SUPPLEMENTARY OPINION

FOR

STELLENBOSCH UNIVERSITY

ABOUT

THE LEGALITY OF THE FINAL DRAFT OF THE PROPOSED 2021 LANGUAGE POLICY

ANDREW BREITENBACH SC

MICHAEL BISHOP

INSTRUCTED BY LORINDA VAN NIEKERK
OF CLUVER MARKOTTER INC

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I INTRODUCTION

1. We have been instructed to advise on the constitutionality of the final draft of SU's 2021 Language Policy, dated 2 October 2021 (**the Final Draft**).

2. We have provided three previous opinions on earlier drafts of the 2021 Language Policy. Most recently, on 26 July 2022, we provided a comprehensive opinion (**the Main Opinion**) on the 22 July 2021 draft of the Policy (**the July Draft**). We advised that the Policy was lawful and constitutional.

3. For the reasons given in the Main Opinion, we are of the view that the Final Draft is lawful and constitutional.

4. However, three things have occurred since we provided the Main Opinion that require further advice:

    4.1. There have been amendments to the July Draft;

    4.2. On 22 September 2021 the Constitutional Court delivered its judgment in *Chairperson of the Council of UNISA v AfriForum NPC* [2021] ZACC 32 (***UNISA CC***); and

    4.3. The Law Faculty provided an opinion questioning our advice on the policy provision in the July Draft requiring that question papers in undergraduate modules at National Qualification Framework (***NQF***) level 8 be available in Afrikaans and English, and that students may answer all assessments and submit all written work in at least Afrikaans or English.

5. This opinion addresses these three issues in turn. We use the abbreviations in the Main Opinion.

II AMENDMENTS TO THE DRAFT POLICY

6. In this section, we identify the relevant amendments of the July Draft in the Final Draft. We do not mention every change, only those substantive amendments that might impact on our advice concerning the legality and constitutionality of the Final Draft.

7. First, the description of the multilingual context in para 2 of the July Draft stated that: "*Applying and enhancing the academic value of Afrikaans is a means of empowering a large and diverse community.*" The Final Draft amends this statement to read: "*Applying and enhancing the academic value of Afrikaans, English and isiXhosa remains a means of empowering large and diverse communities.*" This does not detract from the recognition of the academic value of Afrikaans, but extends that recognition to isiXhosa and English. This is self-evidently correct and does not alter our advice.

8. Second, the description in that paragraph of the *"contextual considerations*" for using isiXhosa has been amended. It changes the description of isiXhosa from "*a developing academic language*" to "*an additional academic language*". More importantly, it removes the qualification "*where reasonably practicable and pedagogically sound*" from the sentence containing SU's commitment to the promotion of isiXhosa. This, if anything, strengthens the reasons and conclusion in paras 272-274 of the Main Opinion that SU's new language policy meets the requirements of the second duty imposed by the National Policy (described in para 101 of the Main Opinion). Essentially, that duty is to take positive steps to promote the use of "*indigenous languages*" as defined in the National Policy.

9. Third, the Final Draft deletes para 6.10, being the last of the policy principles in the July Draft, which provided: "*The Language Policy implementation adapts to the*

changing language demographics and language preferences of students and staff." This deletion does not affect our advice as implementation does not determine the legality of the Policy itself.[1] In any event, this principle seems implicit in para 6.9 which states: "*The Language Policy and its implementation are informed by what is reasonably practicable in particular contexts*", and lists as relevant factors, amongst others, the language proficiency of the relevant students and staff.

10. Fourth, the policy provision in para 7.1.1 of the Final Draft adds "*online learning platforms*" to the list of teaching and learning spaces providing for the flexible use of languages of learning and teaching "*in the spirit of translanguaging*". To be consistent with the other parts of para 7, this must be a reference to online platforms other than formal lectures that occur online (due to the COVID-19 pandemic[2]). If not, it would be inconsistent with the core language specifications in the rest of para 7.1. Thus understood, this addition advances one of the aims of the Final Draft – promoting multilingualism – without limiting access or excluding any group of people. It consequently does not affect our advice.

11. Fifth, the policy provision in para 7.1.4.1 has been altered so that, in undergraduate modules where both Afrikaans and English are used in the same class group, instead of being answered "*at the least*" in the language in which a question in Afrikaans or English is asked, the question will be answered in that language "*where reasonably practicable*".

[1] *Gelyke Kanse CC* at para 18.

[2] SU implemented fully online learning and teaching in 2020, by initiating emergency remote learning, teaching and assessment (**ERTLA**). In 2021 a hybrid approach (augmented remote learning, teaching and assessment – **ARTLA**) has been followed. ARTLA consists of a flexible combination of face-to-face and online learning, depending on the lockdown levels and relevant regulations. Depending on the pandemic, SU may have to implement ERTLA or ARTLA at times in 2022 or thereafter.

12. On the face of things, this is a minor reduction in both the Afrikaans and English offering in the July Draft, and in the 2016 Policy which also used the term "*at the least*".

13. We understand the Final Draft to mean that:

    13.1. Where a question is asked in English, it will be answered in English if the lecturer is able to do so.

    13.2. Where a question is asked in Afrikaans, it will be answered in Afrikaans if the lecturer is able to do so.

    13.3. It is only where the lecturer is unable to answer an English question in English or an Afrikaans question in Afrikaans that it will be reasonably practicable for her not to do so.[3]

    13.4. Where the lecture is translated, all questions and answers in English and Afrikaans will be translated into Afrikaans and English respectively.

14. We consequently believe that that the replacement of "*at the least*" with "*where reasonably practicable*" is a reflection of reality rather than a true reduction in the Afrikaans and English offering. It cannot be the case, even under the 2016 Policy, that a lecturer is required to answer a question in English or Afrikaans if she is unable to do so.

15. Sixth, the Final Draft removes the statement in the policy provisions in paras 7.1.4.3 and 7.1.5.2(a) that SU will provide "*a recorded version of the original unedited lecture*

[3] Though probably rare, there may be instances where a lecturer is able to present a pre-prepared lecture in the one language and a pre-prepared summary or pre-prepared emphases of main content in the other language, but is not sufficiently proficient in either English or Afrikaans to answer questions in those languages during the lecture.

and the real-time interpretation (if the interpreting took place online)." This is now dealt with differently in the policy provision in para 7.1.6 which provides that

> *"based on students' needs and practicability, SU may provide a variety of ICT-enhanced learning strategies, for example, educational (audio and/or video) recordings of lecture material and lectures, which could be made available to students in English and/or Afrikaans, and, in some cases, isiXhosa or South African Sign Language, for self-directed learning, the further reinforcement of concepts, and revision."*

16. The Final Draft converts the obligation to make the recorded obligations available, to a discretion for SU to do so based on students' needs and practicability. We are not sure of the reason for this change from the July Draft. However, it does not, in our view, affect the legality of the Final Draft:

    16.1. The equivalent provisions in the 2016 Policy – which passed constitutional muster – had no mandatory requirement to provide recordings of lectures and their real-time interpretation. Adding a discretion to provide that is not a reduction in the offering in any language.

