



Higher education access in South Africa for students with criminal records

TAABO MUGUME

Researcher, University of the Free State

1 INTRODUCTION

The post-1994 South African democratic State has been successful in reconfiguring the national higher education system from one based on racial divide to a more inclusive regime¹. While access has improved tremendously, there are still challenges which include: student success; funding; unemployed graduates; and infrastructure to accommodate growing student numbers, etc.² These challenges are better illustrated by the 2015-2016 #FeesMustFall student protests.³ Nixon expounded on the role of higher education institutions in a modern society as follows.

They exist so that people from all different backgrounds - economic backgrounds, cultural backgrounds,

¹ Leibowitz B & Bozalek V "Access to higher education in South Africa: a social realist account" (2014) 16 (1) *Widening Participation and Lifelong Learning* 91 at 92.

² See Leibowitz & Bozalek (2014) at 96.

³ Luescher T, Loader L & Mugume T "#FeesMustFall: an internet-age student movement in South Africa and the case of the University of the Free State" (2017) 44(2) *Politikon* 231.

and races can have access to the things that they need. ... If our public institutions are going to fulfill their mission they have to consider that the large majority of people who are impacted by the criminal justice system are the very people that they have a mission to serve. And unless they make that connection they are going to miss the mark in achieving their very own missions.⁴

Therefore, higher education access is fundamental for societal progress. In relation to ex-offenders, it is argued that, for example, getting a higher education reduces the possibility of recidivism.⁵ According to Walmsley, data from the South African national prison administration shows that with more than one and a half million South Africans in prison by 2013, South Africa has very congested prisons.⁶ Even though the country has higher education access prison programmes,⁷ there should be more opportunities to access higher education after serving prison sentences, and even for those with criminal records who may not have served a prison sentence. Moreover, access to higher education is very important for the process of reintegration into communities and reducing recidivism.⁸

This article analyses the 2016 academic year application forms of 16 South African universities to explore: the kind of mechanisms they have in place to promote access, whether institutions require potential students to provide information about their criminal records, the reasons provided for requiring such information, and any indication of how the information is stored, accessed and shared. Therefore, it focuses on access to higher education in South Africa since, as explained above, higher education is fundamental to societal development.

The following discussion includes: a brief discussion of South African higher education; the literature on students with criminal records generally and in South Africa; research methodology; higher education in South Africa and students with criminal records; analysis; a possible route for South Africa; a research agenda; and conclusion. The article is limited by the use of university application forms as the only source of data.

2 HIGHER EDUCATION ACCESS IN SOUTH AFRICA

South Africa under democratic leadership has undergone drastic higher education reforms. While there are challenges, progress is noticeable in the levels of access due to

⁴ Nixon V "Opening remarks at: New York Reentry Education Network pathways of possibility conference" (27 February 2013, City University of New York: Baruch College).

⁵ Sokoloff NJ & Fontaine A "Systemic barriers to higher education: how colleges respond to applicants with criminal records in Maryland" (2013) at 11.

⁶ Walmsley R "World prison population list" (10 ed) (2013) available at http://www.aidsdatahub.org/sites/default/files/publication/World_prison_population_list_10th_edition_2013.pdf (accessed 15 November 2016); Maravanyika EO "Understanding overcrowding in South African prisons" (2016) available at <http://www.sabc.co.za/news/a/b7d0fd004f36e769aa33aed37832bbf1/Understanding-overcrowding-in-South-African-prisons-20161205> (accessed 28 June 2017).

⁷ See Walmsley (2013)

⁸ See Sokoloff & Fontaine (2013) at 11.

policy changes designed post-1994 to support mass higher education.⁹ Informed by the National Commission on Higher Education of 1996¹⁰ and the White Paper on Higher Education of 1997,¹¹ the Higher Education Act of 1997¹² was the first post-1994 fundamental policy initiative designed to ensure regulated transformation of institutions of higher learning. The Act was designed with the main intention of ensuring access to higher education for more students from previously disadvantaged communities and also to avail employment opportunities. In line with promoting access, the State introduced the National Student Financial Aid Scheme (NSFAS) targeting poor students.¹³ The fund has had a fundamental positive effect on access.¹⁴ Moreover, the South Africa Constitution of 1996¹⁵ considers education as a right, rather than a privilege (Bill of Rights). While student access to higher education in South Africa is noted in a positive light, success still faces serious challenges. In response, many initiatives have been introduced in institutions and supported by the State. However student success is beyond the scope of this article.¹⁶ Although some scholars have published on criminal records in South Africa, there is a dearth of literature on access to higher education for students with criminal records. Mujuzi and Tsweledi provide legal clarification on a criminal record “[i]n South African law, there are three situations in which a person may get a criminal record – when he enters a plea of guilty, when he is

⁹ Badat S “The challenges of transformation in higher education and training institutions in South Africa” (2010) available at <http://www.dbsa.org/EN/About-Us/Publications/Documents/The%20challenges%20of%20transformation%20in%20higher%20education%20and%20training%20institutions%20in%20South%20Africa%20by%20Saleem%20Badat.pdf> (accessed 15 October 2016).

