



## Chapter 2

# The Impact on Procurement of Adequate Insurance in the Ever-Changing Risk Landscape of Higher Education Institutions

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### Abstract

In modern times, risk exposure for both natural and juristic persons is continuously evolving and is influenced by numerous factors. Risk, in this context, signifies the possibility of harm. Insurance serves an integral purpose in society and fulfils a significant social function. The idea of risk spreading is dominant to insurance and generally entails that the insurer agrees to accept the risk to which the insured is exposed, and the insured in return pays or agrees to pay a premium. The role of insurance in higher education institutions (HEIs) plays a critical role in protecting institutions and parties involved when loss or damage is experienced either by the institution itself, by its employees, or by students. As such, the risk landscape of HEIs in South Africa is evolving and changing at a rapid rate. Recently, risks such as cybersecurity have become more prevalent; the impact of the Covid-19 pandemic has also sparked various changes within the institutions, and there are constant perils like defamation, sexual harassment, and general instances of damage or loss. There is also the increased risk of weather-related risks due to climate change. Therefore, all these risks are creating novel challenges

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within HEIs. HEIs procure various types of insurance to protect themselves, their employees, and students from the possibility of loss or harm that may be experienced. Importantly, liability insurance plays an integral role and is a part of insurance that deals with the negative elements of the insured's patrimony. Therefore, any liabilities that the insured may incur towards third parties is encompassed under liability insurance. Liability insurance is constantly developing – this is due to growing consumerism as well as a litigious society. Specific liability policies relevant to HEIs include, for example, professional indemnity insurance, public liability insurance, and – more recently – cybersecurity insurance. These types of policies play a crucial role in safeguarding HEIs against risk. Parametric insurance may also become a more popular type of policy procured by HEIs in areas that may be exposed to natural disasters. This chapter seeks to ascertain the relevance and importance of HEIs procuring adequate insurance cover and, specifically, the aim is to determine the evolving risks faced by HEIs and how best to go about insuring these specific risks. The importance of liability insurance will be discussed with specific reference to the unique risks faced by HEIs as well as the importance of cybersecurity insurance and parametric insurance.

## 1. Introduction

In modern times, risk exposure for both natural and juristic persons is continuously evolving and is influenced by numerous factors. Risk, in this context, signifies the possibility of harm.<sup>2</sup> Insurance serves an integral purpose in society and fulfils a significant societal function.<sup>3</sup> The concept of risk dispersal is essential to insurance and necessitates that the insurer undertakes to accept the risk to which the insured is exposed, and in return, the insured pays or agrees to pay a premium.<sup>4</sup> Reinecke

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2 Reinecke, van Niekerk and Nienaber *South African Insurance Law* (2013) 1.

3 Millard *Modern Insurance Law in South Africa* (2013) 1.

4 Reinecke *et al* (n 1) 3.

*et al* state that the whole purpose of insurance is for the insured to be “relieved” of the risk of a loss or the impairment of an interest.<sup>5</sup>

The role of insurance in the space of higher education institutions (HEIs) plays a critical role in protecting the various institutions and parties involved when loss or damage is experienced either by the institution itself, by its employees, or by students.<sup>6</sup> The risk landscape of HEIs in South Africa is evolving and changing rapidly. In the last few years, risks such as cybersecurity have become more prevalent; the impact of the Covid-19 pandemic has also sparked various changes within the institutions, and there are constant perils like defamation, sexual harassment, and general instances of damage or loss. There is also the increased risk of weather-related risks due to climate change. All these risks are creating novel challenges in the higher education space which require the necessary addressing of such risks by HEIs in order to know what type of insurance to procure and, likewise, by the insurers, in that they may need to consider new types of insurance offerings.

HEIs procure various types of non-life insurance to protect themselves, their employees, and students from the possibility of loss or harm that may be experienced.<sup>7</sup> Importantly, liability

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5 Reinecke *et al* (n 1) 234.

6 Examples of some of the common types of loss higher education institutions face include damage to property, reputational damages, possible defamation and harassment cases and losses associated therewith, possibilities of students being assaulted on campus, etc.