    16.2. In the final draft, SU does not commit to recording every lecture and its real-time translation. We have not been provided with any information about the cost of such recordings. However, despite the discretionary formulation of para 7.1.6 ("*SU may provide*"), in our view SU will be obliged to exercise its discretion in favour of making such recordings whenever students need them and it is practicable to do so.[4] It will be practicable to make such recordings whenever the cost of doing so will be affordable. That is likely to be the case for all lectures

[4] The reason is, in those circumstances it would be irrational to do otherwise. Rationality is a requirement for all exercises of public power (*Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) at para 12).

that occur online, and all lectures in venues with recording and interpreting equipment.

17. Seventh, in the policy provisions in paras 7.1.9 and 7.1.10 the reference to postgraduate modules at NQF level 7 has been deleted. This does not alter the meaning of the sections. Those are postgraduate modules as defined. They were mentioned only for clarity.

18. Eighth, the policy provision in para 7.1.13 now refers to granting a Faculty an "*exemption*" from a policy provision in para 7.1, rather than permitting a "*deviation*". This does not alter the effect of para 7.1.13. While they may have a slightly different connotation, in practice an exemption and a permitted deviation will have the same consequences.

II *UNISA CC*

19. In our Main Opinion we mentioned that there was a pending appeal in the CC against the SCA's decision in *AfriForum NPC v Chairperson of the Council of the University of South Africa and Others*.[5] The case concerned a challenge to UNISA's 2016 decision to cease offering modules in Afrikaans almost entirely.

20. The CC delivered judgment in that appeal on 22 September 2021. It unanimously dismissed the appeal. It applied its reasoning in the *University of the Free State* and *Gelyke Kanse*, and largely confirmed the reasoning of the SCA.

[5] [2020] ZASCA 79.

21. While the CC's judgment does not alter the advice in the Main Opinion, it is necessary to consider five elements of the CC's reasoning which could be read to alter the legal position summarized in the Main Opinion.

22. First, one of the core disputes in the case was whether UNISA could rely on evidence that it had not considered when it took the decision. UNISA argued that the Court should adopt an "objective" approach to its compliance with the criterion of reasonable practicability in section 29(2) of the Constitution, and consequently that it could rely on evidence and arguments it put up (in its papers in the case) after the decision was taken.[6] The CC confirmed that it could not.[7] UNISA could defend its policy only on evidence and arguments it considered when it took its decision. In the Court's words: "*UNISA's suggestion that this Court should completely ignore the fact that UNISA did not consider reasonable practicability when taking its decision to revise the language policy would fly in the face of the language of section 29(2) itself*."[8]

23. Relying on a similar finding in the SCA's judgment, this was the advice we gave in our Main Opinion at paras 76-79. It is therefore essential that, at least, all the information provided to us, and our opinions, are provided to the Senate and the Council when they consider the Final Draft.

24. Second, there is some ambiguity in the CC's judgment regarding the respective roles of a university and "the State" in fulfilling the obligations in s 29(2). The Court rejected UNISA's proposition that it was "*not liable to ensure the effective access to, and*

[6] *UNISA CC* at para 39.

[7] Para 56.

[8] Para 61.

implementation of [s 29(2)] in the Republic".[9] It held that UNISA was an "*organ of state*" and was therefore obliged to comply with s 29(2).[10]

25. In our view, properly understood, these passages do not mean UNISA is responsible for the fulfilment of the s 29(2) right throughout the Republic. It is responsible for ensuring it complies with s 29(2) within its sphere of operation. That is consistent with what the High Court held in *Gelyke Kanse*.[11] Although not expressly endorsed by the CC in the ensuing appeal, it is also implicit in the CC's reasoning in *Gelyke Kanse*.[12] In our view, *UNISA CC* should not be read to reverse the (in our view, clearly correct) proposition that a university is responsible for ensuring it complies with s 29(2) within its sphere of operation, but not outside that sphere. *UNISA CC* should be read only to reject the notion that UNISA was not bound by s 29(2) at all.

26. Third, the CC rejected UNISA's argument that teaching in Afrikaans inhibited the development of other African languages. It did so both because there was no evidence of that, and because UNISA did not have to offer tuition in all 11 languages in all its modules. Which languages it could be required to offer in particular modules would depend on the demand and its practical ability to offer tuition.[13]

27. In this context, however, the CC unfortunately also relied on a misinterpretation of the evidence in *Gelyke Kanse*. It stated that in *Gelyke Kanse* there was "*a 'careful study' conducted by the University of Stellenbosch, [which] demonstrated that tuition in*

[9] Para 53.

[10] Para 54.

[11] *Gelyke Kanse and Others v Chairman of the Senate of the Stellenbosch University and Others* [2017] ZAWCHC 119; 2018 (1) BCLR 25 (WCC); [2018] 1 All SA 46 (WCC) at para 88.

[12] *Gelyke Kanse CC* at paras 26, 31, 36, 38, 40, 41, 45 and 49.

[13] *UNISA* para 66.

Afrikaans detracts from the development of the other official African languages as languages of higher education and was therefore not reasonably practicable."[14] But that is not what the evidence in *Gelyke Kanse* showed, nor does it reflect SU's reasons for adopting the 2016 Policy:

27.1. The financial evidence was limited to estimating the cost of providing full parallel medium tuition in Afrikaans and English.

27.2. SU's primary justifications for the 2016 Policy were the exclusionary impact on Black African students of retaining the 2014 Policy's provisions permitting teaching in Afrikaans alone or through the T-option, combined with the prohibitive costs of moving to full parallel medium teaching.

27.3. SU did not consider, and did not rely on, the impact of Afrikaans tuition on its ability to develop other African languages. Indeed, the evidence it considered was confined to whether full PMT in Afrikaans and English would be affordable.

28. In our view, while the CC misunderstood the evidence in *Gelyke Kanse*, this does not affect our assessment of the constitutionality of the Final Draft. The underlying principle seems to be that reducing Afrikaans could be justifiable if it is done to free up funds for other African languages. As the 2021 Policy does not reduce Afrikaans compared to the 2016 Policy, let alone do so to free up funds for ixiXhosa, this aspect of *UNISA CC* is not relevant to the legality of the Final Policy.