¹⁰ National Commission on Higher Education (1996) available at <http://www.che.ac.za/sites/default/files/publications/Acknowledgement%20%26%20Content.pdf> (accessed 28 June 2017); also see chapter one available at <http://www.che.ac.za/sites/default/files/publications/Chapter%209.pdf> (accessed 28 June 2017);

¹¹ Education White Paper 3: A Programme for the Transformation of Higher Education (1997) available at http://www.che.ac.za/sites/default/files/publications/White_Paper3.pdf (accessed 28 June 2017).

¹² Higher Education Act 101 of 1997 available at <http://www.up.ac.za/media/shared/409/higher-education-act-1997.zp86770.pdf> (accessed 28 June 2017).

¹³ Cele MBG “Student politics and the funding of higher education in South Africa: the case of the University of the Western Cape, 1995-2005” (unpublished PhD thesis, University of the Western Cape 2014).

¹⁴ Luescher T “Student representation in a context of diversity, massification and democratisation in African higher education: key concepts, perspectives, and common concerns” in Luescher TM, Klemenčič M & Jowi OJ (eds) *Student politics in Africa: representation and activism* (Cape Town & Maputo: African Minds 2016).

¹⁵ The Constitution of the Republic of South Africa 1996 available at <https://www.ru.ac.za/media/rhodesuniversity/content/humanresources/documents/employmentequity/Constitution%20of%20the%20Republic%20of%20South%20Africa%201.pdf> (accessed 28 June 2017).

¹⁶ Akoojee OS & Nkomo M “Access and quality in South African higher education: the twin challenges of transformation” (2007) 21(3) *SAJHE* 385; Bokana KG & Tewari DD “Determinants of student success at a South African university: an econometric analysis” (2014) 17(1) *Anthropologist* 259; Strydom F, Kuh G & Mentz M “Enhancing success in South Africa’s higher education: measuring student engagement” (2009) 42(1) *Acta Academica* 259.

prosecuted after a plea of not guilty and he is convicted, and when he pays an admission of guilt fine.”¹⁷

3 HIGHER EDUCATION AND STUDENTS WITH CRIMINAL RECORDS

The institutions considered in the following discussion include Harvard University and Yale University in the United States of America (US), and Cambridge University and Oxford University in the United Kingdom (UK).

In the US, legalising the request for college applicants to report their criminal history and for further screening of such applicants in higher education is associated with a 1989 Act: the “Clery Act requires colleges to publish information about campus crime, allowing parents and applicants to compare safety across schools.”¹⁸ The Act does not “specify preventive interventions” and as a result institutions responded to the Act by screening applicants’ criminal history in two ways: requesting applicants to self-report specific information about their criminal history, and running independent criminal background checks.

The primary reason given by most institutions for inquiring about the criminal records of applicants during college admissions is safety of the campus community. This is due to violence reported on campuses in the US including shootings, even though it is clear that at times such crimes are not perpetrated by students.¹⁹ The presence of an Act of Congress helps colleges to implement these measures even though they differ in how they deal with the various cases/applicants. Pierce and Runyan agree that ensuring campus safety may be the main driving force for institutions to screen applicants, but they also argue that other reasons for such screening may include: protection against liability; wanting to evaluate applicants’ characters; and assurance for certain academic programmes that students will be eligible for licensing after graduation²⁰.

Institutions in the US and UK have clear rules in their university statutes and ordinances outlining the process and reasons for requesting applicants to provide such information about themselves²¹. Those institutional policies are guided by national

¹⁷ Mujuzi JD & Tsweledi LB “Discrimination on the basis of a criminal record in South Africa: is having a criminal record an analogous ground” (2014) 14(4) *International Journal of Discrimination and the Law* 244 at 245.

¹⁸ Pierce MW & Runyan CW “Criminal records and college admissions” (2010) 16 *Inj Prev* at 1 available at <http://injuryprevention.bmj.com/content/injuryprev/16/1/58.full.pdf> (accessed 20 October 2015).

¹⁹ See Pierce & Runyan (2010).

²⁰ See Pierce & Runyan (2010).