7 Common types of policies procured by HEIs would be property policies, liability policies, accident and health policies, travel policies, and motor policies. Worth mentioning is that HEIs also face significant risks to property posed by events such as riots and protests by staff and students (as well as non-students that participate in these protests). Protests at universities are not new and have existed for decades. See Fomunyam “Student protest and the culture of violence at African universities: an inherited ideological trait” 2017 *Yesterday and Today* 38 38-63. Also, students take to protests to demonstrate their voices in political as well as other non-political issues. This chapter will not consider the risks posed by riots and protests on HEI campuses. This chapter seeks to look at how HEIs are set to deal with new/novel risks that they face. In South Africa, the state-owned South African Special Risk Insurance Association (Sasria) covers loss and damage to property which emanates from riots and protests. Sasria cover is voluntary

insurance plays an integral role and is that part of insurance which deals with the negative components of the insured's patrimony.<sup>8</sup> Therefore, any liabilities that the insured may incur towards third parties is encompassed under liability insurance.<sup>9</sup> Liability insurance is constantly developing; this is due to growing consumerism as well as a litigious society. Specific liability policies relevant to HEIs include professional indemnity insurance, public liability insurance, and – more recently – cybersecurity insurance; these types of policies play a crucial role in safeguarding higher education institutions. Property insurance is also another policy that HEIs would procure. Property insurance in the form of parametric insurance cover may also become a more popular type of policy procured by HEIs in areas that may be exposed to natural disasters.<sup>10</sup>

This chapter seeks to ascertain the relevance and importance of HEIs procuring adequate insurance cover and, specifically, the aim is to determine the evolving risks faced by these institutions and how best to go about insuring these specific, and somewhat novel, risks. This will entail an analysis of the element of risk in insurance as one of the *essentialia* of a contract of insurance as well as considering the importance of liability and property insurance with specific reference to the unique and

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insurance cover and is provided through an insurer (also known as an agent) and policyholders pay a premium for such cover. Sasria does cover student protests, but it is for the policyholder to opt into this coverage in order to reap the benefits of it. Sasria only provides cover to property and does not cover liability. Once again, worth mentioning is that insurance coverage and premiums are based on risks presented by the policyholder, and insurers will offer coverage and premium determinations based on the risks at hand. HEIs face the risk of riots and protests which may cause damage to property, which is something insurers will take into account when providing cover to HEIs. Due to the events of riots that took place in South Africa in 2021, the body has faced major setbacks and has had to increase its premiums significantly. Insurers may then also increase their premiums for property insurance to cover the potential of pitfalls by Sasria.

8 Reinecke *et al* (n 1) 10.

9 Jacobs "Liability insurance in a nutshell: simplified complexities or complex simplicities" 2009 *SA Merc LJ* 202-207.

10 Parametric insurance is insurance based on a triggering event and not on the actual damage or loss suffered.

impending risks faced by HEIs in the 21<sup>st</sup> century,<sup>11</sup> including the importance of specific insurance products like cybersecurity and parametric insurance considering the evolving risk landscape.

## 2. Understanding the concept of risk in the higher education arena

### 2.1 Conceptualising risk

The term “risk” descends from the early Italian word “*riscare*” which means “to dare” or “danger to be avoided”.<sup>12</sup> Kuschke defines risk as “the possibility of the occurrence of an uncertain event leading to an undesirable consequence, such as damage or harm, whether patrimonial or not, to which the insured himself [or herself], his [or her] property or even his [or her] interests are exposed”.<sup>13</sup> The notion of risk is recognised as one of the *essentialia* of an insurance contract, and relates to the possibility of the existence of an uncertain event which will then ultimately lead to an undesirable consequence for the insured.<sup>14</sup> Risk is usually described with referral to the particular dangers to which insurable interests are exposed.<sup>15</sup> These specific possibilities will either give rise to the risk materialising or not. Therefore, in insurance it is required that the risk actually materialises.<sup>16</sup> Additionally, there must also be a causal nexus between the risk which has been insured against and the actual loss experienced by the insured.<sup>17</sup> This is, therefore, viewed as a purely factual issue and, in insurance, reference is made to the proximate cause test

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11 The term *essentialia* refers to those clauses which are integral for the classification of a contract as belonging to a particular class or category of contract. See Schulze *et al* *General Principles of Commercial Law* 9<sup>th</sup> ed 105.

