

**OPINION**

**FOR**

**STELLENBOSCH UNIVERSITY**

**ABOUT**

**THE LEGAL PRINCIPLES GOVERNING THE  
MAKING OF AN ADMISSIONS POLICY**

## **I INTRODUCTION**

1. We have been briefed by Stellenbosch University (**SU** or **the University**) to provide an opinion to guide it in determining its new admissions policy (**Admissions Policy** or **the Policy**).
2. We have been provided with a revised draft of the Policy (in English),<sup>1</sup> which improves on earlier iterations.<sup>2</sup> We have, separately from this opinion, suggested textual amendments to the current draft of the Policy. (A revised draft of the Policy will be submitted to our instructing attorneys together with this opinion.)
3. This opinion sets out the legal parameters within which SU must operate in drafting the Policy, and identifies certain possible difficulties with the current draft. In addition, we provide advice on the process that SU should follow in finalising the Policy.
4. This opinion is structured as follows:
  - 4.1. **Part II** describes the relevant demographics, and the basic features of the current draft of the Policy;
  - 4.2. **Part III** sets out the legal framework that governs university admissions policies;

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<sup>1</sup> Either the English or Afrikaans version must be designated as the operative version in cases of interpretative doubt, and be adopted by the Council. It does not matter which version is the operative version. However, we note that much of the recent work has used the English version as a basis for comment. We would thus recommend that the English version be adopted as the operative version.

<sup>2</sup> In particular, the document was previously split between a 'Policy' and a 'Plan'. We advised, and the University's administrators agreed, that a single document is preferable.

- 4.3. **Part IV** deals with certain possible concerns about the current policy:
- 4.3.1. Whether it constitutes a valid affirmative action measure;
  - 4.3.2. The role of Extended Development programmes in the Policy;
  - 4.3.3. The legitimacy of relying on people to self-classify their race;  
and
  - 4.3.4. The importance of the fact that the Policy must be written in clear and specific language, which is readily understandable by a target audience of applicants and parents.
- 4.4. **Part V**, considers the process that SU must follow to adopt the Policy lawfully, in particular the need to subject the draft Policy to a notice-and-comment procedure.
- 4.5. **Part VI** deals with questions regarding an applicant's criminal convictions.

## II **BACKGROUND**

5. We are instructed that the University's administrators accept that the racial composition of its current student body remains skewed as a result of both the historical discriminatory policies and practices of the apartheid State, and the University's own historical institutional policies and practices.
6. This acceptance accords with statements by the Constitutional Court. For instance, in the *Ermelo* case,<sup>3</sup> the Court held as follows:

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<sup>3</sup> *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC)

*“Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us.”*

7. The fundamental objective is for the Policy to maintain the University’s culture of academic excellence by attracting the best applicants, while at the same time facilitating the transformation of the University so that it has a more inclusive, and representative, student body.
8. The dual goals of academic excellence and transformation, do not operate in opposition to each other. The University’s reputation as a centre of excellence depends on it ensuring that it attracts and maintains a diverse student body, for at least three reasons:
  - 8.1. First, if the University is less committed to transformation than other regional universities it will be and be perceived by potential students to be a hostile environment for students from previously disadvantaged groups. This will undermine the University’s ability to attract the ‘best and brightest’ applicants from all backgrounds.
  - 8.2. Second, a diverse student body will enrich the learning environment of the University.
  - 8.3. Third, good higher education plays a critical role in improving the lives of individuals. This has a radiating effect when the University’s alumni become parents and active members of their communities.

9. The University must therefore take the lead in determining its admissions targets, and taking steps to achieve them. The alternative will be the imposition of targets by the State through legislation which limits the autonomy of universities to determine and implement their own admissions policies.<sup>4</sup>

### **Demographics**

10. The successful implementation of the affirmative action provisions of the Policy will depend on the availability of up-to-date, reliable statistical information. This must include national and regional statistics, regarding both the general population and the pool of potential applicants (i.e. high school graduates who qualify for admission to a Bachelor's programme).
11. The most relevant statistical information will be the demographic make-up of the group of matriculants from the immediately preceding year, who achieved a pass with a university exemption. Currently, this information is not published by the national Department of Basic Education, or any provincial education departments, and is not publicly available.<sup>5</sup> We recommend that the University address letters to the national and provincial departments indicating that the University is in the process of drafting a new admission policy; that the University recognises the need for transformation; and that it accordingly now requires, and will in future require on an annual basis, the demographic make-up of the group of matriculants from the immediately preceding year, who achieved a pass with a university exemption.
12. The currently available information available is of three types.

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<sup>4</sup> We are instructed that at the moment goals are set by faculties relating to the racial composition of their student body. These are collated for the University and sent to the Minister and Department of Higher Education. The Minister and Department do not attempt to alter the University's targets. Instead, they encourage transformation by giving a State subsidy for BCI students.

<sup>5</sup> We are instructed that Prof Servaas van der Berg of the University has confirmed that this information has not been made available since 2007/2008. The reason for this appears to be that the information was deemed unreliable due to administrative errors.

13. First, at the greatest level of generality, there are national and provincial population statistics.
  - 13.1. This information indicates, amongst other things, that the group of 15-24 year-olds in the Western Cape is made up as follows: 10.4% are White; 50.4% are Coloured; 1% Indian; and 36.4% are Black (African).
  - 13.2. We recognise that this general information is of limited utility, as many of these people have not and will not obtain a matric with a university exemption, and thus will never enter the pool of potential university students. But the University cannot ignore this information altogether, as disparities between the demographic composition of the general population of young people and the group of people who apply to the University for admission, will illustrate the extent to which certain racial groups remain disadvantaged. These and other relevant disparities show that in South Africa, race in particular still correlates closely to social and educational disadvantage, which in turn justifies the need for race-focussed corrective action.
  - 13.3. We are instructed that there is no longer a significant gender disparity in the University's student body.
14. Second, the University has limited information regarding the potential applicant pool.
  - 14.1. The official information available indicates that in 2015, 70.7% of candidates passed the National Senior Certificate (NSC) exams, but only 28.4% (166 263 in total) qualified for admission to a Bachelor's programme. As noted, statistics are not available regarding the demographic make-up of matriculants who pass with a university exemption.

14.2. Further information is available from the South African Institute for Race Relations. The provenance and reliability of this information is not known. This breaks down the simple pass rates according to race, nationally and in the Western Cape Province:

<b>Race</b>	<b>National Pass Rate</b>	<b>WC Pass Rate</b>
<b>Coloured</b>	82.8%	86.5%
<b>Black (African)</b>	67.4%	74.4%
<b>Indian</b>	91.4%	96.9%
<b>White</b>	98.8%	99.5%
<b>Total</b>	70.7%	84.7%

15. Third, the University has information about the applications it actually receives, and the students it actually accepts.

15.1. The SU applicant pool for 2016 breaks down as follows (**CBI** is Coloured, Black (African) and Indian combined):

<b>Race</b>	<b>Number</b>	<b>Percentage</b>
<b>Coloured</b>	3 652	19.85%
<b>Black (African)</b>	5 000	27.18%
<b>Indian</b>	1 083	5.89%
<b>CBI</b>	9 735	52.92%
<b>White</b>	8 660	47.08%
<b>Total</b>	18 395	100%

15.2. The composition of provisionally admitted students differs significantly from the applicant pool. For 2016, the composition of the provisionally admitted first year student body is:

<b>Race</b>	<b>Number</b>	<b>Percentage of Provisionally Admitted Students</b>	<b>Difference from Application Pool</b>	<b>Percentage of Applicants Provisionally Admitted</b>
<b>Coloured</b>	1 915	17.92%	-1.93%	52.44%
<b>Black</b>	2 035	19.04%	-8.14%	40.70%
<b>Indian</b>	743	6.95%	+1.06%	68.61%
<b>CBI</b>	4 693	43.9%	-9.02%	48,21%
<b>White</b>	5 995	56.09%	+9.01%	69.23%
<b>Total</b>	10 688	100%	-	58.10%

16. The University's own statistics may be an unreliable indication of any national or regional trends, as they may be skewed by the fact that many potential applicants do not apply to the University, for a variety of reasons. During a meeting Prof Schoonwinkel indicated that the University should be able to access similar statistics from the University of Cape Town the University of the Western Cape and the Cape Peninsula University of Technology. These statistics will allow the University to ascertain whether, and if so to what extent, its applicant pool and its successful applicant pool are as diverse as those of the three other regional universities.

17. Although the currently-available statistical information is limited, what it shows includes the following:
- 17.1. The applicant pool is not representative of the racial make-up of the population in the Western Cape. There are proportionally more White and Indian applicants and fewer Black (African) and Coloured applicants.
  - 17.2. White applicants to the University have a significantly higher chance of being admitted than Black (African) and Coloured applicants. Indian applicants have a higher chance of being admitted than Black (African) and Coloured applicants. As a result, SU's current first year admissions are not representative of either the demographics of the Western Cape, or its own applicant pool.
  - 17.3. These outcomes are, presumably, because of the far higher matric pass rates and marks of White and Indian learners, which in turn are a result of inequalities in e.g. wealth and access to good schooling.
  - 17.4. These outcomes also show that as a general proposition, race remains a relatively accurate indicator of social and educational disadvantage.

### **The basic features of the current draft of the Admissions Policy**

18. The draft Policy records its overarching norms and goals. There are two primary norms:
- 18.1. *“the pursuit of academic excellence within society at large”*;<sup>6</sup> and

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<sup>6</sup> Draft Policy at para 1.6.