²¹ Available at <http://www.graduate.study.cam.ac.uk/graduate-admissions-policy/graduate-applicants-previous-criminal-convictions>; available at <https://medstudenthandbook.hms.harvard.edu/711-criminal-offender-record-information-cori>; available at http://psychiatry.yale.edu/psychology/education/predoc/Background%20Checks%20-%20Psychology%20Fellows%209-08-16_273613_284_26812.pdf; available at <http://www.thecrimson.com/article/2016/2/9/banning-the-box/>; available at <http://www.cambridgestudents.cam.ac.uk/new-students/rules-and-legal-compliance/disclosure-and-barring-service>; also available at <https://www.ox.ac.uk/admissions/graduate/applying-to-oxford/university-policies/criminal-convictions?wssl=1> (all accessed 25 June 2017).

policy.²² The process involves applicants reporting on their criminal history. Such information is captured by the admissions office. Cases needing further screening are referred to a special committee which authorises the responsible university staff member to contact the applicant and carry out further investigations. When the committee decides to exclude a student, there is a complaints process for an application to be reviewed, while for accepted applicants there is proper infrastructure to ensure that such students with “special needs” get all the necessary assistance to ensure access and success. Some of the issues considered in the process of admission include: the nature of the offence committed; time since it was committed; number of offences; information from third parties; perceived impact on other members of the university community; and getting the view of the applicant which is mostly done by means of an interview.²³ In addition, the expected offers by the university committee in light of such circumstances are clearly outlined: for example, accepted, accepted with conditions, and rejected.²⁴

3.1 Essential policies and processes in the US and UK

In the US²⁵ and UK²⁶, most institutions have a special committee handling these special cases. However, a decision by the committee can be appealed through a “complaints procedure” and no further investigation of the applicant can be carried out in addition to the information given on the application form without a written consent. Moreover, the storage of, access to, and the rules and processes applicable to data generated in the process are clearly explained to the applicant, not only to ensure a fair admission process but also, importantly, to protect the applicant’s privacy. However, there are exceptional circumstances such as, dealing with a student who is convicted of a crime after submitting an application form (such information has to be reported to the institution as soon as the student is admitted).

Furthermore, there are processes for dealing with applicants who mislead the admissions office by refusing to report their criminal history or giving the wrong information. Such applicants may be admitted but as soon as the mistake is discovered, the process is re-evaluated. While the above measures focus on ensuring access and campus safety, institutional processes and practices to help these students to succeed in their studies include: specific recommended programmes directed at them; trained university staff; and funding for extra projects which may be necessary in the process without passing on the costs to the student²⁷. Literature about the US broadly focuses

²² See Pierce & Runyan (2010) at 1.

²³ See <http://www.graduate.study.cam.ac.uk/graduate-admissions-policy/graduate-applicants-previous-criminal-convictions> (accessed 25 June 2017).

²⁴ See Pierce & Runyan (2010) at 1.

²⁵ Available at <https://medstudenthandbook.hms.harvard.edu/711-criminal-offender-record-information-cori> (accessed 25 June 2017).

²⁶ Available at <https://www.ox.ac.uk/admissions/undergraduate/applying-to-oxford/decisions/criminal-convictions?wssl=1> (accessed 25 June 2017).

²⁷ See Pierce & Runyan (2010) at 1.

on using student criminal records information to ensure campus safety first before permitting access.

3.2 Challenges and opportunities for students with criminal records

According to a study by Pager conducted in the US, societal stigma attached to a criminal record acts as a major barrier against accessing opportunities. He posits that a criminal record constructs a “negative credential” which becomes a variable used for social differentiation.²⁸ Moreover, “discrimination based on criminal record, in effect, adds to the punishment experienced by those convicted of crime.”²⁹ Consequently, this undermines the re-integration of offenders back into communities.

Challenges in the US have led to institutions implementing these processes with great introspection, in order not to be seen as profiling applicants from minority communities.³⁰ In addition, while some students may be able to expunge their criminal records, many from the minority communities (particularly poor backgrounds) may not be able to do the same due to lack of finances and access to information.³¹

Having outlined the above processes and their respective challenges, it is clear that the screening of students “may have unintended negative consequences for other important public health and social justice goals, [thus] signaling the need for more research and dialogue.”³² Even though having a criminal history highlights a risk factor for committing a crime in the future, it is not clear whether students with criminal records are more likely to engage in criminal activities at the institution once admitted.

It has been argued that access to higher education is crucial to reducing recidivism because it provides an opportunity to acquire skills. After serving the necessary legal punishment, higher education offers a way out from destructive activities, such as crime. This enables a person to divert their attention to more productive roles in a community.³³ Conversely, Baum and Payea add that the importance of personal benefits of higher education are wide: better income levels; lifetime earnings; improved health; and reduced likelihood of incarceration.³⁴ In addition to reducing recidivism, Pager argues that higher education is one mechanism of re-integrating an offender back into the broader society.³⁵ Therefore higher education access is very important since the offender does not only join a community but accesses skills which are vital to accessing opportunities. Even without employment

²⁸ Pager D “The mark of a criminal record” (2003) 108 (5) *American Journal of Sociology* 937 at 939.