12 The Italian etymology of this word comes from “risco”, essentially meaning danger.

13 Millard (n 2) 85.

14 Reinecke *et al* (n 1) 234. See also *Lake v Reinsurance Corporation Ltd* 1967 (3) SA 124 (W) 127.

15 Reinecke *et al* (n 1) 234. See also *Prudential Insurance Co v Inland Revenue Commissioners* [1904] 2 KB 258 662.

16 Reinecke *et al* (n 1) 238. See also *Eagle Star Insurance Co Ltd v Willey* 1956 (1) SA 330 (A).

17 Reinecke *et al* (n 1) 247–248.

to determine such link.<sup>18</sup> The possibility of the risk occurring is founded on the likelihood of the undesired event happening.<sup>19</sup>

In terms of the applicable insurance legislation, the Short-term Insurance Act<sup>20</sup> (STIA) defines risk as “a possibility that a particular event may occur during the period for which a short-term policy is operative”.<sup>21</sup> Millard explains that understanding the concept of risk in insurance and the appropriate cover needed is necessary since it informs every aspect of insurance.<sup>22</sup>

Understanding the concept of risk leads to the importance of knowing how best to manage the various risks one faces on a daily basis. Ultimately, the idea of risk management guides both natural and juristic persons alike over a vast range of decision-making in modern society. Risk management involves a process of being able to identify a threat in advance and taking measures to mitigate those threats. Generally, private individuals and organisations utilise insurance as a key aspect of risk management processes and mitigation of financial loss as they can be impacted by several factors like theft, natural disaster, or accidents.<sup>23</sup> Particularly in insurance, risk management allows one to transfer the risk to the insurer and thereby takes the burden of the possibility of loss or damage off oneself and transfers it onto the insurer (in return for the compensation of a premium by the policyholder).<sup>24</sup> The transferring of risk to the insurer is fundamental to the concept of insurance and the insurance policy itself.

In the context of HEIs, the entity will obtain insurance cover to protect itself against the risk of an uncertain and undesirable event occurring.<sup>25</sup> Upon taking out the appropriate cover, and then

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18 Reinecke *et al* (n 1) 249.

19 “Probabilities in statistics are the mathematical odds that an event will occur. ... The probability ratio expresses the likelihood that the event will take place. This ratio is significant to insurance providers.” See Reinecke *et al* (n 1) 239.

20 the Short-term Insurance Act 62 of 1998 (hereafter “the STIA”).

21 See the definition of risk under s 1 of the STIA.

22 Millard (n 2) 86.

23 Naveena Ulavan “The Role of Insurance in Risk Management for Businesses” 2023 [https://naveenaulavan.com/the-role-of-insurance-in-risk-management-for-businesses/\(26-08-2024\)](https://naveenaulavan.com/the-role-of-insurance-in-risk-management-for-businesses/(26-08-2024)).

24 Millard (n 2) 86.

25 *Ibid.*

should the risk materialise following a “particular event”,<sup>26</sup> the insurer will compensate the HEI for such loss; in other words, the insurer will make good the loss.<sup>27</sup>

It is trite that the possibilities of damage or prejudice to which both natural and juristic persons are exposed to are infinite, therefore in terms of the insurance policy, the scope thereof may be limited contractually.<sup>28</sup> The policy will, therefore, be specific as to which risks are transferred to the insurer. In this context, “all risk cover” refers purely to risks. This means that certainties are not included therein and that in a policy including this clause, the risks do not have to be specified.<sup>29</sup> Millard reiterates the importance of the fact that both the insurer and the insured must agree on the nature and scope of the risk that will be transferred from the insured to the insurer.<sup>30</sup>

The various risks faced by HEIs are cumbersome and, therefore, procuring adequate insurance cover is fundamental to the financial position and viability of the institution in terms of safeguarding itself against the vast range of possible damages and losses it may sustain should the risks materialise. Up until recently, HEIs have understood the general risks they face and have, therefore, acquired the requisite insurance cover. However, in the last few years HEIs have faced new and unknown risks. The Covid-19 pandemic in 2020 has brought about new issues around remote learning risks (including cybersecurity risks), and the recent floods occurring in the Kwa-Zulu Natal province have also highlighted the imminent dangers of climate change on general infrastructure. As cybersecurity issues rise and the impending risks associated with climate change faced by HEIs intensify, it is crucial that these institutions understand these novel risks and obtain adequate insurance cover to appropriately deal with them. Understanding these risks in the higher education sector is

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26 The STIA explicitly states “particular event”, which indicates that those events insured against may be specified or limited. The Act does not state “uncertain event”. However, it is submitted that the core of insurance is to insure against specified uncertain events.

27 Millard (n 2) 86.

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

fundamental in underwriting as well as procuring the correct and suitable policies for HEIs.