- 18.2. contributing “*to the elimination of inequalities and discrimination in the higher education system – including the effect of past inequalities and discrimination*”.<sup>7</sup>
19. The ultimate goal is for SU to be “*an inclusive, innovative and future-focused university*”.<sup>8</sup> In order to achieve that goal, SU seeks to admit prospective students “*who, considering context and diversity, ha[ve] the potential for success*”.<sup>9</sup>
20. The Policy is intended to afford faculties leeway in determining their own targets, based on a knowledge of their own applicant pools.<sup>10</sup> Faculties determine their own minimum admission requirements for each programme, which are approved by the Senate. These minimum requirements are based on evidence of which students are able successfully to complete the programme.
21. The Policy ensures that the admissions process in all faculties will effectively comprise several fixed stages. Individual faculties are however deliberately left freedom within this framework to formulate requirements, thresholds and targets, based on their own knowledge of the applicant pool for each course of study.
- 21.1. First, only those applicants who meet the minimum admission requirements are considered for placement in any mainstream programme. These requirements are programme-specific, and do not consider race or other markers of disadvantage. They consider only whether the applicant is likely to be able to complete the programme based on past experience. For undergraduate course these primarily take

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<sup>7</sup> Draft Policy at para 1.7.

<sup>8</sup> Draft Policy at para 1.9.

<sup>9</sup> Draft Policy at para 4.3: Brief p 133.

<sup>10</sup> The draft Policy at para 4.5 states that its object is to provide “*a framework within which faculties should draft their guidelines and procedures for faculty-specific admissions and selection for undergraduate and postgraduate programmes*”

account of subject choice and academic results achieved at school. We are instructed that the University considers academic results to be the best predictor of a propensity to meet all the requirements for a course of study. The minimum requirements for each course of study are set by faculties and approved by the Senate.

- 21.2. Second, a determination is made of the number of applicants who will be accepted in each faculty. These numbers are negotiated with the faculties, having regard to the enrolment targets agreed between the University and the Minister of Higher Education each year.<sup>11</sup>
- 21.3. Third, the faculty initially admits applicants based on superlative academic achievement, regardless of race, or socio-economic disadvantage. This can be referred to as the ‘first admission sweep’. This is prioritised to ensure that the University maintains academic excellence, and allows the University to attract and retain the best students at an early stage in the admissions process. For undergraduate degrees, admission on this basis is usually based on the marks achieved by applicants in Grade 11. The admission, which is communicated to the applicants during their Grade 12 year, is provisional in the sense that these students must still successfully complete the matric examinations at the end of Grade 12. The faculties each determine the number of available spots which will be allocated on this basis, or set threshold academic results which must be achieved for provisional admission on this basis. The criteria for provisional acceptance at this stage are based on the faculties’ knowledge of their applicant pools, including (for instance): the level of competition for positions in different course of study; the number of applicants who will probably not take up the offer

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<sup>11</sup> As indicated above, we are instructed that the University collates targets set faculties, and transmits these to the Minister. The Minister has never interfered with these. The transformation of the student body is encouraged by offering higher subsidies for BCI students.

(because they pursue another course of study or choose another university); and the quality of the applicant pools.

21.4. Fourth, the racial composition of the students admitted to a course of study is considered and acted upon. This can be referred to as ‘the second admission sweep’. At present,<sup>12</sup> the draft Policy does not distinguish between Black (African), Coloured and Indian students. Instead, a target is set for the number of BCI students in each faculty.<sup>13</sup> In effect the faculty considers the overall target for BCI students, and the number of BCI students already admitted (based on superlative academic performance). It then works through the best BCI applicants who have not as yet been placed (because they fell short of the threshold for admission based on superlative academic performance), with the aim of ‘topping up’ the number of BCI applicants, until the overall BCI target is met (if possible).<sup>14</sup>

21.5. Fifth, the socio-economic status (**SES**) of the students is considered and acted upon. This can be referred to as ‘the third admission sweep’, and is based on the following factors:

21.5.1.the quintile of the school the applicant attended, or the fees charged by the school;

21.5.2.whether the applicant or his or her family received a social grant;  
and

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<sup>12</sup> We are instructed that this may change in the future, but for the current policy-cycle (of about five years) the intention is that all BCI applicants will be treated the same.

<sup>13</sup> As noted, the targets set by faculties are collated by the University and transmitted to the Minister, who generally agrees to these targets.

<sup>14</sup> In a previous iteration of a ‘Plan’ (which would accompany the Policy), it was indicated that academically strong BCI candidates must be identified and offered positions as soon as possible, to prevent the University from losing them. Based on our advice, the previous drafts of the Policy and the Plan have been unified into a single document. This aspect of the Plan does not appear to have been carried across. But it appears to be the intention that BCI candidates who fall short of the requirements for provisional admission based on academic excellence, but who have still achieved well, may also be provisionally offered positions based on their Grade 11 results.

- 21.5.3. whether the applicant is a first-generation student.
- 21.6. These factors yield an SES score out of 10. An SES score of between 4 and 10 indicates significant socio-economic disadvantage. Once again a target is set by faculties for each course of study, i.e. a number of spaces is set aside for those who have overcome socio-economic disadvantage. The faculty must again consider the SES status of those already admitted, and thereafter work through the remaining applicants with high SES scores until the target is achieved (is possible).
- 21.7. Lastly, any spaces which are still unfilled are filled by the best applicants still on the list, regardless of race and socio-economic status. The number of places available in this final sweep depends on the number of offers which have already been made; together with an estimation of the number of offers which will probably not be taken up (referred to as an 'overbooking' number).
22. Each faculty thus has leeway to determine: (a) its own minimum admission criteria; (b) the overall number of spaces available in each course of study based on resources, infrastructure and demand; (c) the threshold academic results for those admitted on the basis of superlative academic achievement; (d) the target for the number of BCI students in a course of study; (e) the target for the number of socio-economically disadvantaged students in a course of study; and (f) the 'overbooking' number.
23. The faculties' decisions are driven by differences in demand for their courses, the size of their programmes (i.e. the total numbers of places available in each course), the difficulty of the programme and the racial and SES make-up of the applicant pools – all of which vary between faculties and between programmes from year-to-year.

24. The faculties' decisions and targets feed in to the University's overarching target to admit a designated number of BCI and SES students. This is relayed to the Minister and Department.
25. In addition to considering race and socio-economically disadvantage in admissions to the ordinary programme, the faculties facilitate access to and success at SU for disadvantaged students by running Extended Development Programmes (**EDPs**). The EDP is designed for students who are not admitted to the ordinary programme. The programme takes longer, and the students are offered additional support.
26. We are instructed that objective of EDPs is to achieve both an increase in the numbers of BCI and low-SES students, and to admit students who have the potential to succeed if they are given the opportunity to complete a longer course of study.

### **III LEGAL FRAMEWORK**

27. In this Part, we describe the legal framework that regulates SU's admissions' policy. We do so in the following sections:
  - 27.1. the competing constitutional principles of transformation and non-racialism;
  - 27.2. the statutory requirements;
  - 27.3. the right to further education;
  - 27.4. the affirmative action defence in s 9(2) of the Constitution and s 14(1) of the Equality Act;

27.5. some case studies of how that test has been applied; and

27.6. a summary of the relevant principles.

### **Competing constitutional principles**

28. Affirmative action measures – such as SU’s proposed Admissions Policy – operate at the intersection of two powerful constitutional principles: transformation and non-racialism.
29. On the one hand, the Constitution has an expressly “*transformative mission*”.<sup>15</sup> It recognises the history of racial and gender discrimination and “*enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination.*”<sup>16</sup> This goal is most obviously present in s 9(2) of the Constitution<sup>17</sup> which permits unfair discrimination if it is designed to advance categories of previously disadvantaged persons. The need for positive measures to transform society are still necessary “*because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds.*”<sup>18</sup>
30. On the other hand, along with non-sexism, non-racialism is a founding value of the Constitution.<sup>19</sup> And “*the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity.*”<sup>20</sup> The Constitutional Court has recognised that some measures designed to advance the Constitution’s transformative goals, also have the potential to “*impose such substantial and undue harm on*

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<sup>15</sup> *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) (**Barnard**) at para 29.

<sup>16</sup> *Barnard* at para 29.

<sup>17</sup> Section 9(2) of the Constitution reads: “*Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*”

<sup>18</sup> *Barnard* at para 29.

<sup>19</sup> Section 1(b) of the Constitution

<sup>20</sup> *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) (**Van Heerden**) at para 44.

*those excluded from its benefits that our long-term constitutional goal would be threatened.”*<sup>21</sup>

31. Some Justices of the Constitutional Court have described this as a “*transformative tension*”:

*“These two commitments can create tension. And there is a tension between the equality entitlement of an individual and the equality of society as a whole. A tension also arises when our laws attempt to advance multiple groups of previously disadvantaged persons that do not fully overlap. The resolution of this case should address these tensions and provide a framework that permits these constitutional goals to be read harmoniously.”*<sup>22</sup>

32. The Constitutional Court has therefore held that, when evaluating affirmative action measures, it is necessary to harmonise these competing concerns:

*“Our quest to achieve equality must occur within the discipline of our Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive.”*<sup>23</sup>

33. In what follows, we attempt to define what types of affirmative action measures are permissible.

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<sup>21</sup> *Van Heerden* at para 44.

<sup>22</sup> *Barnard* at para 77 (Cameron J, Froneman J and Majiedt AJ, concurring).