²⁹ Jacob JB “Mass incarceration and proliferation of criminal records” (2006) 3 (3) *University of St. Thomas Law Journal* 387 at 390.

³⁰ Johnston BD “What we know” (2013) 19 (369) *Inj Prev* available at <http://injuryprevention.bmj.com/> (accessed 20 October 2016).

³¹ See Pierce & Runyan (2010).

³² See Pierce & Runyan (2010) at 1.

³³ Rose C, Reschenberg K & Richards S “The inviting convicts to college program” (2010) 49(4) *Journal of Offender Rehabilitation* 293 at 294.

³⁴ Baum S & Payea K “Education pays 2004: the benefits of higher education for individuals and society” (2005) available at www.collegeboard.com (accessed 5 November 2016).

³⁵ See Pager (2003) at 939.

after graduating, the academic community of friends provides a network (*social capital*). This can be essential in accessing opportunities, since education plays a crucial role in society as a “mechanism used to distribute ... opportunities for gainful participation.”³⁶ Furthermore, studies have shown that there is less risk of delinquency among graduates in comparison to higher education dropouts for example, or in this case adults with criminal records who may not be allowed to access higher education. Consequently, higher education socialises students into conforming behaviour which involves respecting the law.³⁷ The current embrace of democratic governance in South African universities is a typical example.

4 HIGHER EDUCATION IN SOUTH AFRICA AND STUDENTS WITH CRIMINAL RECORDS

The earlier discussion has shown that in countries such as the US where university applicants with criminal records are required to disclose such information, it is designed to ensure that they are treated as future “students with special needs” (a term used more in international literature). The process seeks to promote access, and protect the institutional community and the vulnerable most especially when accepted students graduate.³⁸ However, prioritisation depends on national context; for example, campus safety is prioritised in the US due to crimes on campus. In support of background checks, Pierce and Runyan noted that “it is hard to imagine parents who would not have serious concerns about their child sharing a room or hallway with someone convicted of rape, murder or armed robbery.”³⁹

Higher education in South Africa has experienced fundamental changes since the dawn of democracy, resulting in massification.⁴⁰ As highlighted above, some of the applicants to the universities may have a criminal history, and as a result they may not be accepted for certain programmes, given the crimes committed, in order to protect the public.⁴¹ It is important to note that institutional enrolment processes are complex, dealing with different age groups, academic levels, and academic fields and disciplines.⁴² In the context of South Africa, it is important that applicants with criminal records do not miss out on the opportunity to access higher education given the value addition to

³⁶ Helliwell HF & Putnam DR “Education and social capital” (2007) 33(1) *Eastern Economic Journal* 1 at 4.

³⁷ Arum R & Beattie IR “High school experience and the risk of adult incarceration” (1999) 37 (3) *Criminology* 515.

³⁸ Brodersen M, Swick D & Richman J “Risk and mitigating factors in decisions to accept students with criminal records” (2009) 45 (3) *Journal of Social Work Education* 349.

³⁹ See Pierce & Runyan (2010) at 01.

⁴⁰ Bunting I “The higher education landscape under apartheid” in Cloete N, Maassen P, Fehnel R, Moja T, Gibbon T & Perold H (eds) *Transformation in higher education: global pressures and local realities in South Africa* (Dordrecht: Springer 2006) 35.

⁴¹ Madoc-Jones L, Bates J, Facer B & Roscoe K “Students with criminal convictions: policies and practices in social work education” (2007) 37 *British Journal of Social Work* 1387.

⁴² Richardson V “Constructivism pedagogy” (2003) 105 (9) *Teachers College Record* 623.

the skills in the country, and also considering the South African developmental context.⁴³

There is a dearth of research on campus crime in South Africa; however, newspaper articles have constantly highlighted the violence and how students are often victims of crimes on campuses around the country and at times are perpetrators.⁴⁴ The latest examples which have made national and international news headlines included student protests at Rhodes University in April 2016 about the “rape culture” at the institution.⁴⁵ This has caused outrage as institutions nationwide reconsider their policies in relation to dealing with on-campus cases of sexual harassment and other forms of violence. Additionally, the #RhodesMustFall and #FeesMustFall student protests involved confrontations and violence on campuses around the country.⁴⁶

While incidents of campus crime make it into national news, campus crime in South Africa does not appear to be a national challenge and this may be one of the reasons for research on the topic being scarce. Considering the current developmental nature of the South African State, attention to students with criminal records by institutions of higher learning would also contribute to the national development agenda, most especially when such focus is majorly intended to emphasise access. Next, the study research methodology is discussed.