## **2.2 The specific risks faced by HEIs**

### *2.2.1 Cybersecurity risks*

Cybersecurity is the “practice of protecting systems, networks and programs from digital attacks”.<sup>31</sup> When cyberattacks occur, they are generally aimed at acquiring, altering, or damaging sensitive information, extorting money from customers, or disrupting standard business practices.<sup>32</sup> The risk of cybersecurity incidents has become a prevalent issue in the 21<sup>st</sup> century. Since almost all forms of transactions concluded are electronic and in an online space, it requires users to have an online presence. This means that most of people’s daily conduct is concluded electronically and on the internet. This brings us to the use of the cyber world in the current era. Natural as well as juristic persons conduct themselves and their activities in an online environment, therefore, the threat of people’s information as well as businesses being hacked is a reality and concern.<sup>33</sup> People and businesses alike try to protect their information and transactional activities in the online world. They have passwords, encryption, and firewalls in place to protect against attacks. Hackers and hacking incidents are ubiquitous in nature and, therefore, information and activities on the internet are capable of being acquired by others in an unlawful manner. The possibilities of loss are, therefore, linked to this information being accessed. In the sphere of HEIs, the use of online platforms and activities is crucial to the institution and learning environment. Whether we are referring to the information of all staff and students held by an HEI, or online databases utilised, or

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31 Kaspersky “What is Cyber Security” n.d. <https://www.kaspersky.co.za/resource-center/definitions/what-is-cyber-security> (27-10-2022).

32 Hoory, Aditham and Livingston “What is a cyberattack? Definition, Types and Prevention” Forbes Advisor 2024. <https://www.forbes.com/advisor/business/what-is-cyber-attack/> (26-08-2024).

33 In recent years, South Africa has seen severe cyberattacks and the leaking of critical personal data. Examples include the Dischem data breach in 2022 as well as the 2020 Experian data breach and the 2022 TransUnion data breach.

even the teaching and learning activities conducted online, these are all possible targets to hackers wanting to obtain and control such information.

Following the Covid-19 pandemic, HEIs conducted all teaching, learning, and assessment activities online. The prevalence of these activities in a virtual space meant new risks posed to the institution as well as to students and staff. With an increase in virtual assessments, programmes, teaching, and learning, this meant there were new and higher possibilities of cyberattacks. Therefore, as HEIs digitise themselves further, the exposure to cybersecurity breaches increases. In the last few years, cybersecurity breaches have increased and become a somewhat common occurrence. From government institutions being hacked, to private companies being compromised, the issue is a serious concern for individuals and businesses alike.<sup>34</sup>

The term cyberattack refers to aiming to disable, disrupt, destroy, or control computer systems and information held therein.<sup>35</sup> There is no doubt that HEIs are at risk of such attacks; they hold valuable information and are, therefore, seen as possible target. However, HEIs are aware of this and therefore do all they can to protect themselves against such possible attacks and breaches. HEIs also procure and hold adequate cybersecurity insurance in order to protect themselves against such possibilities. However, with the growing use of online platforms, HEIs must be proactive in this regard and ensure that adequate protection mechanisms and insurance are in place for such increased risks.

Within HEIs, information technology (IT) specialists and departments play an important role in ensuring the best protection mechanism are in place.<sup>36</sup> These specialists within the HEIs will need be one step ahead of the cyber criminals and ensure that systems are as safe as they can possibly be. This may mean

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34 See Hoory, Aditham and Livingston (n 31).

35 Pratt "Definition of Cyber-attack" 2023 <https://www.techtarget.com/searchsecurity/definition/cyber-attack#:~:text=A%20cyber%20attack%20is%20any,data%20held%20within%20these%20systems> (22-10-2022).

36 HEIs have IT specialists within the organisation that keep up to date with all the prevailing cyber threats.

rethinking existing security and cloud solutions. HEIs will have to work closely with the IT specialists to ensure that their systems are not outdated. HEIs require large sums of money to ensure that the best security measures are in place, and spending the money is a necessity. Insurance in this regard is one of the best tools that an HEI can procure to protect itself against possible losses due to such attacks. The concept of cybersecurity insurance policies will be elaborated on further in paragraph 3.3.1 (below).

Cybersecurity risks are just one of the rather “new” issues facing HEIs due to the increased use of online activities by these institutions, but another relatively novel risk that has come to the fore is that presented by climate change and increased weather-related events that may cause significant damage to HEIs and their property. This will now be considered below.