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[14] Para 69, quoting (in footnote 126) the following part of *Gelyke Kanse CC* para 31: "*The University determined by careful study that the cost of immediately changing to fully parallel-medium tuition would total about R640 million in infrastructure (including additional classrooms), plus about R78 million each year thereafter for additional personnel costs. This would entail a 20% increase in fees, an additional R8 100 on top of the approximately R40 000 per year students on average pay now.*"

29. In any event, *UNISA CC* cannot be read to reverse the two rationales that *Gelyke Kanse* held justified the 2016 Policy, and that continue to justify the Final Draft. Rather, it should be read to add "promotion of other African languages" as an additional permissible reason for adopting a policy that reduces or limits tuition in another African language.

30. Fourth, *UNISA CC* could be read to revive an earlier distinction between the constitutional standard for the positive provision of the s 29(2) right to those without existing access, and the negative aspect of the right protecting against the reduction of existing access. Quoting *Ermelo*,[15] *UNISA CC* holds: "*An important consideration is that at the time of the impugned decision, Afrikaans tuition was available to UNISA students for some modules. UNISA bears a negative burden of establishing appropriate justification for why the right to receive education in the language of one's choice, Afrikaans, should be removed.*"[16] This implies that what is reasonably practicable depends on whether there is existing access or not.

31. In our view, *UNISA CC* should not be read as creating a different constitutional standard depending on whether existing access is reduced, or new access is not provided. The CC firmly rejected the idea of different legal standards for these situations in *Gelyke Kanse*.[17] Instead, *UNISA CC* should be read as recognizing that the *fact* of existing access is important. It may be evidentially more difficult for a university to show it is not reasonably practicable for it to provide tuition in a language if it is currently

[15] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 52.

[16] *UNISA CC* at para 77.

[17] *Gelyke Kanse CC* at para 24.

providing access, than if it is not. But the standard remains the same – reasonable practicability.

32. In the present context, this distinction should not make a difference because:

32.1. The Final Draft does not reduce the Afrikaans offering compared to the 2016 Policy; alternatively

32.2. Even if there is a minor reduction, the Final Draft offers as much Afrikaans tuition as is reasonably practicable.

33. Fifth, *UNISA CC* judgment repeatedly emphasizes the obligation on universities to consider "*all reasonable educational alternatives*".[18] UNISA's failure to consider any alternatives to abolishing Afrikaans was one of the reasons it acted unlawfully.

34. The obligation to consider educational alternatives arises directly from s 29(2). However, it is afforded greater importance in *UNISA CC* than it was in *University of the Free State* or *Gelyke Kanse*, which focused almost exclusively on whether the chosen method was reasonably practicable, rather than on whether the university had adequately considered alternative options.

35. In crafting the Final Draft, has SU sufficiently considered "*all reasonable educational alternatives*"? In our view, it has. It has directly considered and costed three options, namely continuing with the 2016 Policy; full in person parallel-medium tuition; and full technology enhanced PMT. Those were the major options available to SU.

36. There are of course variations on any of those primary options. The 2016 Policy could be altered in any number of minor ways. It could, for example, require parallel medium

[18] See, for example, *UNISA CC* paras 54 and 77.

or simultaneous translation until second year instead of only in first year. It could extend the language requirements for undergraduate teaching to certain post-graduate teaching (notably, post-graduate course-work). It could make greater use of technology, without committing to full technology-mediated PMT.

37. Are each of these gradations on the major options available to SU "reasonable educational alternatives" that must be independently considered and costed for SU to comply with s 29(2)?

38. We do not believe they are. It would make the task of complying with s 29(2) almost impossible. There will always be some minor variation of a policy that a critic of a language policy could imagine. If it could show that the organ of state did not directly consider that variation then, on this reading of *UNISA CC*, it could establish a violation of s 29(2). In our view, that sets too high a burden on organs of state with no real benefit for the holders of the rights under s 29(2).

39. In our view, the "*reasonable educational alternatives*" a higher education institution must consider relate to the basic structure or core principles of a language policy, not its minutiae. In the case of a higher education institution like SU, which historically has offered, and currently does offer, teaching and learning in Afrikaans and English, it must consider single medium, dual-medium, or parallel-medium, where those are feasible. Perhaps it should consider a major variation on one or more of them. In this regard, the 2014 and the 2016 Policies both contain versions of dual-medium, albeit significantly different versions. By adopting the 2016 Policy, SU rejected the 2014 Policy's T-option because of its exclusionary impact on non-Afrikaans speakers, and replaced it with the predominantly English dual-medium option in the policy provision in para 7.1.4.

40. While the failure to consider a reasonable basic option will be inconsistent with s 29(2), the details of how such an option will be implemented are matters for decision by the higher education institution. The failure to consider a specific variation will be reviewable only if the failure is irrational, or its absence from the language policy violates the primary standard of reasonable practicability. The failure to consider any minor variation is not, on its own, a basis to declare a language policy unlawful.

41. SU has considered the appropriate big picture options. It has also considered several variations. When we raised this issue with SU, we were provided with a document entitled *Task Team Response: Consideration of Reasonable Alternatives* prepared by the convenor of the Task Team, Dr Van der Merwe. The document explains other options that the Task Team considered in its work. These include:

    41.1. Using the experience with Information and Communication Technologies (ICT) during the COVID-19 pandemic to introduce those options into the Final Draft. This is captured primarily in the policy provision in para 7.1.6, discussed above.

    41.2. The Task Team also considered extending some of the language specifications for undergraduate teaching to post-graduate course-work teaching. It decided against this because the class sizes in post-graduate modules are generally small, and the students are generally proficient in English. The Final Draft provides flexibility to allow lecturers and students to agree on the appropriate language to be used in post-graduate modules.

42. We understand these as merely examples of the fine-grained issues considered by the Task Team in crafting the Draft Policy. It was not necessary to expressly cost each of these options, or seek separate legal advice on them, because they were about the details

of the Policy, not its basic structure. Accordingly, in our view, SU has complied with its obligations under s 29(2), as interpreted in *UNISA CC*.

III THE LAW FACULTY OPINION

43. On 20 August 2021 the Law Faculty provided the SU with an opinion questioning our view in the Main Opinion regarding the policy provision in the July Draft requiring that question papers in undergraduate modules at NQF level 8 be available in Afrikaans and English, and that students may answer all assessments and submit all written work in at least Afrikaans or English. We attach a copy marked **A**.