5 RESEARCH METHODOLOGY

This is an exploratory study based on document analysis⁴⁷, whereby the 2016 application forms for student admissions to 16 South African public universities (11 traditional universities, two comprehensive universities and three universities of technology) were analysed. They include: Cape Peninsula University of Technology (CPUT); Central University of Technology (CUT); University of Cape Town (UCT); University of Fort Hare (UFH); University of the Free State (UFS); University of Kwazulu-Natal (UKZN); University of Limpopo (UL); University of Mpumalanga (UM); North-West University (NWU); University of Pretoria (UP); Rhodes University (RU); University of South Africa (UNISA). Stellenbosch University (SU); University of Venda (UV); University of the Western Cape (UWC); and University of the Witwatersrand (Wits).

The focus was on examining each application form as an institutional document to explore the following: the kind of information required from applicants in relation to

⁴³ Edigheji O. *Constructing a democratic developmental state in South Africa: potential and challenges*. (Pretoria: HSRC Press 2010).

⁴⁴ Mtshali N “‘Petty crime’ plagues SA universities” (2013) available at <http://www.iol.co.za/news/south-africa/gauteng/petty-crime-plagues-sa-universities-1585293> (accessed 24 October 2015); Ndawonde N “Chaos erupts at UKZN” (2007) available at <http://www.iol.co.za/news/south-africa/chaos-erupts-at-ukzn-1.379817#.VivWpH4rLIU> (accessed 24 October 2015).

⁴⁵ Molander K “Students protesting over list of alleged rapists arrested at Rhodes University” *Times Live* 20 April 2016 available at <http://www.timeslive.co.za/local/2016/04/20/Students-protesting-over-list-of-alleged-rapists-arrested-at-Rhodes-University> (accessed 9 October 2016).

⁴⁶ See Luescher, Loader & Mugume (2017).

⁴⁷ Babbie E & Mouton J *The practice of social research* (Oxford: Oxford University Press 2001) at 79.

their criminal records and the reasons for that; any other mechanisms universities have in place to promote access for students with criminal records; the content of the application form declaration; and any indication of how the information may be stored, accessed or shared. Document analysis “is a systematic procedure for reviewing or evaluating documents-both printed and electronic.”⁴⁸ It is used in this study to find, select, assess and synthesise data from the respective university application forms. The data was then organised into themes, such as, questions about criminal history, reason for requesting such information, any other process implemented if the applicant had a criminal history, and the declaration content.⁴⁹ An application form is the first source of information for universities about potential students, therefore it provides a background to the kind of information universities may request from an applicant.

The analysis sought, first, to identify whether application forms had specific questions requiring applicants to report on their criminal history; secondly, if reasons were provided as to why such information was required; and thirdly, whether institutions required a specific declaration to be made by the applicant, and how the data provided by the applicant can be stored, accessed and/or shared. Therefore, the analysis should assist in providing information about the mechanisms which promote access, the kind of information universities may not be receiving while most likely to be important, and to comparatively show how different institutions may be well positioned to help students with criminal records to better access higher education.⁵⁰

This study is limited by relying only on application forms for the 2016 academic year from 16 South African universities for data generation. This limits its ability to explore deeply into the complexity of the topic, such as, institutional contexts after the application phase or national figures for students with criminal records and the circumstances of those students.

6 ANALYSIS

6.1 Questions on criminal history of applicants

An analysis of the application forms of the 16 South African public universities for 2016 admissions shows only one university (CUT) that poses a direct question to the applicants: “have you been found guilty of a criminal offence?” Four other institutions, namely, UKZN, UFH, UV and UM, ask applicants whether they have ever been “refused admission” to any institution of higher learning, expelled, prohibited or excluded in any way.

Below are the questions from the five institutions mentioned above, requiring an applicant to report on his/her criminal history and other questions inquiring whether

⁴⁸ Bowen GA “Document analysis as a qualitative research method” (2009) 9 (2) *Qualitative Research Journal* 27 at 27.

⁴⁹ Xu J & Croft B “Query expansion using local and global document analysis” (1996) available at <http://www.eng.utah.edu/~cs7961/papers/XuCroft-SIGIR96.pdf> (accessed 20 October 2015).

⁵⁰ See Bowen (2009).

the applicant has ever been excluded or prohibited from accessing any institution of higher learning. In each of the university application forms analysed, a positive response to any of the questions below leads to an applicant being probed further to supply more information. They include: have you been found guilty of a criminal offence? (CUT); have you ever been suspended from or refused admission to any post-secondary institution? (CUT); have you ever been refused entry to, or expelled or excluded from another institution? (UKZN); have you ever been refused entry to, or excluded or expelled from a residence of any university, college or technikon? (UKZN); have you ever been prohibited from proceeding with your studies at any university (UFH); have you previously been excluded from any institution of higher learning? (UM); and have you ever been refused admission to any post-secondary institution? (UV).