<sup>23</sup> *Barnard* at para 30. See also *Solidarity and Others v Department of Correctional Services and Others* [2016] ZACC 18 (*Solidarity*) at paras 96-101.

## **The Higher Education Act**

34. SU's Admissions Policy is regulated, in the first place, by the Higher Education Act (HEA).<sup>24</sup>

35. Section 37 of the HEA reads as follows:

***'37 Admission to public higher education institutions***

*(1) Subject to this Act, the council of a public higher education institution, after consulting the senate of the public higher education institution, determines the admission policy of the public higher education institution.*

*(2) The council must publish the admission policy and make it available on request.*

*(3) The admission policy of a public higher education institution must provide appropriate measures for the redress of past inequalities and may not unfairly discriminate in any way.*

*(4) Subject to this Act, the council may, with the approval of the senate-*

*(a) determine entrance requirements in respect of particular higher education programmes;*

*(b) determine the number of students who may be admitted for a particular higher education programme and the manner of their selection;*

*(c) determine the minimum requirements for readmission to study at the public higher education institution concerned; and*

*(d) refuse readmission to a student who fails to satisfy such minimum requirements for readmission.'*

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<sup>24</sup> Act 101 of 1997.

36. It is important to bear in mind that s 37(1) and s 37(4) set different procedural requirements.

36.1. Section 37(1), which applies to SU's admissions policy, provides that the policy is determined by the Council after consulting the Senate. This means the admissions policy must be determined by the Council (i.e. it cannot be determined by any other body or person), and when doing so the Council must consult and give serious consideration to the views of the Senate, but it is not bound by them. The Council has the final say.<sup>25</sup>

36.2. Section 37(4), which applies to the determination of (a) entrance requirements in respect of particular higher education programmes, (b) the number of students who may be admitted for a particular higher education programme and the manner of their selection, (c) the minimum requirements for readmission to study at SU and (d) the refusal of readmission to a student who fails to satisfy such minimum requirements for readmission, provides the Council may determine these matters with the approval of the Senate. In practical terms this means that the Council is entitled but not obliged to determine any of (a) to (d), but before it may do so the Senate must agree. Otherwise, (a) to (c), which are generally-applicable determinations, are matters to be dealt with in the admissions policy or in terms of the admissions policy (e.g. by faculty boards with or without the concurrence of the Senate and/or the Council, depending on the formulation of the policy).

37. One of the HEA's purposes is to "*REDRESS past discrimination and ensure representivity and equal access*". Section 37(3) of the HEA, quoted above, expands on that purpose with reference to a university's admissions policy by

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<sup>25</sup> On the meaning of the phrase 'after consultation with', see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at para 131.

providing that the policy “*must provide appropriate measures for the redress of past inequalities and may not unfairly discriminate in any way.*” There are three important elements of this requirement:

37.1. SU must have “*appropriate measures*” to redress past inequality. The HEA provides little guidance about what is “*appropriate*”.

While universities will likely be given significant leeway in determining precisely what is “*appropriate*” in their particular context, the measures must not be window-dressing.

37.2. The measures must be designed to redress past discrimination and ensure representivity and equal access and have those effects.

37.3. At the same time, the measures must not “*unfairly discriminate*”. This language is a clear reference to s 9(3) of the Constitution and s 14 of the Equality Act.

38. The legal position regarding a university’s admissions policy is comparable to that of certain employers in the employment context where the Employment Equity Act obliges designated employers to take affirmative action measures.<sup>26</sup> Two recent Constitutional Court cases on employment equity – *Barnard* and *Solidarity* – are particularly instructive. We discuss them later in this Part.

### **The right to further education**

39. Section 29(1)(b) of the Constitution provides that everyone “*has the right to further education, which the state, through reasonable measures, must make progressively available and accessible.*” That right includes both a positive and a negative component. The positive component requires the state to

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<sup>26</sup> Act 55 of 1998 s 13(1).

increase the availability and accessibility of further education. The negative component prohibits measures that obstruct access to further education.<sup>27</sup>

40. Admissions policies that prevent access to a university limit the negative component of the right.<sup>28</sup> They need to be justified in terms of s 36(1) of the Constitution.<sup>29</sup>
41. Most parts of a rational policy will be easily justifiable. Academic requirements are necessary to ensure that a person will succeed in the programme, and that the University's resources are spent on those who will receive the greatest benefit. To the extent that a policy which aims to redress past inequalities obstructs access to further education by persons who are not suffering the enduring effects of those inequalities, that obstruction will be justified because – and to the extent that – it is permitted by s 9(2) of the Constitution and is compatible with the positive component of the right in s 29(1)(b).
42. When assessing an affirmative action measure in an admissions policy there are, theoretically, two distinct inquiries: (a) Is the limitation of s 29(1)(b) justifiable in terms of s 36(1)? and (b) Is the discrimination justified because it falls within the ambit of s 9(2) or within the ambit of the positive component of the right in s 29(1)(b)? However, in our view it is unlikely that a court would reach different conclusions in the two different inquiries. If a court concludes that the positive discrimination in an admissions policy is justified under s 9(2) of the Constitution (or s 14(1) of the Equality Act) or under the positive component of the right in s 29(1)(b) of the Constitution, it will also conclude

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<sup>27</sup> See generally S Woolman & M Bishop 'Education' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2 ed, 2007) ch57 p38-9.

<sup>28</sup> Woolman & Bishop (n 27 above) at ch57 p38-9. See also *Motala & Another v University of Natal* 1995 (3) SA 374 (N) (*Motala*) at 383.

<sup>29</sup> Section 37(3) of the HEA constitutes the "law of general application" that can be used to justify SU's admissions policy.

that it constitutes a justifiable limitation of the negative component of the right to further education in s 29(1)(b).

### **Affirmative action measures**

43. Any policy that grants benefits to one racial group over another constitutes discrimination that needs to be justified. The most obvious defence is that it constitutes a permissible affirmative action measure.
44. That defence is contained in s 37(3) of the HEA (quoted above) and in s 14(1) of the Equality Act,<sup>30</sup> which reads: “*It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.*”
45. Section 14(1) of the Equality Act to a large extent mirrors the requirements of s 9(2) of the Constitution.<sup>31</sup> In *Van Heerden* the Constitutional Court held that if a party charged with unfair discrimination can prove compliance with s 9(2), any discrimination involved will be fair.<sup>32</sup> As Albertyn and Goldblatt put it: “[Section] 9(2) provides a complete defence to a claim that positive measures constitute unfair discrimination. All that is required to succeed in this defence

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<sup>30</sup> The Constitutional Court has formulated a “*principle of subsidiarity*”, holding that policies must be evaluated in terms of the Equality Act, not directly against the Constitution. *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 40. However, there is little, if any, substantive difference in the two inquiries.

<sup>31</sup> Although section 14(1) of the Equality Act also operates as a complete defence, it is not identical to s 9(2). The difference between section 14(1) of the Equality Act and section 9(2) of the Constitution is that the Constitutional provision is preceded by the phrase: “*To promote the achievement of equality*”. It is that language that underpins the third *Van Heerden* requirement in its section 9(2) analysis. The absence from s14(1) of the words “*To promote the achievement of equality*”, can be interpreted in two ways. It could be regarded as indicating the intention of the legislature that the broader and longer term consequences that concerned the Court in *Van Heerden* would not be relevant to similar challenges under the Equality Act. Alternatively, it could be argued that s 14(1) must be interpreted consistently with the Constitution, so that it is necessary and appropriate to read in the requirement that the measure generally advance the achievement of equality. In our view, the second approach is preferable. It would not be consistent with the constitutional scheme, or the scheme of the Equality Act, to conclude that measures that will promote the interests of previously disadvantaged persons in the short term, but will be harmful to the achievement of equality in the long term, could not be unfair.

<sup>32</sup> *Van Heerden* at para 36.

*is to demonstrate compliance with the internal conditions established in ... s 9(2)."*<sup>33</sup>

46. In *Van Heerden* the Constitutional Court determined that s 9(2) had three such "internal conditions".<sup>34</sup>
47. First, the measure must target "persons or categories of persons who have been disadvantaged by unfair discrimination".<sup>35</sup> Put differently, "[t]he beneficiaries must be shown to be disadvantaged by unfair discrimination."<sup>36</sup> In *Van Heerden* the Constitutional Court acknowledged that it is often not possible to tailor a remedial regime precisely in order to benefit all the members of the disadvantaged class and no members of the advantaged class:

*"[O]ften it is difficult, impractical or undesirable to devise a legislative scheme with 'pure' differentiation demarcating precisely the affected classes. Within each class, favoured or otherwise, there may indeed be exceptional or 'hard cases' or windfall beneficiaries. That however is not sufficient to undermine the legal efficacy of the scheme. The distinction must be measured against the majority and not the exceptional and difficult minority of people to which it applies."*<sup>37</sup>

48. The second requirement under section 14(1) is that the measure must be "designed to protect or advance such persons or categories of persons".<sup>38</sup> The Court explained that such a provision does not require an absolute or perfect connection between means and ends. "The future", Moseneke DCJ

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<sup>33</sup> 'Equality' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2 ed, 2005) at ch35 p33.

<sup>34</sup> *Van Heerden* at para 37.

<sup>35</sup> *Van Heerden* at para 37.

<sup>36</sup> *Van Heerden* at para 38.

<sup>37</sup> *Van Heerden* at para 39.