44. In paras 235-239 of the Main Opinion we had advised that, properly interpreted, and despite the contrary interpretation of the Engineering and Law Faculties, the 2016 Policy required that assessment of final year undergraduate NQF level 8 modules be offered in both Afrikaans and English (and not just in English, as those Faculties believed). We consequently advised that, if the 2021 Policy departed from that requirement by offering such assessment in English only, SU would face the risk of a constitutional challenge, which may be successful in the absence of a convincing justification for the reduction in assessment in Afrikaans.

45. The Law Faculty Opinion questioned our interpretation of the 2016 Policy, and therefore the legality of the July Draft. They argued that the 2016 Policy did not require that assessment in final year undergraduate NQF level 8 modules be offered in Afrikaans and, therefore, there would be no diminution in the Afrikaans offering if the 2021 Policy also permitted assessment only in English. The Faculty contended it would be legally risky for SU to draft the 2021 Policy based on our incorrect interpretation of the 2016 Policy.

46. We prepared a memorandum in response to the Law Faculty's opinion. We attach a copy marked **B**. In that memorandum we:

46.1. Accepted that the 2016 Policy was ambiguous, i.e. it could be read to require that assessment in final year undergraduate NQF level 8 modules be offered in English and Afrikaans, or only in English;

46.2. Explained why we still preferred our interpretation over that proffered by the Law Faculty;

46.3. Argued that SU faced a greater risk if it accepted and implemented the Law Faculty's interpretation of the 2016 Policy. If a court held our interpretation was correct, limiting assessment for undergraduate NQF level 8 modules assessments to English would be a reduction of the Afrikaans offering and would open SU to a constitutional challenge. By contrast, if a court held the Law Faculty's interpretation of the 2016 Policy was correct, offering assessment for undergraduate NQF level 8 modules assessments in both Afrikaans and English would be an increase in the Afrikaans offering, something which would not result in any risk to SU of a constitutional challenge;

46.4. Argued that the risk to SU of accepting and implementing the Law Faculty's interpretation of the 2016 Policy is significant because SU has not provided an adequate explanation for why providing assessment for all undergraduate modules in Afrikaans (and not just in English) is not reasonably practicable; and

46.5. Concluded that the less risky course is to recognize the ambiguity – and therefore the possibility that our interpretation is correct – and make it explicit

in the new Policy that assessment will be offered in both Afrikaans and English in all undergraduate modules.

47. The Final Draft does not differ from the July Draft on this issue, and our advice in the Main Opinion regarding it therefore remains the same.

ANDREW BREITENBACH SC

MICHAEL BISHOP

13 October 2021

Chambers, Cape Town

"A"

20 August 2021

Comment on the SU Language Policy second draft: paras 7.18, 7.19 and 7.1.10

1. The second draft of the 2021 Language Policy ("the new Policy") contains new provisions dealing with language use in NQF 8 undergraduate modules and in particular the assessment of those modules.

2. The relevant provisions in the current (2016) Language Policy ("the 2016 Policy") read:

   7.1.8 Question papers for tests, examinations and other summative assessments in undergraduate modules are available in Afrikaans and English. Students may answer all assessments and submit all written work in Afrikaans or English.

   7.1.9 In postgraduate learning and teaching, including final year modules at NQF level 8, any language may be used provided all the relevant students are sufficiently proficient in that language.

3. These provisions are replaced by the following provisions in the new Policy:

   7.1.8 In all aspects of postgraduate learning and teaching, including undergraduate modules at National Qualifications Framework (NQF) level 8 and postgraduate qualifications at NQF level 7, English or any other language(s) may be used provided the lecturer(s) and all the students are academically proficient in the other language(s).

Dekaan, Fakulteit Regsgeleerdheid | Dean, Faculty of Law
Privaat Sak X1, Private Bag X1, Matieland, 7602
Tel: +27 21 808 4853 | Faks | Fax: +27 21 883 9656 | Epos | Email: nsmit@sun.ac.za | www.sun.ac.za

7.1.9 Question papers in undergraduate modules, excluding postgraduate modules at NQF level 7, are available in Afrikaans and English. Students may answer all assessments and submit all written work in either Afrikaans or English or, by prior arrangement and if the lecturer is proficient to grade the assessment in isiXhosa, in isiXhosa.

7.1.10 Question papers in postgraduate modules, including postgraduate modules at NQF level 7, are at least available in English. Students may answer all assessments and submit all written work in English or, by prior arrangement and if the lecturer is proficient to grade the assessment in Afrikaans or isiXhosa, in Afrikaans or isiXhosa.

4. These new provisions are ostensibly based on a legal opinion drafted by Adv Breitenbach SC, Adv Bishop and Adv Cohen, dated 14 July 2021, regarding the 2016 Policy ("the Opinion"). The relevant parts of the Opinion are at paragraphs 235 to 239. The key passage in the Opinion is that in paragraph 237, where it is stated:

   Under the 2016 Policy all undergraduate assessments have to be available and may be answered, and all undergraduate written work may be submitted in Afrikaans and English. That included NQF level 8 modules for an undergraduate degree. If that were not the case, those modules would have been mentioned in (i.e. expressly excluded from) para 7.1.8 of the 2016 Policy. The Law and Engineering Faculties' contrary interpretation of the 2016 Policy, based on para 7.1.9 of the 2016 Policy, is, in our view, incorrect. Para 7.1.8 of the 2016 Policy is a special provision (dealing with the language for assessments). Para 7.1.9 of the 2016 Policy is a general provision (dealing with postgraduate learning and teaching, including final year modules at NQF level 8). There is nothing in those two paragraphs which dislodges the presumption of interpretation that general provisions do not derogate from special provisions.

5. In their opinion of 26 July 2021 these points are made in paragraph 234-236. The argument quoted above that was previously set out in para 237 is now moved to paragraph 235. Counsel apparently felt the need to bolster their previous argument with the following statement that did not form part of the 14 July opinion: "In addition, the Policy must – like all laws and policies – be interpreted to '*promote*

the spirit, purport and objects of the Bill of Rights'.[1] If there were ambiguity, the correct interpretation is the one that enhances rather than reduces access to education in the official language of choice".

6. With respect, Counsel's interpretation of the 2016 Policy, as set out above, is incorrect. There is a distinct danger that the Task Team's decision to frame the new Policy in the way it has in paragraphs 7.1.8 to 7.1.10 could lead to a decision to adopt the Policy in these terms that would be vulnerable to legal attack, among others on the basis of an erroneous interpretation of law. That is, due to the erroneous interpretation expressed in the Opinion, the Task Team is, by its own admission, currently under the impression that it has no choice but to adopt the revised provisions set out above. Given that this is indeed not the case, the Task Team does have a discretion to adopt an alternative approach, as will be shown below. If the Task Team continues to approach the revision of the policy on its current view, following the Opinion, it will not be exercising its discretion in a legally appropriate manner, which in itself could be a ground for judicial review of the eventual policy.