#### 2.2.2 *Climate change risks*

The South African Climate Change Bill published in the 2021 defines climate change as “a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods”.<sup>37</sup> The word climate refers to specific weather conditions on earth averaged at a particular point. Characteristically, when one speaks of the climate, it is articulated with reference to expected temperatures, wind conditions and possible rainfall, all based on historical observations. This is either the average climate or climate inconsistency that persists over an extended period.<sup>38</sup> In order to establish whether climate change has occurred or not requires a measure after decades of careful observations and analysis of weather conditions.<sup>39</sup>

There are several contributing factors towards climate change. Many of these contributors are influenced by human

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37 GG No. 45299 of 11 October 2021.

38 Riedy “Climate Change” 2016 *The Blackwell Encyclopedia of Sociology* 1-3.

39 British Geological Survey “Climate Change: Discovering Geology” n.d. [https://www.bgs.ac.uk/discovering-geology/climate-change/\(12-08-2022\)](https://www.bgs.ac.uk/discovering-geology/climate-change/(12-08-2022)).

activities. Governments around the world, as well as other stakeholders, have acknowledged that the threat climate change poses to human, environmental, and economic systems is imminent and dire.<sup>40</sup> In South Africa, the government has published the South African Climate Change Bill recognising and acknowledging that there is a need to develop an effective response to climate change and an extensive and lengthy evolution to a “low-carbon and climate-resistant economy and society in the context of sustainable development”.<sup>41</sup> The aim of the Bill is to provide for a harmonised and united response to climate change for South Africa, which specifically provides for the effective administration of climate change impacts, making a just and fair involvement to the worldwide effort to alleviate the absorptions of greenhouse gases, as well as giving effect to the country’s international responsibilities and obligations in relation to climate change, and protecting and maintaining the planet for the advantage of present as well as future generations of the human race.<sup>42</sup> The Bill is yet to be promulgated; however, it is anticipated that it will be passed into law soon due to the mounting pressure government faces in this regard. This will be the first legal framework by the South African government in response to climate change.<sup>43</sup>

Climate change impacts various aspects of life as the normal processes that cause rain, snow, storms, and hail are now dependent on various factors including human activities, political decisions, and, recently, technological advancement.<sup>44</sup> The

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40 International Association of Insurance Supervisors (IAIS) “Issues paper on climate change risks to the insurance sector” 2018 [https://www.unepfi.org/psi/wp-content/uploads/2018/08/IAIS\\_SIF\\_-Issues-Paper-on-Climate-Change-Risks-to-the-Insurance-Sector.pdf](https://www.unepfi.org/psi/wp-content/uploads/2018/08/IAIS_SIF_-Issues-Paper-on-Climate-Change-Risks-to-the-Insurance-Sector.pdf) (10-10-2022).

41 Climate Change Bill. An explanatory summary of the Bill and prior notice of its introduction were published in GG No. 45299 of 11 October 2021.

42 *Ibid.*

43 Joubert, Rushton and Kododia “Key Aspects of South Africa’s much-anticipated Climate Change Bill” 2022 <https://www.polity.org.za/article/key-aspects-of-south-africas-much-anticipated-climate-change-bill-2022-06-14> (22-10-2022).

44 British Geological Survey “Impacts of Climate change” n.d. <https://www.bgs.ac.uk/discovering-geology/climate-change/impacts-of-climate-change/> (22-10-2022).

International Association for Insurance Supervisors (IAIS) has put forward an issues paper dealing with climate change and has identified that climate change has an impact on environmental systems and a negative impact on natural capital stock on which the society and economy rely.<sup>45</sup> This has increased the risk of extreme weather events around the world and has been seen over the years by extreme events such as heatwaves (leading to communicable diseases), drought, rainfall, wildfires, storms, and flooding.

In the beginning of 2022, the South African province of KwaZulu-Natal experienced severe floods and these floods are a major cause for concern. This highlighted the severity of climate change as well the dire impact that these weather conditions can have on communities and the economy at large. There is a need for an urgent response to climate change in South Africa and worldwide. Scientists specialising in climate issues anticipate that the floods may be attributed to human-induced climate change as they are consistent with forecasts of extreme weather events brought on by climate change. The extreme flooding in the province resulted in severe damage to homes, properties, infrastructure and the like and furthermore, saw more than 300 people's lives claimed by the devastating events.<sup>46</sup>

The increased risks due to climate change are imminent and this is an ominous threat that will lead to further and severe losses in the future. HEIs face serious threats in this regard. An institution's infrastructure is vital to its continued existence and, therefore, requires suitable cover and protection. If HEIs should become the victim of a severe weather-related incident, they risk losing more than just the value of the lost or damaged property. It also means that operations within the institution may need to come to an end, which will then have a direct impact on the income they receive, and this may lead to further losses for them. If an HEI needs to stop teaching and learning activities

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45 See IAIS (n 39).