<sup>38</sup> *Van Heerden* at para 37.

acknowledged, “*is hard to predict.*”<sup>39</sup> However, the means defended under s 9(2) “*must be reasonably capable of attaining the desired outcome.*”<sup>40</sup> Section 9(2) does not set a standard of necessity, nor do supporters of a measure need “*to establish that there is no less onerous way in which the remedial objective may be achieved.*”<sup>41</sup>

49. Third, the measure must promote “*the achievement of equality.*”<sup>42</sup> This is where the balance between redress and non-racialism takes place. The Court stressed that affirmative action measures “*may often come at a price for those who were previously advantaged*” and that this would not exclude the measure from constitutional protection.<sup>43</sup> However, the “*long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity.*”<sup>44</sup> Or, as the minority judgment put it in *Barnard*: “*To achieve the magnificent breadth of the Constitution’s promise of full equality and freedom from disadvantage, we must foresee a time when we can look beyond race.*”<sup>45</sup> As a result, section 9(2) would not cover a measure that imposed “*such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.*”<sup>46</sup>
50. Importantly, unlike in an ordinary unfair discrimination analysis, there is no evidentiary burden on the respondent in a challenge based on s 14(1) of the Equality Act to show that the measure is fair. Rather, the onus is on the claimant to produce evidence showing that a measure is not consistent with s

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<sup>39</sup> *Van Heerden* at para 41.

<sup>40</sup> *Van Heerden* at para 41.

<sup>41</sup> *Van Heerden* at para 43.

<sup>42</sup> *Van Heerden* at para 37.

<sup>43</sup> *Van Heerden* at para 44.

<sup>44</sup> *Van Heerden* at para 44.

<sup>45</sup> *Barnard* at para 81.

<sup>46</sup> *Van Heerden* at para 44.

9(2),<sup>47</sup> or that its implementation is not consistent with s 9(2).<sup>48</sup> Although it has not yet been determined, the same must be true for s 14(1) of the Equality Act.

### **Application**

51. While the description of these factors gives significant guidance, it is also helpful to look at how courts have applied them in practice as this demonstrates what types of measures are acceptable, and what types of measures are not. We briefly consider the four leading cases, one concerning university admissions, one concerning government pensions, and two dealing with employment.

#### *Motala*

52. *Motala v University of Natal* is the most similar to the present inquiry. The University of Natal's medical school had introduced a policy that evaluated Black (African) learners differently from learners from other racial groups. Although the details were hazy, a Black (African) applicant with lower marks would be admitted before a White or Indian applicant with higher marks. The goal was to obtain a student body that roughly reflected the composition of the various "*cultural groups*" in society. The parents of an Indian learner who had obtained very high marks but had not been admitted, challenged the legality of the policy and sought an interim order admitting their daughter to the medical programme.

53. In a judgment delivered very early in the constitutional era, Hurt J dismissed the parents' application. He held that the policy discriminated and that it also limited the right to further education. However, he concluded that the policy was consistent with s 8(3)(a) of the interim Constitution – the equivalent of s

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<sup>47</sup> *Van Heerden* at paras 33-35.

<sup>48</sup> *Barnard* at para 53.

9(2) of the final Constitution – and that any limitation of the right to further education was therefore justified. In particular he upheld the distinction between Black (African) and Indian learners on the basis that “*the degree of disadvantage to which African pupils were subjected under the “four tier” system of education was significantly greater than that suffered by their Indian counterparts.*”<sup>49</sup>

### *Van Heerden*

54. *Minister of Finance v Van Heerden* – the first Constitutional Court case to consider s 9(2) – concerned a pension scheme for parliamentarians which granted a greater employer contribution to the pensions of MPs who had not previously been members of Parliament. The primary purpose was to provide redress to Black (African) members who had been excluded from the pre-Constitution tri-cameral parliament.

55. The Constitutional Court generally upheld the system because it was designed to advance previously disadvantaged people, largely achieved this goal and did not threaten the achievement of equality. The system had two interesting features that may be relevant in designing SU’s Admissions Policy:

55.1. Not all the MPs who benefited from it were Black (African). Indeed, only 79% were. The majority of the Constitutional Court found that this constituted an “*overwhelming majority*” and was sufficient to satisfy the second s 9(2) requirement.<sup>50</sup>

55.2. There were 15 MPs who had not benefited from the previous dispensation, but also did not benefit under the new system. The Court

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<sup>49</sup> *Motala* at 383.

<sup>50</sup> *Van Heerden* at para 48.

held that the existence of these “*jamergevalle*” was not sufficient to undermine the system as a whole.<sup>51</sup>

### *Barnard*

56. In *South African Police Service v Solidarity obo Barnard* the Constitutional Court held that it was permissible not to promote a white woman (Ms Barnard) to a post solely because the South African Police Service (**SAPS**) already employed too many white women at that level.
57. The precedential effect of the judgment is limited for a number of technical reasons.<sup>52</sup> In addition, the legislative framework for affirmative action measures in the employment context is not identical to university admissions.
58. But the judgment still provides useful guidance on three issues:
- 58.1. The judgment distinguished between “*numerical targets*” and “*quotas*” under s 15 of the Employment Equity Act. The former are permissible, the latter are not. It held that the difference between the two is “*flexibility*” – quotas are inflexible and “*amount to job reservation*”; numerical targets are “*a flexible employment guideline*”.<sup>53</sup>
- 58.2. The judgment held that SAPS used numerical targets, not quotas because the Employment Equity Plan (**EEP**) permitted deviation, and the evidence showed that the National Commissioner had in fact deviated from the Plan in some circumstances.<sup>54</sup>

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<sup>51</sup> *Van Heerden* at paras 55-56.

<sup>52</sup> The Court’s findings on the legitimacy of the decision were *obiter dicta* as the Court held the issue was not properly before it. The Court also accepted that the Employment Equity Plan that governed the decision not to promote Ms Barnard was lawful because it was not challenged.

<sup>53</sup> *Barnard* at para 54.

<sup>54</sup> *Barnard* at para 66.

58.3. The judgment did not determine the standard of scrutiny that applies when applying the *Van Heerden* test to the implementation of Employment Equity Plans. It held only that there had to be at least a rational basis between the decision and the purpose of the plan.<sup>55</sup> It left open the possibility that a higher standard could apply.

### *Solidarity*

59. In a similar case also brought by the trade union Solidarity, the Constitutional Court recently struck down the application of the Department of Correctional Services' (DCS) EEP. The EEP set strict racial and gender percentages for each salary level based solely on national demographics, and stated how many men and women from each race could be appointed at each level. The EEP required the same demographic representation in all provinces. The only flexibility was that the National Commissioner could depart from the requirements if the candidate had "*special skills or where operational requirements of the Department dictated that that candidate be appointed.*"<sup>56</sup> The result was that several Coloured employees in the Western Cape were not promoted because there were already too many Coloured persons or too many women at that salary level nationally, although they remained under-represented in the Western Cape.

60. The majority of the Constitutional Court made several relevant findings:

60.1. The majority accepted that "the *Barnard* principle" – that a person could be refused promotion solely because her race was already over-represented – could be applied against Coloured people. That is, a

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<sup>55</sup> *Barnard* at para 39.

<sup>56</sup> *Solidarity* at para 7.

Coloured person could be refused promotion in favour of a Black (African) or White person in order to ensure the correct demographics.<sup>57</sup>

60.2. The majority held that the percentages set in the EEP were not quotas because the National Commissioner could permit a departure, even though the opportunity for departures was limited.<sup>58</sup> Nugent AJ (joined by Cameron J) disagreed. They held that the EEP did set quotas, primarily because the National Commissioner could only deviate from the plan for a limited class of employees.<sup>59</sup>

60.3. The majority held that when the DCS applied the EEP, it acted unlawfully because – contrary to s 42(a) of the EEA<sup>60</sup> – it considered only national demographics and failed to consider the demographic profile of the regional and national economically active population.<sup>61</sup> Nugent AJ supported this finding but stressed that it was not only contrary to the EEA, it was also irrational.<sup>62</sup>

## **Conclusion**

61. From the above discussion, we can draw the following principles to guide SU's determination of its Admissions Policy.

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<sup>57</sup> *Solidarity* at para 40.

<sup>58</sup> *Solidarity* at para 53.

<sup>59</sup> *Solidarity* at paras 113-118.

<sup>60</sup> At the relevant time, EEA s 42(a) read:

*“In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act must, in addition to the factors stated in section 15, take the following into account:*

(a) *the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation the—*

(i) *demographic profile of the national and regional economically active population”*

<sup>61</sup> *Solidarity* at paras 79-80.

<sup>62</sup> *Solidarity* at para 122.

62. First, SU is required to adopt an Admissions Policy that takes “*appropriate*” measures to redress past inequalities.
63. Second, the law does not prescribe the form or content of SU’s admissions’ policy. SU therefore has a discretion.
64. Third, the primary yardstick of the appropriateness of the affirmative action measures in its Admissions Policy is likely to be s 14(1) of the Equality Act. A court is likely to show SU some deference in that analysis. In particular, the court is likely to:
  - 64.1. require any person attacking the validity of the affirmative action measures to show that SU has not struck an appropriate balance between the competing constitutional principles of transformation and non-racialism; and
  - 64.2. evaluate the imposition of the standard with a relatively low level of scrutiny.
65. Fourth, SU is entitled to set lower standards for the admission for applicants from different racial groups, if it is intended to take account of ongoing disadvantage and/or ensure a more representative student body.
66. Fifth, there is a risk in adopting strict racial quotas, as opposed to more flexible numerical targets. Although the issue has only been determined in the specific statutory context of EEPs, it is possible that courts will adopt a similar approach to university admissions.
67. Sixth, in setting its policies, SU should consider the relevant applicant pool, and take account of both national and regional demographics. While this has only been decided in the employment context, it is likely a similar approach will be taken to university admissions.