Most questions on the above list are focused on an applicant's history of compliance with institutional rules rather than criminal history *per se* in the national context. Therefore only one out of 16 universities requests applicants to provide information of their criminal history, while four other universities pose any question about applicants being excluded in any way by an institution of higher learning. Considering the above, there is very little evidence from the 2016 applications to show that the universities express interest in collecting such information from applicants. All application forms have a declaration section.

6.2 Declarations on application forms

All university application forms analysed required applicants to sign a declaration. The declaration in general covers agreeing to comply with the university rules and regulations if the application is successful, and liability for payments during study at the institution. For the latter, where the applicant is below 18 years, the guardian/parent has a section to sign for that responsibility. However, the contents of a declaration differs from one institution to another.

The UFS offers a unique example in this regard since there are two separate declaration sections to sign. All applicants are supposed to sign the first declaration which also highlights the abovementioned points to the applicant as prerequisites of compliance in order to study at the institution. Then there is a second declaration section at the end of the application form. This declaration excludes first-time applicants for undergraduate study at the institution as follows: "Personal Credential Verification (not needed when candidates apply for the first time for undergraduate study at this university)."

While the question about the applicant's criminal history was asked directly in the CUT application form, in the case of the UFS the institution requests for permission to verify an applicant's criminal history as follows:

Authorised credential verification types include, but are not limited to, educational qualifications, professional membership, employment history, employment references, consumer credit, criminal record, driver's license, and fraud prevention checks.

While in earlier applications considered, the request for information on criminal history focused on potential students, in the case of the UFS, this same declaration is also used to verify staff members' personal information. Therefore, the same declaration form used for students (postgraduates in this case) is also used by staff members. Professional programmes offer a more detailed approach.

6.3 Declarations on application forms for professional programmes

Professional programmes in some institutions require the applicant to consent that she/he is aware of the requirements for the academic programme chosen, therefore implying that in future, if they cannot be licensed to practise professionally after completing the course or stopped in the middle of the course, for example, due to their criminal history, the institution does not take the blame. Below is an example of such a declaration:

I undertake to familiarise myself with and adhere to all the rules and general regulations applicable to the qualification for which I intend to enroll ... I am aware that my enrolment is only valid if it complies with the applicable prescripts and regulations governing the qualification concerned.⁵¹

It is assumed that the student is aware of the programme's requirements before signing the declaration, not just in the context of qualifying grade requirements in order to study at the institution, but even after graduating. This leaves students in study programmes such as law and accounting vulnerable, as they may graduate and not be able to qualify for certain jobs. Having noted above the problem of unemployed graduates in a developmental State such as South Africa, this adds to the challenges.⁵² In this regard, it is only in the health sciences that specific information is required from students. But this is also more of a requirement set by the Health Professions Council of South Africa (HPCSA), which is implemented by institutions.

6.4 Applicants in the health sciences

Health sciences applicants for programmes such as medicine and nursing have one special requirement which seems to be compulsory, the "health questionnaire". It informs on the history of the applicant's health.

The HPCSA requires applicants for registration as healthcare practitioners to declare their criminal history as follows:

I ... declare that I have never been convicted of any criminal offence or been debarred from practice by reason of unprofessional conduct in any country and that, to the best of my knowledge and belief, no proceedings involving or likely to involve a charge of offence or misconduct is pending against me at present.⁵³

⁵¹ CPUT.

⁵² See Leibowitz & Bozalek (2014) at 96.

⁵³ See HPCSA Application for Registration Form 23 available at http://www.hpcsa.co.za/Uploads/editor/UserFiles/downloads/registration_forms/2014_2015_apr/appl_regis/form_23_app_reg.pdf (accessed 25 June 2017).

Hence a “criminal conviction” against any practitioner is considered a direct contravention of the ethical code of the profession and thus a disciplinary proceeding is instituted against the member. Consequently, it is in accordance with such professional requirements that these institutions require students to sign a declaration expressing their understanding of the professional requirements and therefore their responsibility for any future consequences if it is discovered that they do not meet the requirements. The following discussion considers the implications.