46 Omarjee "With climate change causing severe weather, KZN floods may just be the beginning" 2022 [https://www.news24.com/fin24/companies/analysis-with-climate-change-causing-severe-weather-kzn-floods-may-just-be-the-beginning-20220415\(23-08-2022\)](https://www.news24.com/fin24/companies/analysis-with-climate-change-causing-severe-weather-kzn-floods-may-just-be-the-beginning-20220415(23-08-2022)).

due to collapsed or lost infrastructure, then this may also result in income losses. An HEI's infrastructure serves an integral purpose for staff and students alike and, therefore, mitigating and managing these risks is essential for the continued existence of the institution.

### **2.3 Evolution of risks**

It is evident that HEIs are facing increased exposure to various types of novel risks. Cybersecurity risks are on the rise and HEIs face increased pressure to ensure that they have the correct measures in place to protect data and information held by the institution in the online space. This will require a robust response from HEIs to ensure that they procure adequate insurance coverage relating to cybersecurity risks. This requires an analysis of liability insurance as a specific type of insurance and will be discussed in section 3.1 (below).

The prevalence of remote learning during the Covid-19 pandemic increased cyber exposures for basically all HEIs. As HEIs continue to employ a hybrid mode of teaching, it appears that online learning is not disappearing any time soon. This is just one area that increases the need for cyber insurance. Cyber insurance allows HEIs to insure their complex, virtual networks and further ensure that they are properly secure to reduce the risk of attacks and breaches.

Also, part of the evolving risk landscape faced by HEIs is the issue of climate change and the increased risks which climate change will bring to the institutions. As climate change is exacerbated by current tendencies in the world, the risks that HEIs will face in this regard will intensify. HEIs will face increased possibilities of property damage due to the likelihood of floods, droughts, fires, and other climate-related events. This means that HEIs in specific areas will have to account for the specific types of weather-related risks they may face and procure adequate cover in this regard. Parametric insurance will be considered in more detail in section 3.3.2 (below).

### 3. How should HEIs go about insuring these risks?

#### 3.1 The role of liability insurance in HEIs

As far as the objective of liability insurance is concerned, this refers to the interest of the insured in not incurring liability towards a third party.<sup>47</sup> Liability insurance undertakes a considerable financial role in the distribution of risk and most notably in the burden of civil liability.<sup>48</sup> The importance of liability insurance can be accredited to the hasty increase of rights awareness amongst consumers and policyholders alike, developments in consumer-centric legislation,<sup>49</sup> and an expanding litigious society.<sup>50</sup> A liability policy characteristically provides cover to an insured against their legal liability for third-party damages. It is necessary to understand that ordinary loss or damage suffered by the third party is not enough. The insured party must be legally and rightfully liable for the third party's loss or damage and the third party must be capable of recovering damages from the insured prior to the latter's liability insurer incurring any liability in terms of the policy issued.<sup>51</sup>

In terms of Table 2 of the Insurance Act,<sup>52</sup> the liability class is distinguished and detailed therein. Within the various liability sub-classes, public liability is listed therein.<sup>53</sup> The liability class within the Insurance Act describes the subclass as covering liability to another person.<sup>54</sup> Therefore, when it comes to the

47 Reinecke *et al* (n 1) 539; See also *Boshoff v South British Insurance Co Ltd* 1951 (3) SA 481 (T).

48 Reinecke *et al* (n 1) 538; See also *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C).

49 In insurance, take note of the Policyholder Protection Rules.

50 Jacobs "Legal protection insurance **in the context of** liability insurance: Possible solutions in English law?" 2011 SA *Merc LJ* 464.

51 Millard (n 2) 45. See also *Watson NO v Shaw NO* 2008 (1) SA 350 (C).

52 Insurance Act 18 of 2017. This details the classes and subclasses of insurance business for non-life insurance.

53 Table 2 of sch 2 of the Insurance Act 18 of 2017. See also Yiannakis "Does the current drone legislation in South Africa and the United Kingdom assist insurers and their underwriters to assess and address the liability risks associated therewith? A comparative study" 2019 Master's Dissertation, University of Johannesburg.