68. Seventh, SU is entitled – and may be required – to distinguish between different categories of disadvantaged groups, particularly Black (African), Coloured and Indian people. It is also entitled to refuse admission to a person from one disadvantaged group in order to achieve better representation of other disadvantaged groups.
69. Eighth, the Admissions Policy does not need to achieve perfect representation, or avoid any unintended injustices. As long as the Policy is designed to, and does in fact, principally benefit the targeted group(s), the fact that a small number of people who should not benefit do, or a small number of people who should benefit do not, will not affect the validity of the Policy.

#### **IV ANALYSIS**

70. In this Part, we consider potential legal shortcomings in the current draft of the Admissions Policy. We do so to provide guidance to SU in finalising the Policy. We address the following issues:
- 70.1. affirmative action;
  - 70.2. specific concerns raised by the affirmative action measures in the University's draft Policy;
  - 70.3. the EDP; and
  - 70.4. the need for specificity.

## Affirmative action

71. The first question is whether the Policy – which discriminates against White people and in favour of Black (African), Coloured and Indian people – is consistent with s 14(1) of the Equality Act. In our firm view, it is. We say so for the following reasons.
72. First, it targets people currently disadvantaged by past discrimination.
- 72.1. As dealt with above, any affirmative action measure must be premised on the recognition that the beneficiaries of that measure have been “*disadvantaged by unfair discrimination*”.
- 72.2. The beneficiaries of the affirmative action measures in the University’s draft Policy will almost all have been born after South Africa’s transition to democracy, and will not have themselves lived under the discriminatory apartheid regime.
- 72.3. However, the consequences of the colonial and apartheid eras obviously did not end in 1994. The lingering effects of past discriminatory laws remain as a result of entrenched spatial patterns, inequality of opportunities and resources, and the fact that the children of today are limited by their parents’ ability to access better opportunities.
- 72.4. The Constitutional Court has noted the continuing disadvantage suffered as a result of past discriminatory laws on a number of occasions.<sup>63</sup> This is also borne out by the statistical analysis referred to above, which shows there remains a close correlation between race (on the one hand) and educational opportunities and success (on the other). It is likely that

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<sup>63</sup> See, for example, *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at paras 121-125; *Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at paras 45-47; and *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC) at paras 1-2.

there is a similar correlation between SES status and educational opportunities and success.

- 72.5. The reality is thus that race remains a relatively accurate indicator of present disadvantage, which flows directly from past discrimination. It is thus fair to treat so-called ‘born frees’ (children born after 1994) as the beneficiaries of an affirmative action policy, even though some of them will not be significantly disadvantaged (an issue to which we return below).
73. Second, the Policy is reasonably likely to achieve the goal. By reserving a certain number of places for BCI candidates, it will advance them over White candidates. There are a few possible challenges at this leg of the test:
- 73.1. The Policy does not distinguish between Black (African), Coloured and Indian applicants. It could be argued that it should do so to prevent over-representation of any previously disadvantaged group. In our view, while on the authority of *Motala* and *Solidarity* it would be permissible for SU to do so – and may be advisable for SU to do so – distinguishing between Black (African), Coloured and Indian applicants is not a requirement for the Policy to be protected under s 14(1). Current national legislation – the Employment Equity Act 55 of 1998 and the Broad-Based Black Economic Empowerment Act 53 of 2003 – do not do so, referring instead to “*black people*” (a generic term which means Africans, Coloureds and Indians).
- 73.2. SES places could be granted to White people. As the Court noted in *Van Heerden*, it is not necessary for there to be a perfect fit. It is acceptable for the measure to benefit some people who were not previously disadvantaged. In any event, poverty is also a form of historical disadvantage that SU is entitled to attempt to address under ss 14(1) of the Equality Act.

73.3. It could be argued that because the Policy itself does not expressly prescribe the racial targets, it does not go far enough in advancing the interests of BCI applicants. However, the targets are not set in the Policy because they are separately determined annually by faculties, and the University's overall BCI target is agreed in conjunction with DHET. As a general approach, this is acceptable. It is possible that the actual agreements between SU and DHET, or between the University and the Faculties, could be subject to a separate challenge because they go too far, or do not go far enough. But that does not affect the legitimacy of the general position adopted in the Policy. In our view, the reasons for allowing differentiation between faculties – the differing size and make-up of the applicant pools, the extent of demand and the degree of difficulty of the programme – justify leaving the determination of targets to the faculties.

73.4. It could be argued that affirmative action measures give too much preference to race over SES and therefore privilege BCI applicants from wealthier backgrounds who were able to attend better schools, over poorer BCI applicants who have suffered (and continue to suffer) greater disadvantage. In other words, SU should focus more on socio-economic disadvantage and less on race. However:

73.4.1.in South Africa race is the primary marker of historical discrimination, which is what s 14(1) is aimed at redressing;

73.4.2.in South Africa race remains a reasonably accurate proxy for current disadvantage;

73.4.3.SU is entitled to pursue both affirmative action measures, and excellence; the Policy is designed to achieve the two goals simultaneously; and

73.4.4. courts should afford universities a large degree of discretion in making policy about the difficult issue of admissions. It may be that a policy that focused more on present socio-economic disadvantage could also be successfully defended under s 14(1). But that does not reduce the legitimacy of the approach taken by SU.

74. Third, the Policy will not interfere with the long term achievement of equality. The Policy does not exclude White people from accessing the University. It recognises their historical privilege and requires them to demonstrate that they have taken advantage of that privilege by performing better than applicants from other races. It therefore meets the third requirement of s 14(1).

### **Concerns about the affirmative action measures in the draft Policy**

75. We are satisfied that, in general, the draft Policy contains legitimate and defensible affirmative action measures. However, we have some concerns which in our view require attention, being:

- 75.1. the need to ensure that race-based measures in the Policy are properly construed as permissible targets, and not as impermissible quotas; and
- 75.2. the basis on which applicants are expected to make a self-classification based on race.

### **Quotas versus targets**

76. As dealt with above, both the *Barnard* and *Solidarity* cases draw a distinction between permissible flexible targets, and impermissible inflexible quotas.
77. The issue that arises is whether the current formulation of the draft Policy imposes a target for BCI students in the second sweep, or impermissibly imposes a fixed quota.

78. In the *Barnard* and *Solidarity* cases the understanding of quotas appears to be of a system of fixed percentages for all racial groups. The draft Policy is distinguishable in that:
- 78.1. It imposes neither a minimum, nor an explicit maximum on the number of White applicants who can be offered slots; and
  - 78.2. It only aims for a minimum number of BCI students to be offered slots, without regulating a maximum.
79. That being said, there may be a compelling argument that if the Policy sets a ‘hard’ minimum for the number of BCI applicants to be offered places, it effectively sets a quota; and thereby indirectly fixes a maximum for the number of White applicants to be offered places.
80. This argument is neutralised to a large extent by the following:
- 80.1. As a fact, White students are still largely over-represented in the student body (compared to the applicant pool). This indicates that White students generally remain the beneficiaries of social and educational advantage. This in turn makes it hard to sustain any suggestion of unfair disadvantage on account of corrective admission policies.
  - 80.2. The first, third and final sweeps of the admission programme are race-neutral.
  - 80.3. The BCI targets are aspirational, and must be set as such. It may be that the in a given year some of more of the targets will be unattainable because the University does not receive sufficient numbers of BCI applicants who meet the academic minima.
  - 80.4. The BCI targets determine the manner in which places are offered to applicants, which may not necessarily translate into fixed racial

admission statistics. This is so as many BCI applicants who are offered positions may not actually take these up. It may thus transpire that a greater proportion of White applicants take up offers from the University in a particular faculty, while more BCI students take up alternative courses of study or offers at other universities or decide not to go to university at all. The result may thus be that the BCI target does not translate into a fixed number of BCI students.

81. In order to remove any doubt that the University will be setting targets not quotas, we recommend that the Policy should include an extra element of flexibility, which will entitle faculties to adjust targets after applications have been received, based on a cogent justification.

81.1. The faculties will set their BCI targets in anticipation of applications. They should be permitted to revisit the targets after the applications have been received (and before the admissions process). This will mean that a faculty can, for instance, take account of the fact that the pool of White applicants is particularly strong in a particular year; or that the pool of BCI applicants is disappointingly weak.

81.2. Faculties should be required to justify any such adjustments carefully and cogently, based on empirical analysis of the applications actually received or any other relevant factors or considerations; and be required to present a written report.

### **Racial self-classification**

82. The idea of asking applicants to identify themselves racially will be objectionable to those who hold a moral objection to the idea of racial

classification at all,<sup>64</sup> and those who find it incompatible with the attainment of true non-racialism.

83. The continued use of race by the University may also give rise to moral, philosophical and political debate. However, as a matter of law, continued use of race at this juncture is not problematic. This is so as the Constitution, which is the supreme law, has already made the value-laden choice, in that it specifically permits racially-based affirmative action policies. As dealt with above, this is also reflected in the statutory provisions guiding the University's admission policy.
84. Furthermore, the Constitutional Court has repeatedly recognised that it is legitimate to use race in affirmative action matters. It has therefore endorsed the idea that while race is a social construct, it has continuing real effects which must be redressed. To hold otherwise would prevent any affirmative action at all, which is plainly contrary to the Constitution and the Equality Act. It would also require the University closing its eyes to the reality of South African society, and the demonstrable link between race and continuing disadvantage.
85. There is of course a tension between affirmative action measures, and the quest for non-racialism. But this is resolved by the fact that substantive equality is not measured against abstract notions or ideological positions (no matter how admirable or pure the intentions), but against the reality of the society in which we live.
86. We thus do not believe that any legal objection could be raised to a requirement that applicants should be required to indicate a race, or that this is used as a basis for offering some applicants an advantage in the admissions process.
87. The attribution of a race to each applicant does, however, raise practical problems.