6.4 Request for information on criminal history and implications

The discussion above shows that one institution asks applicants to provide information about their criminal history while others do not. Since most institutions do not require such information as a precondition for admission, it cannot be argued that requesting applicants’ information about their criminal history generally undermines access to universities. However, it is important to note that the current process may put some institutions at a disadvantage in comparison to others since an applicant with a criminal history would simply apply to universities where such information is not requested. In addition, not much information is provided to the applicant to understand the reasons for requesting such information, since providing clear reasons would also require the institution to state when such information gets removed from the institution’s system and destroyed. There is no information provided in relation to how collected data on students’ criminal history is stored and shared with any third party. Even though South Africa has the Protection of Personal Information Act of 2013 (POPI Act 4 of 2013), the Act is not mentioned anywhere even the institutions which directly or indirectly request such information. Therefore, institutions which do not request information about applicants’ criminal history may be viewed positively since students can easily be admitted without providing such information. However, as a result students may be wrongly advised about their programme choices which can impact negatively on their career prospects. In addition, if such students need assistance to cope while the institution is not aware of the student’s circumstances, it could be difficult to avail the necessary support. Moreover, not paying attention to such students (not even knowing that they exist) jeopardises the chances of putting in place structures to help them. This can be made much easier if institutions know for example about the students’ criminal history and avail the necessary infrastructure, such as a support unit to provide assistance, depending on the necessary need.

Depending on the crime committed, for some study programmes students may need advice/guidance from the institution. For example, the health sciences, as noted above, clear information on qualifying for a licence after graduation and the absence of structures (to request for information and guide students) can negatively affect the student. Consequently, the absence of a multi-institutional approach is central to the problem as each institution innovates as to how to deal with students with criminal history.

7 A POSSIBLE ROUTE FOR SOUTH AFRICAN HIGHER EDUCATION

The literature has highlighted that the request for criminal history information from higher education applicants, most especially in the US is mainly due to the country's high crime rates (including crimes on university campuses). The information is used by institutions to recruit students with criminal records well aware of their background in order not only to create a good studying environment but also to maintain a safe campus. It is important to state that research shows no known link between students with criminal backgrounds and endangered campus safety, while education is linked to lower recidivism rates. This suggests that if students are to provide information about their criminal background, such information should be majorly used to promote access to institutions.⁵⁴

Therefore, even though examples of campus safety challenges at South African institutions are outlined in the earlier discussion, a policy focusing on students with criminal records on campuses majorly for reasons of safety would be misleading and uncritically targeting vulnerable students. Moreover, it is argued that criminal behaviour prior to joining higher education institutions in the US for example can be seen as a risk factor for campus misconduct but it cannot be seen as a reliable predictor of campus misconduct. Therefore institutions cannot use a student's criminal record to predict whether he/she will misbehave in future if admitted. In addition, "higher education is directly correlated with reduced recidivism rates ... making higher education available to individuals with criminal backgrounds is, therefore, a keystone strategy to promoting public safety."⁵⁵

Furthermore, higher education is noted as a positive force in communities, since the re-integration of offenders becomes more acceptable as they become a productive force in communities, thus delegitimising the stereotypes attached to holders of criminal records in communities.⁵⁶

Given the above, the policy focus in South Africa relating to students with criminal records should be on improving access. However, institutions interested in requesting such information should be more explicit, as for example CUT. They should indicate why such information is requested. A regional or provincial approach towards standardising application forms would go a long way in clarifying respective information needs. This would also ensure that research at the national level pays close attention to the topic and that institutions can differ on which crimes warrant denial of admission. However, such policies should not in any way result in unnecessary exclusion of potential higher education students. In line with the above discussion, institutional policies should outline programmes which require strict criminal history screening and why, to ensure a balanced response from institutions in compliance with the Higher Education Act of 1997⁵⁷ while protecting students' careers after

⁵⁴ See Sokoloff & Fontaine (2013).

⁵⁵ See Sokoloff & Fontaine (2013) at 29.

⁵⁶ See Sokoloff & Fontaine (2013) at 29.

⁵⁷ Available at <http://www.up.ac.za/media/shared/409/higher-education-act-1997.zp86770.pdf> (accessed 28 June 2017).

graduating.⁵⁸ Additionally, institutions should provide programmes to assist such students who may need special assistance to cope with university life for example, rather than being oblivious to the need therefor.

Even though only one institution collects information directly about criminal records (CUT), six other institutions use questions presented differently to request for similar information. For example, asking whether applicants have ever been expelled from other higher education institutions and why. For institutions requesting applicants to report on their criminal history, such information can be better stored in the admissions office. Extra screening can only be done on applicants who on the basis of their academic qualifications have been accepted to a programme. Therefore, failure to qualify for admission to a programme should mean no further screening. The failure to have a clear institutional policy and be upfront with the applicants in relation to the reasons for seeking such information may have negative consequences, as noted in a US study about students with criminal records. It was discovered that “more than half of the schools that collect and use criminal background information mostly provide additional supervision (rather than added support to such students) - often experienced as harassment - of students who were admitted with a criminal background.”⁵⁹ The collecting of such information can deprive students with criminal records of a conducive academic environment even when they are registered students. The POPI Act offers some insights on data handling.