54 table 2 of sch 2 of the Insurance Act 18 of 2017.

insuring of HEIs' liabilities, this is where one finds application within the legislation. Reinecke *et al* describe liability insurance as that which is concerned with the negative elements which come into being as part of the insured's patrimony.<sup>55</sup> Insured parties will procure such insurance to protect themselves against economically debilitating consequences of sustaining legal liability towards others.<sup>56</sup>

### 3.2 The role of property insurance in HEI

The notion of property insurance generally considers the positive elements or assets of the insured's patrimony or estate, and it is concerned specifically with those attributes.<sup>57</sup> It is also known as first-party insurance, as the insured procures such insurance to protect its assets against possible loss or damage. Therefore, the insured is concerned with their positive aspects of their patrimony.<sup>58</sup> In terms of the Insurance Act, Table 2 refers to the class of property insurance and divides it into two subclasses – personal lines and commercial lines – and defines it as covering “damage to or loss resulting from the possession, use or ownership of property”.

In the case of HEIs, they procure such short-term (or non-life) insurance policies to protect their various assets against possible loss or damage that they may be subjected to. This type of insurance plays a significant role in protecting the actual assets held by the HEIs, including buildings, vehicles, equipment, etc. Therefore, in terms of climate change risks faced by HEIs and the increase of weather-related events, there is an increased risk of property damage due to events such as floods, fires, and other severe weather systems.

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55 Reinecke *et al* (n 1) 10.

56 Reinecke *et al* (n 1) 540.

57 Reinecke *et al* (n 1) 10.

58 Reinecke *et al* (n 1) 538.

### 3.3 The appropriate cover for HEIs in terms of the novel risks

#### 3.3.1 *Cybersecurity insurance policies*

The risk of cyberattacks has introduced cyber insurance as a specific type of insurance product offered by various insurers and is therefore considered a financial product by insurance companies.<sup>59</sup> The FAIS Act<sup>60</sup> defines a financial product as a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act<sup>61</sup> and the Short-term Insurance Act.<sup>62</sup> Section 2 of the Financial Sector Regulation Act<sup>63</sup> also uses similar wording to the FAIS Act.<sup>64</sup> Cyber insurance is now a specific type of liability insurance policy offered by many commercial insurers.

The rise of cyberattacks and breaches necessitates HEIs in procuring cyber insurance policies. Since HEIs store third-party data, they need to ensure that this information is protected. Advantages of HEIs procuring cyber insurance include that the institution will be able bounce back from any interruption or financial loss incurred as a result from a cyberattack or breach. It also assists in the practical side of getting IT experts to restore the systems, recreate data, and prevent as well as foresee new possible threats. Procuring adequate cyber insurance policies ensures that HEIs are not held liable for accidental loss of data or

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59 For example, see the United Kingdom Company Chubb that specifically offers cyber insurance products for various entities. This can be seen as part of their product offering: <https://www.chubb.com/za-en/businesses/cyber-insurance.html> (26-08-2024); AIG “Comprehensive cyber insurance to protect clients from one of the most volatile risks facing businesses today” n.d. <https://www.aig.co.za/business/our-products/financial-lines/cyber> (14-08-2022); Specifically, in South Africa Santam offers cyber insurance as part of liability cover for businesses – see <https://www.santam.co.za/insurance/for-my-business/liability-insurance/> (26-08-2024).

60 the Financial Advisory and Intermediary Services (FAIS) Act 37 of 2002.

61 the Long-term Insurance Act 52 of 1998.

62 the Short-term Insurance Act 53 of 1998.

63 the Financial Sector Regulation Act 9 of 2017.

64 The Act defines a financial product as a short-term policy as defined in s 1(1) of the Short-term Insurance Act or a non-life insurance policy as defined in s 1 of the Insurance Act.

any accidental damage caused by computer-driven property, as well as ensuring that the institutions do not suffer a loss, damage, or liability caused by algorithmic errors and malfunctions.<sup>65</sup>

### 3.3.2 *Parametric insurance policies*

Parametric insurance is insurance cover based on the likelihood of a predefined event happening, instead of indemnifying the insured for actual loss incurred.<sup>66</sup> It is viewed as an arrangement to make a payment upon the existence of a triggering event and is therefore removed from an underlying physical asset or piece of infrastructure.<sup>67</sup> Consequently, it is an ‘if/then’ contract for insurance. This is because payment is attached to predefined parameters being met. The insurance policy itself is said to be dissociated from an essential physical asset (like a car, agricultural fields, or house) and any damage to that asset.<sup>68</sup> Evidently, parametric insurance is different from traditional insurance policies because it is not based on indemnifying the policyholder on the actual loss incurred from a risk event.<sup>69</sup> It is based on the fact that the insurer agrees to an approved-upon monetary payment when the predefined factors are realised. This in turn makes the pay-out procedure both quick and predictable. A parametric insurance policy will thus consist of only two elements: the triggering event and the pre-approved pay-out process.<sup>70</sup> The policyholders cover is prompted if the parties’ predefined parameters are met as measured by an objective index.<sup>71</sup>

Parametric insurance cover may be aligned with property insurance policies to provide appropriate cover to HEIs in the event of climate-change or weather-related events. Therefore, parametric cover may be attractive to HEIs as a feasible

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65 Santam “Cyber Security for your Business” 2022 <https://www.santam.co.za/blog/business-advice/cyber-security-for-your-business/> (9-10-2022).