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<sup>64</sup> This argument was raised by Prof Fagan in 2012 when UCT was considering its Admissions Policy.

88. The first is that some recognition ought to be given to the fact that some applicants may be opposed to indicating a race. Little purpose would be served by seeking to compel these individuals to indicate a race, and to act against their conscience. Instead, they should be accommodated by giving them the option to indicate that they would prefer not to indicate a race. The Policy should make it clear that if the applicant chooses this option, he or she will not be given the benefit granted to those who are identified as BCI candidates. In practice, this means that they will not be considered in the second sweep of the admissions process.
89. For any White applicant, it will make no difference if he or she is identified as such, or if he or she is recorded under the ‘prefer not to say’ category. The application of the admissions process will be the same. It is unlikely that there will be a significant number of candidates (if any) who could otherwise legitimately identify themselves as BCI, but who feel so affronted by any idea of racial classification that they are prepared to forego the advantage of identifying themselves as such. But if any applicant exists, he or she should be afforded the opportunity to waive the benefits of the affirmative benefits in the Policy.
90. The second issue relates to the criteria that are used for attributing a race to applicants.
- 90.1. There is no longer any official, “objective” government racial classification system in South Africa. Very few of the current applicants for admission to an undergraduate course would have been racially classified by the apartheid state.
- 90.2. The draft Policy overcomes this by relying on a system of racial self-classification. This is, in our view, defensible. The only alternative to self-classification would be for SU to itself classify all South African

applicants according to race, which is something a university is ill-equipped to do.

- 90.3. A person may be able to pass in society as two or more races. Racial identity therefore does not depend only on appearance, or how the person is perceived. Self-classification indicates a more honest assessment of how the applicant identifies him or herself – taking into account how their parents identified, where they live, what language they speak, what school they went to and so on. Their race is determined by all those factors, as well as their physical appearance. Each individual is in a good position to determine their own race.
- 90.4. But, as explained below, self-classification must have some justifiable basis. This is most accurately achieved by eliciting information about the applicant's parents. Anyone who suffers continuing disadvantage as a result of the racial classification of the apartheid state will almost invariably have grown up under a parent or guardian who was racially classified by the apartheid state. This may change in the future, but will be true in most cases for the coming 5-year policy cycle.
91. The third issue relates to the possibility of a dishonest self-classification, in order to obtain a benefit.
  - 91.1. As explained more fully below, the Policy legitimately allows SU to refuse to accept an applicant's self-classification which it believes is false. That provides an adequate safeguard. If an applicant is dissatisfied with SU's rejection of his or her self-classification, he or she can take SU on review to the courts.
  - 91.2. A wilfully dishonest self-classification will often be a basis to disregard the applicant altogether. It may even justify a ban on re-applying to SU for a specified (reasonable) period of, say, up to three years. Applicants

should be required to affirm or swear to the correctness of the information in their application form. They should be warned that any dishonest content may result in their application being refused and their being banned from re-applying for the specified period.

92. The issue which remains is that the draft Policy does not provide any guidelines to applicants relating to their self-classification, or the basis on which a suspect self-classification will be investigated.
93. In a response to UCT's admission policy, Prof Anton Fagan<sup>65</sup> suggested that a "compromise" position as follows:

*"No applicant should be asked to state whether he or she actually is 'black', 'coloured', 'Indian', 'Chinese' or white, or is a member of a population group so described. Instead, applicants should be asked to which of these groups the racist apartheid state most probably would have assigned them'.*

94. This solution is elegant because it *"makes visible the historical contingency of this racial classification and its connection with the racist programme of the apartheid state."* This links back to the legal requirement, dealt with above, that an affirmative action policy must be linked to present disadvantage based on historical disadvantage.
95. Prof Fagan's formulation highlights that the draft Policy must make it clear that it does not merely reward 'blackness', or validate any racial signifiers, but addresses a present reality based on a historical aberration. This would also indicate that the University is attempting to address a particular South African situation, and offer a benefit to those directly affected by this society. It is thus not aimed at benefitting anyone who fits a particular racial profile, or who has

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<sup>65</sup> Anton Fagan "UCT's new admission policy", in The Journal of the Helen Suzman Foundation issue 71 of November 2013.

certain skin tone, but is aimed at those who have suffered and continue to suffer the lingering effects of successive colonial and apartheid regimes in South Africa.

96. Prof Fagan's formulation is however problematic to the extent that it suggests that applicants must play a thought-experiment, in which they play the part of a race-classification board under apartheid legislation, and racially classify themselves based on those standards. This would be an unrealistic expectation of most applicants, who did not live under apartheid, and would have no understanding of the byzantine intricacies of apartheid legislation. It may also be experienced as insensitive, hurtful and degrading.
97. That being said, we have indicated above that any affirmative action policy must be based on the recognition that previous racial discrimination in South Africa translates into continuing disadvantage. The corrective aspects of an affirmative action policy thus cannot be uncoupled from the reality that in the past people were racially classified, and that these classifications formed the basis of discrimination.
98. Furthermore, for most applicants who grew up in South Africa, it is likely that one or more of their parents would have been racially classified by the apartheid state. The racial classifications of an applicant's parents can be used to verify their self-classification, and to confirm that they are entitled to the advantages of being included in the second sweep of the admissions process.
99. By referring to these racial classifications the University would not be resuscitating apartheid or condoning its pernicious effects, but dealing with the realities that the system of apartheid did (as a fact) classify people; that these classifications had real consequences, including educational disadvantage; and that these consequences remain present for applicants to the University.

100. Racial classification under apartheid developed into a byzantine system. For current purposes some aspects of importance are the following:

100.1. Although the apartheid laws changed over time, they generally recognised three racial groups, being White, Black (although the favoured nomenclature changed over time) and Coloured. The Coloured group was defined in negative terms as people who were not Black or White. The Coloured group was internally stratified into seven sub-groups, being Cape Coloureds, Griquas, Malays, other Coloureds, Chinese, Indians, and other Asians.

100.2. All people classified as Black were expected to take nationality of a 'homeland' government, and enjoyed no representation outside of the homeland.

100.3. Under the 'tricameral' arrangement in the 1983 Constitution, separate legislative houses were created for Indians and all other Coloureds.<sup>66</sup>

100.4. Then it should be mentioned that the Population Registration Act 30 of 1950 was repealed in 1991.

101. To counteract the ongoing adverse effect of apartheid laws, some modern laws (such as the Employment Equity Act 55 of 1998 and the Broad-Based Black Economic Empowerment Act 53 of 2003) distinguish between Whites and "*black people*" generally, a term which is defined to mean "*Africans, Coloureds and Indians*". In this arrangement Chinese people are also considered to be included under the rubric of "*black people*".<sup>67</sup> The same would apply to other Asian people who fell under the "Coloured" group during Apartheid.

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<sup>66</sup> Basson and Viljoen Suid-Afrikaanse Staatsreg (2ed, 1988) at 335-338.

<sup>67</sup> An order to this effect was granted by the Transvaal Provincial Division of the High Court (per Pretorius J) in *Chinese Association of South Africa and others v The Minister of Labour and others* (TPD case 59251/2007, of 18 June 2008).

102. WE do not believe that the Policy should provide any synopsis of apartheid legislation. As indicated above, the intention would not be to require applicants to try and apply that legislation for the purposes of self-classification. It should however be explained why the University refers to this information, and to explain any confusion that may be caused by the confusing stratification of Coloured people under apartheid.
103. Against this backdrop the policy should explain that applicants will be asked:
- 103.1. With which group does the applicant most closely himself or herself?  
Options can include at least “Black African”, “White”, “Coloured”, “Indian”, “I’d prefer not to say”, or “other (specified)”.
- 103.2. Whether one or both of their parents, or a guardian under whose care they were brought up, was racially classified by the apartheid State?  
Options should be provided for each parent, or guardian/s, and should include “yes”, “I don’t know and cannot find out”, “I’d prefer not to say”, and “My parent/s or guardian/s did not live in South Africa before 1991, and were not racially classified”.
- 103.3. If the answer is “yes” for either parent or a guardian, the options should be provided for “Black”, “Cape Coloured”, “Griqua”, “Malay” “Indian”, “Chinese”, “Other Asian” or “White”.
104. The person’s self-identification will usually (i.e. absent a justified cause for concern about its honesty) be treated as determinative. Any person who self-identifies as White, or refuses to indicate a race, will be excluded from consideration in the second sweep of the admissions process.
105. The answers to the other questions can be used as a basis to verify the applicant’s self-classification.