7. Counsel's interpretation is based solely on the principle of interpretation, *lex generalis specialibus non derogat* (general provisions do not derogate from special provisions). However, counsel's application of the *lex generalis* principle here is questionable.

   7.1. Firstly, the Opinion does not seem to adequately take account of the full import of the *lex generalis* principle. The Constitutional Court framed this principle as follows in *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) (on which counsel also relies): "A longstanding principle of statutory interpretation points to the conclusion that a later statute's general provisions do not derogate from a statute's specific provisions (lex generalis specialibus non derogat)". The Constitutional Court referred to the Supreme Court of Appeal judgment in *Khumalo v Director-General of Co-operation and Development* [1990] ZASCA 118; 1991 (1) SA 158 (A) in support of this statement. In *Khumalo*, the Supreme Court of Appeal explained an important dimension of the principle, referred to as the presumption, in the following terms: "[I]n the absence of an express repeal, there is a presumption that a later general enactment was not intended to effect a repeal of a conflicting earlier and special enactment. This presumption falls away, however, if there are clear indications that the Legislature none the less intended to repeal the earlier enactment. This is the case when it is evident that the later enactment was meant to cover, without exception, the whole field or subject to which it relates." The

[1] Constitution s 39(2).

Constitutional Court quoted this paragraph with approval in *Ruta.* Thus, when applying the *lex generalis* principle, one should ask whether the general provision is intended to cover the field, in which case it will trump the special provision. In the present instance, it seems clear that paragraph 7.1.9 of the 2016 Policy in its own terms intends to cover the entire field or subject matter of teaching and learning relating to postgraduate modules, including NQF level 8 modules.

7.2. Secondly, counsel's interpretation of what is general and what is specific in their interpretation seems fairly arbitrary. They take teaching and learning to be general and assessment to be special. On this approach, for which they provide no reasoning, they conclude that the provision dealing with teaching and learning (7.1.9) is the general one and the provision dealing with assessment (7.1.8) is the special one. However, one can just as easily adopt a different approach focusing on levels of study. In such a view, the provision dealing with undergraduate modules overall (7.1.8) is the general one and the provision dealing only with NQF 8 level undergraduate modules (7.1.9) is the special one. In such an interpretation, which is at least just as possible as the one proffered by counsel, the effect of the *lex generalis* principles is the exact opposite from the one put forward in the Opinion, viz. 7.1.9 (the special provision) trumps 7.1.8 (the general provision). This illustrates that reliance on the *lex generalis* principle does not really take the matter any further and provides no support for counsel's conclusions.

8. In asking what the correct interpretation of the 2016 Policy is in this respect, one should thus look beyond the single principle of *lex generalis.* When one does so, one finds a number of other principles of interpretation that the Opinion does not take into account and which, individually and in combination, clearly indicate that the Law and Engineering Faculties' interpretation of the 2016 Policy is correct and the one adopted in the Opinion mistaken. This holds significant implications for the new Policy. One must remember the Supreme Court of Appeal's statements in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) that "where more than one meaning is possible each possibility must be weighed in the light of all the factors". The court then formulated this exercise as follows: "The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document" (footnotes omitted).

9. The first relevant principle of interpretation here is the rule against absurd results and "unbusinesslike" interpretations, which in our context of course means interpretations that do not make sense in the business of education. As Wallis JA stated in *Endumeni Municipality,* "a sensible meaning is to be

preferred to one that leads to insensible or unbusinesslike results". From an educational perspective, it would be absurd to teach an entire module in one language, especially in a context where language is not just the medium in which competence is developed, but is part of the competence, i.e. the precise use of language is part of the training, and then to assess the achievement of that competence in a different language. One only has to state these outcomes to realise how absurd they are. The only interpretation of paragraph 7.1.9 of the 2016 Policy that is not absurd is the one that includes assessment in that provision. Furthermore, many of the students who will take undergraduate modules on NQF level 8 in the Faculty of Law will in any event be at a postgraduate level (as students registered in the second-degree LLB programme, i.e. those completing the LLB degree in two years after having obtained either the BA (Law) or BCom (Law) degrees) and it would be difficult to see why they should be treated differently from other postgraduate students. Those who are undergraduates will already have been at University for 3 years and will already be at NQF level 8, which by the University's own admission in the case of postgraduate studies, no longer justifies bilingual assessments. It would seem that counsel, who are not experts in education, placed far too much emphasis on whether modules are undergraduate or postgraduate and overlooked that the far more important measures for the level on which modules will be presented and assessed are their NQF levels. It is the NQF levels that determine the students' competence and the appropriate outcomes in the particular module rather than the increasingly arbitrary label of postgraduate or undergraduate. Thus, a "businesslike" interpretation, in the context of higher education and the NQF, would support the interpretation of the Faculties of Law and Engineering.

10. The second relevant principle of interpretation is that of purposive interpretation, which is probably now one of the most important principles of interpretation, and taking into account the mischief that the provision is aimed at addressing. As the current revision Task Team accurately states in the notes accompanying the new Policy, one of the primary reasons for including NQF level 8 undergraduate modules in the provision for postgraduate modules (i.e. in the new paragraph 7.1.8) is to accommodate those professional fields, like law and engineering for example, where students will have to sit for professional exams following their university education and that those exams are now mostly only in English. We thus have a duty to adequately prepare students for such exams. This, in the words of the Task Team, is the reason for having a rule like 7.1.9 in the 2016 Policy and 7.1.8 in the new Policy. If this is the purpose of the provision, it makes absolutely no sense to exclude assessment from the provision since assessment is the most important element in achieving the purpose – assessment is thus exactly the mischief that the provision is aimed at.

11. Thirdly, drawing on the drafting history and context and the intention of the drafters, i.e. the "the background to the preparation and production of the document" in Wallis JA's words in *Endumeni Municipality,* there is no doubt, as members of the committee that finalised the 2016 Policy can attest, that the intention in drafting paragraph 7.1.9 of the 2016 Policy was to allow NQF level 8 undergraduate modules to be treated exactly as honours modules, that is fully in one language where necessary. That intention definitely included assessment.

12. Finally, the belated reliance on the notion that the language policy should in cases of ambiguity be interpreted to give effect to language rights does not take the argument any further. In so far as it is still necessary to show that there is ambiguity before this interpretative aid is used, we suggest that there is none. But even if it is conceded that the policy is ambiguous there are clearly other factors that outweigh a particular language group's ostensible language rights in this context, not least because it would be impracticable to do so (see paragraphs 14-16 below).

