four themes; this choice was at the discretion of the institution being interviewed. The four themes were:

- Institutional perspectives on guiding principles and mechanisms desirable for system-wide governance in South Africa's restructuring higher education system;
- Institutional governance structures and processes required in merging institutions (with a special focus on Interim Councils);
- Academic governance in merging institutions, (with a special focus on Senates, ‘Academic Boards’ and key decision processes in the academic sphere); and
- Governance and management in merging institutions (with a special focus on key decision processes in the operational sphere and how to ensure a successful transition from interim to steady-state governance).

To enable the researchers to prepare for the interviews, institutions were asked to provide background documentation such as position papers or discussion documents regarding the merger, or minutes of Council, Senate, Institutional Forum or other meetings where

¹⁵ This approach was used in preference to a questionnaire or survey approach.

¹⁶ With one exception where the interview was restricted to a one-on-one session with the Vice-Chancellor.

relevant issues had been discussed. The documentation reviewed was qualitatively varied and generally low in volume. Documentation provided comprised at a minimum the formal institutional submission to the Minister in response to restructuring proposals gazetted in June 2002, as well as public statements accessible through institutional websites. In some cases, this was supplemented with other confidential documentation related to the envisaged merger process, in the form of brief memoranda. In one case, fairly extensive material documenting the institution's perspectives on a range of issues relating to the governance of restructuring and mergers was provided. It was the impression of the researchers that institutions in the study sample were reluctant to share confidential written information with respect to the merger process at the stage at which interviews took place. In addition, in many cases, it seemed unlikely that detailed documentation in fact existed: discussions may not have been formally minuted, for example, even if they had taken place; and relatively little in-depth formal attention (with one or two exceptions) appeared to have been given to the issues of governance which formed the focus of the project. In general, then, this project did not have access to the fascinating range of documentary material that was willingly provided by institutions for the phase one work.¹⁷ There was also a sense that, although institutions gave generously of their time in participating in the study, they were operating under greater constraints of time and resources than in the phase one work. This was wholly understandable given the demands being placed upon institutions by the impending mergers as well as by other change processes flowing from a range of national policy interventions and change implementation initiatives.

These points made, it is nevertheless essential to note the high quality and enthusiasm of participation in institutional interviews, without which the study would not have been able to deliver this report and its proposals. As it was, the quality and frankness of observations and insights offered by all participants allowed the researchers to develop proposals using a comparative methodological approach, with the institution as the key unit of analysis.

1.3 SUMMARY: TERMS OF REFERENCE AND APPROACH

This chapter has set out the objectives, scope and methodology of the investigation embodied in this report.

The focus of the investigation is the governance of merger in South African public higher education, with a subsidiary focus on governance in the contexts of incorporation and multi-campus institutions. Merger is taken to mean the combination of two or more separate institutions into a single entity with a single governing body and chief executive body. Incorporation refers to the process whereby a subdivision of one institution is absorbed by another institution, without affecting the latter's legal status. The term multi-campus is used

¹⁷ All phase one participating institutions provided, for example, agendas and minutes for all meetings of Council, Senate and the Institutional Forum over an 18-month period; many provided additional material as well.

to refer to unitary institutions with geographically distant delivery sites. By governance is meant the structures and processes of policy design, decision-making and oversight of policy implementation.

The investigation's three primary objectives are to develop a conceptual and contextualised framework for merger governance in South African public higher education; to interrogate the state of preparation, with respect to governance capacity, of the higher education system and its institutions for the complex process of restructuring on which they have embarked; and to make proposals regarding system-wide and institutional-level governance to facilitate effective and efficient restructuring that will enable a sustained focus on transformation in the higher education sector.

The methodology was developed on the basis of four key considerations. First, the work needed to build upon prior research into how to promote effective governance in South African higher education. Second, the timing of the investigation meant it had to take into account theoretical, policy and legal viewpoints affecting mergers, as well as rapidly emerging realities to be dealt with, interpreted and commented upon. Third, the study had to be sensitive to the position of institutions directly affected by restructuring. Finally, the study had to achieve a sharp and manageable focus in a complex field. This was done by focusing primarily on merger governance, with care taken not to stray into associated territories of management, administration and operations.