**EDP**

106. The Policy does not contain much detail regarding EDPs. We are instructed that this is because a separate policy on EDPs is still under consideration.
107. We are instructed that faculties take two possible approaches to who will be admitted to EDPs:
- 107.1. BCI and socio-economically disadvantaged students who met the minimum criteria for admission to the ordinary programme, but were not selected; or
- 107.2. students who did not qualify for admission to the ordinary programme.
108. Each of the above options has disadvantages.
- 108.1. In the first option, the consequence is that applicants who qualify for admission to the ordinary programme, and thus (presumably) have the requisite skills to succeed, will be compelled to spend the extra time in the EDP. These students will often be persons who cannot afford the additional fees, living costs, and time required for a longer study period.
- 108.2. In the second option, the anomalous situation will arise that poorer-performing applicants will be favoured over better-performing applicants. In other words, there may be BCI or socio-economically disadvantaged students who met the minimum requirements, but could not be offered a space in the mainstream programme. They would also not be offered a space in the EDP. Yet candidates who achieved worse results, and who failed to meet the minimum requirements, will be given the opportunity to complete the degree through the EDP.
109. In our view, SU must be clear about the purpose and structure of the EDP. We are instructed that the aim of the EDP is to broaden access.

110. If detail cannot be provided in the current draft Policy, a policy must be drafted dealing with EDPs which must state clearly:

110.1. Whether the purpose of the EDP is: (a) to admit more BCI or low-SES students; (b) to admit students of any race who have the potential to succeed in a longer programme; or (c) some combination of those purposes and/or some other purpose.

110.2. Which group of applicants the EDP is meant to accommodate: (a) only those who did not meet the admission criteria for the ordinary programme; or (b) also candidates who did meet the admission criteria for the ordinary programme; and

110.3. Whether the faculties may take different approaches to admissions to their EDP.

111. In our view, SU will be able to defend any choice it makes in answer to the above questions. The important goal is clarity.

112. Having said that, it seems to us that the best approach to the EDP is to:

112.1. open it to all students who meet the admissions criteria for either the ordinary programme or the EDP; and

112.2. either reserve the EDP for BCI and SES students, or provide a very heavy preference for those students.

### **Clarity and specificity**

113. The requirements of clarity and specificity are as much requirements of practicality as they are of law. The Policy will be relied upon by applicants, and given effect to by administrators in each faculty. This requires that they be understandable, and create a predictable regime for applicants that can also be

readily applied by administrators. Both the contents of the Policy, and its application by individual faculties, may be challenged in a court.

114. We would highlight the following aspects:

114.1. First, any attempt to gloss over a contentious issue by using nebulous terms, will be censured as being vague. The Policy could be struck down if essential provisions are vaguely formulated. We are generally satisfied that the draft Policy avoids vagueness. The concern however remains that the important ideas are lost amongst surplusage or repetition.

114.2. Second, as indicated above, we accept that several determinations must be left to faculties – including the minimum academic requirements for admission; the number of places in a course of study; the threshold for admissions based on academic excellence; and the determination of places earmarked for BCI and disadvantaged students. These determinations will vary greatly between faculties and courses of study, based on their popularity and the particular applicant pool. But at the same time, the University cannot create a Policy which is little but a framework, with all or most of the important substance to be added in various ways by the faculties.<sup>68</sup>

114.3. Third, to the extent that determinations are left to individual faculties, these must be guided<sup>69</sup> and link back to the overall requirements for the University.

115. Based on these requirements, and the various aspects dealt with above, we are of the opinion that the University's Policy should aspire to achieve the following aims:

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<sup>68</sup> *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) at para 93.

<sup>69</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 61.

116. In the first place the Policy should be an accessible document.

116.1. The current draft Policy is clearly the outcome of considerable thought, effort and care. It brings together many ideas, and incorporates the comments of many disparate constituencies within the University.

116.2. The result, however, is that it is not easy to read and understand. For us, as outsiders to the University, it took some study, and the benefit of a consultation with certain of the University's senior administrators, to get a clear understanding of the gist of the Policy, and its application. The document will benefit from editing by a specialist in plain language. It should be presented in a user-friendly manner. So for instance, basic principles could be expressed up-front in bold, while more detailed descriptions of concepts could follow.

117. In the second place the document should lay out the central guiding principles, and a vision of what the University is attempting to achieve. Based on our instructions it would appear to us that these principles would include at least the following:

117.1. The University is committed to both academic excellence, and increasing the numbers of BCI students. These two factors must work in tandem, and not in competition. It is thus important for the University to attract both the best candidates, regardless of race, and the best BCI candidates.

117.2. The University must be satisfied that any applicant, regardless of race, has the ability to successfully complete a course of study to which he or she is seeking admission.

117.3. The minimum requirements for a course of study are based on the experience of each faculty. They are aimed at ensuring that every

prospective student has the ability to complete a course of study, without lowering the standards of teaching and assessment.

- 117.4. Marks attained at school, particularly in subjects relevant to a chosen course of study, are the best predictor of the capacity of candidates to successfully complete that course of study. The minimum requirements are thus principally based on subject choices at school and the marks attained, although some weight may also be attributed to other factors deemed important indicators of possible success by the faculty.
- 117.5. The University recognises the disparities between its existing student body, compared with the pool of candidates qualifying with university exemption from high schools, and with the demographic make-up of the Western Cape region and the country.
- 117.6. The University is committed to affirmative action measures, with the specific aim of overcoming the long-term effects of apartheid and racial division, evidenced by those disparities.
- 117.7. In implementing an affirmative action plan, for the time being the University will generally use a generic definition of Black students, which gives equal advantage to all BCI students (i.e. for the time being no sub-group of Black (African) students will be given any additional advantage compared to Coloured or Indian students). There may be exceptions, such as in Health Sciences, in which preference is given to Black (African) and Coloured applicants to reflect national and regional demographics.
- 117.8. The University bases its determination of an applicant's race on the honest self-assessment by applicants. The University reserves the right to reassess an applicant's self-assessment if any disparity appears from

the information available to the University, or is brought to the attention of the University.

- 117.9. The University aims to at least achieve the demographic representation targets it sets in conjunction with the DHET, or a higher target taking into account the demographic make-up of the pool of candidates qualifying for study in a particular course.
- 117.10. The achievement of demographic representation will not be achieved instantly, but incremental improvements must be made and measured.
- 117.11. The University also recognises the need to reserve places for socio-economically disadvantaged students, regardless of race, who achieve the minimum requirements for a chosen course of study, but who would not otherwise be admitted to that course of study. Based on the current socio-economic realities of South Africa, most of these students are likely to be BCI applicants, but this may change over time.
- 117.12. The Policy, and the targets set in each year, will be adapted to reflect the progress made at the University and in the wider community, at eradicating the effects of apartheid and racial division. The objective of the Policy must be to achieve a situation in which it is no longer required.
118. In the third place the Policy must lay out the clear steps in the admission process, as summarised in paragraph 21 above. As indicated, the basic process should be common to all faculties, subject to variations by faculties as described.

119. In the fourth place the Policy must present clear guidelines which will inform the variations made by each faculty. These should include at least the following:

119.1. The determination by a faculty of minimum requirements for a particular course must consider whether any of those requirements may have the effect of excluding candidates from any demographic group in greater proportion to candidates from other groups. The University must be alive to the possibility of unintended or indirect discrimination, which comes about when an otherwise facially neutral requirement has the effect excluding members of one racial group in greater proportions to others. This poses a practical problem, as in many cases the consequences of racially-based education in South Africa mean that many schools serving a predominantly Black (African) population will not, for instance, have facilities or educators capable of teaching subjects like mathematics and science at a high level. Yet, at the same time, proven abilities in these subjects may be a vital requirement for admission to a course of study. In essence, and as indicated above, any requirement which has such an indirect discriminatory effect, must be reasonable and justifiable.

119.2. The determination of a threshold for admission of applicants with superlative academic achievements must ensure that the University attracts the best candidates. At the same time the threshold must leave sufficient places for BCI candidates and those from socio-economically disadvantaged backgrounds. This is significant as the first step in the admissions process is to attract academically excellent candidates, regardless of race. The current draft Policy indicates that this excellence threshold may be set by, for example, reserving a certain percentage of places in a course of study for excellent applicants. We however understand that other faculties may instead set a threshold based on

applicants' school marks, with all those achieving above a certain mark being granted provisional admission. In either event, the threshold must be set high enough to ensure that it leaves a sufficient number of places to ensure that the faculty still meets the targets for the admission of BCI and socio-economically disadvantaged candidates.

- 119.3. The process for the determination of the academic threshold must also be specified in the Policy. It appears from our instructions that this involves a decision made by the faculty, based on an understanding of its applicant pool.
- 119.4. The process for the determination of the number of places earmarked for BCI and socio-economically disadvantaged students in a faculty, must be explained. As we understand it, these determinations will primarily be made by faculties. We would suggest that the process must cater for some input from representative student bodies in the faculty, and must be subject to approval by an external body – such as the Senate.
- 119.5. In our view the proportion of BCI and socio-economically disadvantaged student targets in a faculty, should generally not be lower than the proportion of BCI students to the overall student body. Any lower targets must be specially justified. This may, for instance, be based on the fact that a course of study does not attract any interest from a sufficient number of suitably-qualified BCI or socio-economically disadvantaged candidates, despite reasonable efforts made to attract these candidates. The maximum targets should also generally not be disproportionately high, taking account of the demographics of the applicant pool. Once again, any deviation must be justified. This may take account of the demands of a profession, or the market. For instance, it may be that a greater number of educators are required to serve schools which serve predominantly Black (African) communities;

and it is reasonably anticipated that Black (African) students are more likely to take up these positions than others.

119.6. The purpose of the EDP must be explained, and its application made clear.

## **V PUBLIC PARTICIPATION**

120. Is SU required to engage in further public participation before it adopts an Admissions Policy at the end of its current policy-making process?