13. In light of the above, it is clear the counsel's erroneous interpretation of the 2016 Policy leads them to incorrectly conclude that we must include NQF level 8 undergraduate modules for assessment purposes with all other undergraduate modules instead of postgraduate modules, for adopting a different approach would ostensibly result in a derogation of entitlements currently enjoyed by Afrikaans-speaking students under the 2016 Policy. This is simply incorrect. The correct interpretation of the 2016 Policy dictates the exact opposite result.

14. The analysis above shows that the interpretation of the 2016 Policy by the Faculties of Law and Engineering is the correct one. That implies that the 2016 Policy bestows no entitlements on Afrikaans-speaking students to complete assessments in Afrikaans in NQF 8 level modules offered only in English. This realisation opens the door to a different formulation in the new Policy, one that reflects the reality of current practice in the vast majority of undergraduate modules at NQF level 8 offered by the University, primarily in the Faculties of Engineering and Law. This option is not only a legally viable one, but indeed the most appropriate one to take. The existing practice along these lines in the Faculties of Engineering and Law has clearly shown that there are minimal (if any) problems with this approach. This is clearly borne out by language implementation reports from these two faculties that show an absence of any material complaints about this practice. As pointed out above, the provision for enabling undergraduate NQF level 8 modules to be offered in English only, really only makes sense if assessment is also done in English. The rationality of an alternative approach, when judged pedagogically, is highly questionable.

15. The approach advanced above is also supported by a host of other considerations. These include, among others, enabling lecturers that are not Afrikaans-speaking to teach effectively in the undergraduate curriculum in these programmes without relegating them to the status of a "deviation", should special permission be required not to offer the assessments in Afrikaans or relying on a different lecturer to manage the assessment. This of course strongly supports transformation efforts at the University. The pursuit of excellence is additionally supported by, for example, creating the possibility of outside experts presenting such modules.

16. The provision in the 2016 Policy should also be considered in the light of the process followed by the University in drafting the 2016 Policy. This was done against the backdrop of section 29 of the Constitution of the Republic of South Africa, 1996. It is clear that in terms of this provision, the previous rights of students to be provided with assessments in Afrikaans (prior to the 2016 Policy) could be reduced only if it were not reasonably practicable to maintain them (see *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* (CCT 311/17) [2019] ZACC 38; 2019 (12) BCLR 1479 (CC); 2020 (1) SA 368 (CC) (10 October 2019) especially para 35). To prepare assessments in Afrikaans as well as English requires a considerable investment of time and resources from staff with almost no gain. However, if a module is presented exclusively in English it is unlikely that students would want to answer their assessments in Afrikaans. Unsurprisingly, our experience has been that if a module is presented exclusively in English, almost all students also will answer their assessments in English. In the case of the two assessments in the final year module Mercantile Law 471, for instance, only one student wrote one of the assessments in Afrikaans, even though the assessments were also provided in Afrikaans. It clearly would not be reasonably practicable to provide assessments in Afrikaans in these circumstances. It clearly would also not be a reasonable application of scarce resources to do so.

17. For the reasons set out above, the new Policy must allow for the possibility of NQF level 8 undergraduate modules to be designated as English-only modules for teaching and learning and that such designation should include assessment. To achieve this, paragraph 7.1.9 of the new Policy should be redrafted to read:

    7.1.9 Question papers in undergraduate modules, excluding postgraduate modules at NQF level 7 and undergraduate modules at NQF level 8 offered only in English in terms of paragraph 7.1.8, are available in Afrikaans and English. Students may answer all assessments and submit all written work in either Afrikaans or English or, by prior arrangement and if the lecturer is proficient to grade the assessment in isiXhosa, in isiXhosa.

And paragraph 7.1.10 should be redrafted to read:

7.1.10 Question papers in postgraduate modules, including postgraduate modules at NQF level 7 and undergraduate modules at NQF level 8 offered only in English in terms of paragraph 7.1.8, are at least available in English. Students may answer all assessments and submit all written work in English or, by prior arrangement and if the lecturer is proficient to grade the assessment in Afrikaans or isiXhosa, in Afrikaans or isiXhosa.

18. Should the Task Team not be inclined to accept above analysis at face value, despite it having been endorsed by the vast majority of lecturers in the Law Faculty at its Faculty Board meeting of 20 August 2021, it is suggested that the Task Team should, at the very least, seek independent legal advice, i.e. a second opinion, on this particular matter. It is imperative that the Task Team appreciates that adopting the current formulation in the new Policy is not a safe option, insulating the new Policy from possible legal attack on this issue. The Task Team should realise that adopting the current wording, on the basis of the Opinion, is, for that very reason, causing the eventual new language policy to be vulnerable to legal attack.

"B"

RESPONSE TO THE LAW FACULTY

I INTRODUCTION

1. We have been asked by Stellenbosch University (**SU**) to respond to the opinion endorsed by the Faculty Board of the Law Faculty on 20 August 2021 (**the Law Faculty Opinion**).

2. The Law Faculty Opinion differs from our view on one issue concerning the draft 2021 Policy. In our opinion, we advised that the 2016 Policy required assessments of final year undergraduate NQF level 8 modules to be offered in Afrikaans. We advised that, if the 2021 Policy departed from that requirement, SU faced a risk of a successful constitutional challenge.

3. The Law Faculty argues that the 2016 Policy does not require assessments of final year undergraduate NQF level 8 modules to be offered in Afrikaans and, therefore, there would be no diminution in the Afrikaans offering if the 2021 Policy also permitted assessments only in English. The Faculty contends it would be risky for SU to draft the 2021 Policy based on an incorrect interpretation of the 2016 Policy.

4. In short, our view is:

    4.1. The Law Faculty makes an arguable case for its interpretation of the 2016 Policy. We remain of the opinion that our interpretation is preferable. But we accept that the 2016 Policy is ambiguous and that the Faculty's interpretation is plausible.

4.2. As it is not possible to determine conclusively which interpretation is correct, SU should instead consider which approach in the 2021 Policy would: (a) best serve two of its underlying goals; and (b) reduce the risk of a successful legal challenge.

4.3. We advise that adopting our interpretation will have the following benefits.

4.3.1. It will promote access for Afrikaans students and multilingualism at final year undergraduate level. While we understand there is a concern that students no longer wish to submit written work and be assessed in Afrikaans in these modules, we have been provided with no evidence concerning the demand for Afrikaans assessment, or the cost of providing it, across the many final year undergraduate NQF level 8 modules offered at SU.