66 “What is parametric insurance?” 2018 [https://corporatesolutions.swissre.com/insights/knowledge/what\\_is\\_parametric\\_insurance.html](https://corporatesolutions.swissre.com/insights/knowledge/what_is_parametric_insurance.html) (27-10-2022).

67 See (n 65).

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 *Ibid.*

mechanism to manage risks such as catastrophic weather events. The HEIs would not need to prove the loss suffered after such a catastrophic event; rather, the triggering event would automatically lead to the payment of the claim. This will be an extremely valuable option for HEIs in catastrophe-prone areas. Parametric policies are becoming more popular and relevant especially due to the rise of climate-change issues. Insurers are recognising the need for parametric cover due to the rise climate-change-related perils.<sup>72</sup>

## **4. Recommendations and conclusions**

### **4.1 Recommendations**

It is recommended that HEIs take out adequate insurance coverage to protect themselves against the novel risks they face. HEIs should be proactive and not reactive in procuring appropriate insurance. This will require proper risk analysis studies undertaken by the relevant HEIs so that they are able to understand the full extent of the risks they face considering the evolving risk landscape.

Taking out specific liability policies for cyber insurance is instrumental in ensuring that cyber risks and possible breaches related thereto are covered at all times and that any risks associated with cyber issues are transferred to the insurer. This will ensure that all cybersecurity issues that HEIs face are at all times considered and covered by the relevant policy.

In light of climate change risks, it may be viable for HEIs to consider parametric insurance coverage. Parametric insurance coverage will ensure that HEIs are covered in the event of any triggering event related to weather-related incidents, that is despite the loss that they suffer. This will ensure that HEIs are able to deal with any property damage that they suffer due to weather-related incidents. The triggering event will automatically lead to a claims pay-out. This will allow the HEIs to immediately

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72 Santam “Digital trends in the insurance industry” 2021 [https://www.santam.co.za/about-us/media/corporate-news/digital-trends-in-the-insurance-industry/\(9-10-2022\)](https://www.santam.co.za/about-us/media/corporate-news/digital-trends-in-the-insurance-industry/(9-10-2022)).

deal with any losses related thereto. This type of expedient claim pay-out allows for timeous responses which allow HEIs to carry out its education duties with little interruption.

Some other recommendations for HEIs to consider are providing continuous training to faculty, staff, and students about the risks and safety issues associated with such risks. Creating awareness around the risks is essential in managing and mitigating risks as far as possible. It will also be essential for HEIs to maintain up-to-date risk management policies and procedures. HEIs in different areas face different risks and therefore, setting out these specific risks in appropriate policies is needed. HEIs can also look to having appropriate crisis management planning in place. This means that how an HEI responds to a crisis is critical to its survival.

Risk-pooling with other HEIs that have similar risks may also prove to be a viable option for these institutions. Risk-pooling, in this sense, refers to HEIs that share similar risks each contributing towards the costs of neutralising any eventual loss. This may lead to lower premiums for the HEIs, as they are able to share the risk on an equal basis. These recommendations can go a long way towards managing the novel risks that HEIs face in the current era. It is crucial that these institutions remain proactive in their risk management procedures.

## **4.2 Conclusion**

It is evident that HEIs are facing novel risks in the 21<sup>st</sup> century, and that their insurance coverage needs to adapt to these new risks. Cybersecurity risks faced by HEIs are prevalent due to the surge in use of online learning and making use of more online platforms to conduct education. Coupled with this are the looming effects of climate change and the possible losses that this will bring to the higher education sphere. Therefore, it is vital that HEIs remain aware of these risks and procure adequate insurance coverage to protect themselves. Here, it is equally important that the HEIs can afford the increased premiums that these risks may bring. Mitigating their risks as far as possible will also become crucial

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for HEIs. Ultimately, insurers and HEIs should communicate as to their specific needs and coverage.