121. In our view, while the answer is uncertain, there is a significant risk that a court will conclude that further participation is required. We expand on that answer using the following structure:

121.1. we summarise the requirements of the Promotion of Administrative Justice Act (**PAJA**);<sup>70</sup>

121.2. we explain why SU has not complied with s 4(1) of PAJA; and

121.3. we consider whether SU can be exempted in terms of s 4(4) of PAJA.

## **PAJA**

122. The determination of SU's Admissions Policy is an administrative action as defined in s 1 of PAJA.<sup>71</sup> It must, therefore, be procedurally fair.<sup>72</sup> The nature of the process that SU must follow depends on whether or not the process

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<sup>70</sup> Act 3 of 2000.

<sup>71</sup> It entails the taking by an organ of state of a decision under legislative authority which has the capacity to affect rights and will have a direct, external legal effect.

<sup>72</sup> PAJA s 3(1).

“*materially and adversely affects the rights of the public*”. If not, SU must comply only with s 3 of PAJA. If so, SU must obey s 4 of PAJA.

123. In our view, a court is likely to conclude that the determination of an admissions policy affects the rights of the public, rather than of any particular individual. PAJA defines “*public*” to include “*any group or class of the public*”. In addition, the courts<sup>73</sup> and academics<sup>74</sup> have interpreted the term “*public*” in s 4(1) of PAJA broadly. A change to the Admissions Policy will impact not only on the University community, but future members, and the surrounding community as well. Perhaps its most profound effects will be on prospective students who are currently at high school, their parents and their teachers. More tangentially, it will affect local employers and businesses. It is the type of decision that s 4 of PAJA seems designed to cover.

124. The determination of an admissions policy must therefore comply with s 4(1) of PAJA, which reads:

*“In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –*

- (a) to hold a public enquiry in terms of subsection (2);*
- (b) to follow a notice and comment procedure in terms of subsection (3);*
- (c) to follow the procedures in both subsections (2) and (3);*
- (d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or*

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<sup>73</sup> See, for example, *Scalabrini Centre and Others v Minister of Home Affairs and Others* 2013 (3) SA 531 (WCC) at para 81 (potential future refugees are part of “*the public*” for purposes of s 4).

<sup>74</sup> See C Hoexter *Administrative Law in South Africa* (2 ed, 2012) at 410; I Currie *The Promotion of Administrative Justice Act: A Commentary* (2 ed, 2007) at paras 5.6-5.9.

(e) *to follow another appropriate procedure which gives effect to section 3.*”

125. In addition, s 4(4) of PAJA excuses a decision-maker from complying with s 4(1) if “*it is reasonable and justifiable in the circumstances*” taking into account various factors.

126. SU has not held a public inquiry, nor has it adopted a notice and comment procedure. The key questions, therefore, are:

126.1. whether the procedure followed by SU complies with either s 4(1)(d) or (e) of PAJA; and

126.2. if not, whether that non-compliance would be permissible in terms of s 4(4) of PAJA.

### **A different but fair procedure**

127. SU has, thus far, followed the following procedure in devising its Admissions Policy:

127.1. the University held three rounds of discussions with the various faculties regarding different iterations of the current draft Policy; and

127.2. the University has consulted with student and statutory bodies. Their comments are included as annotations to the current draft Policy.

128. The University has not, however, consulted with the wider community or external groups, and currently does not intend to do so. The only remaining processes it currently envisages are the following:

128.1. The Council will consider the matter of admissions generally and set parameters for the new policy, taking into account the factors discussed

in this opinion. The existing documents may then have to be redrafted to accord with these parameters.

128.2. The final draft of the policy will be placed before faculty board meetings, the Institutional Forum (**IF**) and the Senate, all of which, presumably, will express their views on the draft policy.

128.3. The final draft of the policy can thereafter be adopted by the Council.

129. As far as consulting within the University community is concerned, there is little doubt that SU will have followed a fair and regular procedure.

130. The concern is whether it has done enough to consult those outside the University who will also be affected by the decision. SU could argue that it has complied either with:

130.1. PAJA s 4(1)(d) because it has followed the procedure prescribed in s 37 of the HEA – approval by Council after consultation with the Senate; or

130.2. PAJA s 4(1)(e) because it has followed “*another appropriate procedure*”, including consultation with the Institutional Forum.

131. In our view, s 37 of the HEA does not prescribe “*a procedure that is fair but different*”. Rather, it identifies which entities within a public higher education institution must be involved in the determination of the institution’s admissions policy, without prescribing the procedure they must follow in order for it to be fair. The procedure is governed solely by the requirements of PAJA. SU cannot, therefore, rely on s 4(1)(d).

132. It may however be able to rely on s 4(1)(e).

133. The only way in which outsiders will have a voice in the process is through the IF. The IF is required by s 31 of the HEA to advise the Council. It must be

made of representatives from a number of different stakeholders including management, council, senate, employees, students and “*any other category determined by the institutional statute*”.

134. SU’s institutional statute requires the IF to consist of 32 members. Eight of those are representatives from the “community sector” which is constituted as follows:

- “(a) *Two members of the Convocation appointed by the president of the Convocation*
- “(b) *Six persons respectively appointed by bodies representative of civic society, without the exclusion of any sector thereof, as identified from time to time by the IF in co-operation with the Senior Director: Community Interaction.*”<sup>75</sup>

135. We are instructed that the meetings of the IF are generally poorly attended, which indicates that it cannot reasonably be assumed that it will be provide a sufficient forum for hearing voices from outside the University.

136. We thus advise that the more cautious course of action would be to follow a public notice and comment procedure. This will minimise the risk of a potential procedural challenge to the adoption of the Admissions Policy. Indeed, for the reasons which follow, we consider a public notice and comment procedure is legally required.

### **Departure from s 4(1)**

137. Section 4(4) of PAJA permits departures from the procedure prescribed in s 4(1) and elaborated on in ss 4(2) and (3). A departure is permissible if it is “*reasonable and justifiable*” considering the all relevant factors, including:

- “(i) *the objects of the empowering provision;*

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<sup>75</sup> SU Statute at para 44(2)(iv).

- (ii) *the nature and purpose of, and the need to take, the administrative action;*
- (iii) *the likely effect of the administrative action;*
- (iv) *the urgency of taking the administrative action or the urgency of the matter; and*
- (v) *the need to promote an efficient administration and good governance.”*

138. In our view, it will be difficult for SU to justify not adopting a public notice and comment procedure. We base that advice on the following considerations:

138.1. The purpose and effect of the administrative act – adopting the Admissions Policy – could be said to more directly affect those outside the University community. It is future students who will be most affected. As SU is a public asset, they should be able to have a voice in the contents of that policy.

138.2. While finalising the Policy has now become urgent, SU will not be able to rely on the current urgency to justify a lack of public participation.

138.3. There are obviously increased costs in time and resources to run a public notice and comment procedure. The most extensive costs are not likely to be calling for comment, but managing the comments that are made. However, the degree of additional resources will be directly proportionate to the extent of public interest. If few comments are received, little additional resources will be required. If there are many comments, it demonstrates a high public interest and therefore justifies the additional cost in time and money.

139. We therefore advise that SU follow a public notice and comment procedure. As we explain in the next section, that can be done in parallel with the current, internal process without incurring any additional delay.

## **VI QUESTIONS ABOUT CRIMINAL RECORDS**

140. We have been requested to also consider whether the University may ask questions of applicants regarding their criminal records.

141. We can find no reason why the University would be prevented from asking this information. On the contrary, the information may be highly relevant to:

141.1. Determine whether the applicant should be accepted into the student body, without endangering fellow students; and

141.2. Determine whether the applicant is fit for a particular course. For instance, it would make little sense to admit a student in the Law Faculty, who is most unlikely to be able to satisfy a court in the foreseeable future that he or she is a "*fit and proper person*" to be admitted as an attorney or advocate.

142. It should however not be left to an applicant to determine whether he or she believes that a criminal conviction is relevant. Instead:

142.1. Applicants should be asked to disclose any criminal conviction, save where an admission of guilt fine was paid. This proviso would avoid traffic and other minor offences.

142.2. The Policy should make it clear that the information will be kept confidential, and maybe used in guiding an admission decision. A criminal conviction will thus not automatically result in the rejection of an application. The key question will be whether the conviction

indicates that the applicant is not suitable for admission as part of the student body generally, or to a specific course of study.

142.3. Provision should be made for the applicant to record when the criminal conviction happened; what the sentence was; whether the crime was politically motivated; whether he or she has received amnesty for the conviction; and to provide any additional information which he or she wishes to include, which may impact on an admission decision. This could include an expression of remorse, an explanation of extenuating circumstances, an indication that the applicant has undergone some sort of therapy etc.

## **VII CONCLUSION**

143. We are satisfied that the University's proposed Admission Policy accords with the relevant legal requirements – save for the limited amendments we have suggested to avoid any suggestion that it includes a quota for a minimum number of BCI learners, and to address practical concerns regarding the identification of a racial group.
144. We recommend that the Council establish broad guiding principles for the finalisation of the draft Policy, based on the requirements in paragraph 113 above, and the aims in paragraphs 116 to 119 above.
145. The draft Policy should be edited by a plain language expert to ensure that it is accessible. This revised draft should thereafter be simultaneously subjected to two processes: The first would be a notice-and-comment procedure open to the public; and the second would be a process of consideration by the faculty boards and the Institutional Forum. Thereafter the final draft should be

provided first to the Senate for its comments and thereafter to the Council for its approval (or disapproval).

**ANDREW BREITENBACH SC**

**DAVID BORGSTRÖM**

**MICHAEL BISHOP**

**Chambers**

**Cape Town**

**12 September 2016**