4.3.2. Even if we are wrong about the meaning of the 2016 Policy, increasing the Afrikaans offering cannot be a basis for legal attack. By contrast, not requiring Afrikaans assessment for final year undergraduate NQF level 8 modules in the 2021 Policy could be regarded as a diminution of the Afrikaans offering. As we have still not been provided with evidence to justify that diminution, that would create the risk of a successful legal challenge.

4.4. The Law Faculty believes that SU will be at risk if it adopts the "wrong" interpretation of the 2016 Policy when it devises the 2021 Policy. But if SU crafts the 2021 Policy in the knowledge that there is uncertainty (as it invariably will upon considering the Faculty's opinion and this response), and chooses one interpretation over the other to mitigate its risk of a successful legal challenges, and to achieve its underlying goals of ensuring access for Afrikaans speakers and promoting

institutional multilingualism, then there is no risk of a successful review on this ground.

5. This Memo responds to the Law Faculty's Opinion under the following headings:

5.1. The meaning of the 2016 Policy; and

5.2. Promoting multilingualism, ensuring access for Afrikaans speakers and managing risk in drafting the 2021 Policy.

II THE MEANING OF THE 2016 POLICY

6. There are two core provisions – paras 7.1.8 and 7.1.9. They read:

> *7.1.8 Question papers for tests, examinations and other summative assessments in undergraduate modules are available in Afrikaans and English. Students may answer all assessments and submit all written work in Afrikaans or English.*
>
> *7.1.9 In postgraduate learning and teaching, including final year modules at NQF level 8, any language may be used provided all the relevant students are sufficiently proficient in that language.*

7. In our opinion, we took para 7.1.8 as qualifying para 7.1.9. We had two reasons:

7.1. First, we relied on the presumption that the general qualifies the specific. The general issue of learning and teaching in final year undergraduate NQF level 8 modules is dealt with in para 7.1.9 which allows them to be in any language. But the specific task of assessment of undergraduate modules (which includes final year undergraduate NQF level 8 modules) is governed by para 7.1.8 which requires assessment in English and Afrikaans.

7.2. Second, if there is ambiguity, s 39(2) of the Constitution requires that it should be resolved in favour of the interpretation that best promotes the right to tuition in the official language of choice. Requiring assessments to be offered in Afrikaans – especially in the absence of any evidence doing so is not reasonably practicable – best promotes that right.

8. The Law Faculty disputes our interpretation. It advances five reasons.

9. First, the Faculty argues that para 7.1.8 can be regarded as the general provision applying to all undergraduate modules, and para 7.1.9 as the specific provision governing final year NQF level 8 undergraduate modules.[1] We accept that it is possible to read the 2016 Policy this way. It depends on what one is comparing. If you are comparing undergraduate modules, then the Faculty's approach makes sense. If you are comparing activities, then our approach should be preferred. In our view, as the 2016 Policy is structured more by activity than by type of module, we think our interpretive approach is preferable. But we concede that the alternative is textually plausible.

10. Second, the Law Faculty argues that the results of our interpretation are absurd:

10.1. The Faculty contends that it makes no sense to permit a final year undergraduate NQF level 8 module to be taught entirely in English, but require assessment in Afrikaans.[2] We disagree:

10.1.1. Para 7.1.9 contemplates that the module could be taught in any language or combination of languages. In practice, we understand that these modules are generally taught in English, but that does not alter its meaning.

[1] Law Faculty Opinion para 7.2.
[2] Law Faculty Opinion para 9.

10.1.2. An Afrikaans home-language student may well be comfortable to be taught in English, but still prefer to submit written work and receive and answer a question paper in Afrikaans. They would have been entitled to do so for their previous three years of study, even though for their second and third years they would likely have received tuition in English in at least some modules. We have not been provided with evidence to demonstrate that in final year undergraduate NQF level 8 modules there is no demand for Afrikaans assessment, or that Afrikaans-speaking students who can understand an English lecture suffer no impediment if they are required to submit written work and receive and answer assessments in English.

10.2. The Law Faculty argues that what matters is not whether a module is part of an undergraduate or postgraduate degree, but its NQF rating. In addition, many law students will be postgraduate students as they would already have completed a BCom or BA degree.[3] We are not persuaded by either of these arguments:

10.2.1. A student who enters an undergraduate degree may well have a reasonable expectation that they will continue to be able to submit written work and receive and answer assessments in Afrikaans for the duration of that degree. From the undergraduate student's perspective, it seems to matter far more whether the module is part of the same degree, than what its NQF rating might be.

10.2.2. It does not, in our view, matter that some law students will have already completed a prior degree. The policy applies to all faculties equally. Many faculties have undergraduate modules at NQF level 8 – we have been

[3] Law Faculty Opinion para 9.

provided with a list of 255 undergraduate modules of this sort. Moreover, it is always possible that a student pursuing an undergraduate degree already has another undergraduate degree.

11. Third, the Law Faculty contends that a purposive approach favours its interpretation. The purpose of permitting English tuition in final year undergraduate NQF level 8 modules is to prepare students for professional fields – Law and Engineering. That purpose would be undermined if students are not required to be assessed in English.[4] We do not see it that way:

11.1. We doubt that is the purpose of exempting final year undergraduate NQF level 8 modules from the ordinary rules applicable to language of instruction. Our instructions are engineering graduates may obtain registration as professional engineers once they have three years practical experience after graduating; and, until now, law graduates have been permitted to answer professional examinations in Afrikaans. Moreover, as just mentioned, the rule does not only apply to Law and Engineering, but to all faculties that offer final year undergraduate level 8 modules. The Law Faculty's purpose does not explain why the rule applies in those contexts.

11.2. In our view, para 7.1.9 was driven by the reality that, at final year undergraduate NQF level 8, almost all students were likely to be conversant in English and there would be little prejudice in holding lectures only in English. However, it does not follow that some Afrikaans-speaking students would not be prejudiced if they were required to receive and answer assessments and submit written work in English. We repeat that we have no evidence that Afrikaans-speaking students who can

[4] Law Faculty Opinion para 10.

understand English lectures would not prefer to submit written work and receive and answer assessments in Afrikaans.

11.3. The 2016 Policy sought to balance the costs and benefits in line with what is reasonably practicable. It removed the entitlement to Afrikaans tuition at final year undergraduate NQF level 8, but retained the right to submit written work and to assessment in Afrikaans. Our interpretation serves that combined purpose.

12. Fourth, the Law Faculty relies on the drafting history and "*the intention of the drafters*". The Faculty argues that the committee that finalized the text of the 2016 Policy intended final year undergraduate NQF level 8 modules to be treated exactly like honours modules.[5] In our view, the reliance on the intention of the drafters is unhelpful:

12.1. Our courts have recognised the danger of relying on the supposed intention of drafters divorced from the text the drafters used.[6] The correct approach to interpretation is one that focuses on the text, context and purpose. To the extent drafting history reveals that context or purpose, it is relevant, but the goal is not to determine what drafters subjectively intended.

12.2. In any event, the committee that finalized the text of the 2016 Policy was not empowered to adopt it for SU, and did not do so. The Policy was made by the Council, with the concurrence of the Senate, both multi-member bodies. The intention of the drafting committee cannot be ascribed to either of them.[7]

12.3. Moreover, the Law Faculty's recollection is not supported by any contemporaneous documents. And it does not appear to align with the institutional approach SU

[5] Law Faculty Opinion para 11.
[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (***Endumeni***) at paras 20-24.
[7] *Endumeni* at para 20

adopted in the *Gelyke Kanse* litigation. While this debate was not directly addressed, the position adopted in both SU's main answering affidavit[8] and its heads of argument[9] was that all undergraduate modules would be assessed in English and Afrikaans. It did not exempt final year undergraduate NQF level 8 modules. Finally, we understand that there has been ongoing disagreement since 2017 about the correct meaning of the 2016 Policy.

13. Fifth, the Law Faculty disputes our reliance on s 39(2) of the Constitution for two reasons: (a) the Faculty does not accept that paras 7.1.8 and 7.1.9 are ambiguous; and (b) even if they are, the Faculty contends that there are other factors that outweigh the impact on constitutional rights.[10] We stand by our reliance on s 39(2):

    13.1. In our view, the 2016 Policy is ambiguous. It is capable of both meanings.

    13.2. When an interpreter is confronted with two competing interpretations, it is required to choose the one that *better* promotes the rights in the Bill of Rights.[11] The Faculty does not suggest that its interpretation would better serve any constitutional right. Our interpretation should, therefore, be preferred.

    13.3. We do not accept that our interpretation is impracticable. We address that issue below.

14. In sum, both interpretations are plausible. On balance, we believe our interpretation is the better one as it better fits both the structure of the 2016 Policy, and better promotes the constitutional rights at stake. But we accept it is possible that a court may prefer the Law Faculty's interpretation.

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[8] Paragraph 289.5.
[9] Constitutional Court heads of argument para 48.2.
[10] Law Faculty Opinion para 12.
[11] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC) at para 45.

15. The question then is how SU should draft the 2021 Policy in the face of that ambiguity.

III PROMOTING MULTILINGUALISM, ENSURING ACCESS FOR AFRIKAANS SPEAKERS AND RISK MANAGEMENT IN DRAFTING THE 2021 POLICY

16. In our view, SU should be guided not only by which interpretation of the 2016 Policy it thinks has stronger support, but also by: (a) the purposes it wishes to advance; and (b) the risks of adopting each approach.

17. Offering Afrikaans assessments for final year undergraduate NQF level 8 modules will advance two of SU's underlying goals, namely ensuring access for Afrikaans speakers and promoting institutional multilingualism. English speakers lose nothing if assessments are offered in Afrikaans. The only reason not to do it is to conserve resources. In the absence of information about the extent of demand for or the cost of Afrikaans assessment in final year undergraduate NQF level 8 modules, which will doubtless be difficult to obtain across the spectrum, it is impossible to conduct a meaningful cost-benefit analysis.

18. In the face of the uncertainty about the meaning of the 2016 Policy, the best way for SU to mitigate risk is to assume that our interpretation may be correct. As we pointed out in our original opinion, if the 2016 Policy requires assessments in Afrikaans for final year undergraduate NQF level 8 modules, and the 2021 Policy removes that requirement, it will diminish the Afrikaans offering. SU is entitled to diminish the Afrikaans offering, but it will need to explain why what was reasonably practicable in 2016 is no longer reasonably practicable in 2021.

19. We understand that the reason that is likely to be advanced is that there is insufficient demand for Afrikaans assessments in these modules to justify the cost of translation. The

Law Faculty provides anecdotal support for this position.[12] That may be a legitimate justification. But, as mentioned earlier, we have not been provided with any substantive evidence concerning either: (a) the demand for Afrikaans assessment in final year undergraduate NQF level 8 modules; or (b) the cost to SU of students' right to submit written work and to assessment in Afrikaans those modules.

20. If it has information that could support the proposition that continuing to offer Afrikaans assessments for final year undergraduate NQF level 8 modules is not reasonably practicable, SU must consider that information now when preparing the final draft of the 2021 Policy and make that information available to the Senate and the Council when they consider the final draft of the Policy. If SU does not do so, it cannot later rely on the evidence to justify the policy.[13] Absent that information, we advise that there is a reasonable risk that a constitutional challenge will succeed. The way to mitigate that risk is to retain what – in our view – is the position under the 2016 Policy.

21. The Law Faculty raises a different risk. It appears to argue that the 2021 Policy will be vulnerable to review if SU relies on the wrong interpretation of the 2016 Policy. As the Faculty believes our interpretation is wrong, it advises that it would reduce SU's risk to adopt its (correct) interpretation.[14]

22. We do not see it that way:

    22.1. The interpretation of the 2016 Policy is a question of law. The review that the Law Faculty fears is that SU made a material error of law by adopting the wrong interpretation of the 2016 Policy when it drafted the 2021 Policy. The error of law

[12] Law Faculty Opinion para 16.
[13] *AfriForum NPC v Chairperson of the Council of the University of South Africa and Others* [2020] ZASCA 79 at para 36. UNISA has argued in the Constitutional Court that it is entitled to rely on evidence to justify its language policy even if that evidence was not available to it at the time. Judgment from the Constitutional Court is pending.
[14] Law Faculty Opinion para 6.

22.2. But if SU adopts the approach we suggest above, it will not be acting because of its interpretation of the 2016 Policy. It will accept that there is ambiguity in the interpretation of the 2016 Policy. It will draft the 2021 Policy to mitigate the risk that arises from that ambiguity and to achieve its underlying goals of ensuring access for Afrikaans speakers and promoting institutional multilingualism. The 2021 Policy will not be vulnerable to review.

23. Accordingly, the risk of a successful legal challenge is higher if SU adopts the proposal for paras 7.1.9 and 7.1.10 in the Law Faculty's Opinion, and lower if it adopts the current draft version.

ANDREW BREITENBACH SC

MICHAEL BISHOP

[15] Law Faculty Opinion para 17. Compare *Hira and Another v Booysen* 1992 (4) SA 69 (A) at 93A-94A especially 93G-I; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at para 91

6 September 2021

Chambers, Cape Town