7.1 The Protection of Personal Information Act 2013 (POPI)

The POPI Act of 2013⁶⁰ is meant inter alia to “promote the protection of personal information processed by public and private bodies; [and] to introduce certain conditions so as to establish minimum requirements for the processing of personal information”. The Act provides the necessary requirements nationally as to how personal information is handled and therefore can be shared at different levels. This includes how institutions of higher learning deal with student data since application forms in these institutions do not provide information about how requested data is handled. Compliance with the Act would require centralising the storage of such sensitive information (criminal history) in addition to the information gathered from all students subject to the student administration or any institutional research unit/department⁶¹. These staff members are trained in the ethics of data management in accordance with national and institutional policies to ensure clarity on restrictions and thus the necessary clearance steps for staff members to access such information. In addition, compliance would require a POPI Act office within the institutional research unit, student administration or registrar’s office focusing specifically on compliance at different levels for protection of student data. Such compliance would be better

⁵⁸ See Pierce & Runyan (2010).

⁵⁹ See Sokoloff & Fontaine (2013) at 11.

⁶⁰ See <http://www.justice.gov.za/legislation/acts/2013-004.pdf> (accessed 25 June 2017).

⁶¹ Muller N, Langa S & Dlamini P “Institutional research units in higher education institutions in South Africa” in Botha J & Muller NJ (eds) *Institutional research in South African higher education: intersecting contexts and practices* (Stellenbosch: Sun Press 2016) at 69

enforced by linking the POPI Act office to a legal office for the handling of queries or any interpretation of data requests⁶². In institutions of higher learning with a Faculty of Law, such systematic linkages would be easier from within. But the POPI Act office can also be allowed access to the legal representatives of the institution. These are examples of the basic conditions necessary for proper interpretation of the POPI Act in an institution and the handling of student data, including sensitive student criminal records. Proper data handling shields such students from being stigmatised by other students or staff and thus creates a conducive environment for access. However, this level of compliancy and the whole initial phase of data generation comes at a cost.

7.2 Potential costs of the process

The additional process of collecting data, storage, processing and any sharing of such information carries a cost. In addition to requiring students to provide information about their criminal history, if these institutions go further to investigate for more information, as in the case of the UFS application form, this could divert resources from other valuable programmes in an institution. On the other hand, if applicants bear the costs, the process could become another “economic barrier” which low-income applicants would have to face.⁶³ In the context of the latest #FeesMustFall national student protests for free higher education in South Africa that would not be a desirable route to consider.⁶⁴ Additionally, for the majority of institutions, as noted above, the application phase is always the beginning phase which implies that more costs have to be incurred later in the process if criminal history questions are to be added to the application form. Costs to consider would include: the questions to be inserted in the application form would require expert legal advice to comply with national and institutional policies; a POPI Act office and any other necessary legal assistance; staff would have to be trained in how to deal with such students; a committee of the university management or the administration office made up of officials from various academic, management and other levels/structures to deal with the selection, admission, and also the follow-up, of students who have been admitted and those who may not have been accepted, most especially if they want to appeal such decisions.

8 TOWARDS A RESEARCH AGENDA: STUDENTS WITH CRIMINAL RECORDS IN SOUTH AFRICAN HIGHER EDUCATION

The article considers institutional processes which promote access for students with criminal records. The evidence shows that the few institutions which request such information and are therefore aware of having such students, have no processes and practices designed to handle the admission process of such students. Hence the

⁶² Boon RD “Regulated ethics: institutional research compliance with IRBs and FERPA” in Howard RD, McLaughlin GW & Knight WE (eds) *The handbook of institutional research* (San Francisco: Jossey-Bass 2012) at 328.

⁶³ See Pierce & Runyan (2010).

⁶⁴ See Luescher, Loader & Mugume (2017).

argument for a research agenda in such institutions to ensure that any policy changes rely on research for such changes to suit the South African context.

In addition, research on the topic should highlight the potential costs which are to be incurred by institutions which are currently requesting such information and those which may do the same in the future. As argued by Johnston⁶⁵ concerning applicants' criminal history, it is important to constantly keep a critical eye on the whole process to ensure that the answers that come from the data collected on these applicants is used in a "manner that is fair and responsible". Therefore institutions should be able to systematically assess the information provided using a fair process. Most importantly, given South Africa's racial history, institutional processes should be as transparent and fair as possible, and not to be seen as excluding a specific group of students while lenient on others by using criminal history.

Issues to consider for research: the similarities and differences among institutional policies in relation to students with criminal records; possible national and institutional policy options; investigating the lived experience of students with criminal records before and after being admitted to the university (re-integration challenges); the impact of students with (and without) criminal records on campus safety; the impact of higher education on reducing recidivism; and the impact of higher education on reintegration.

Considering the evidence presented and the discussions above, it is clear that this article does not claim that higher education is a panacea for all the social ills which may result in one way or another in persons getting criminal records. It rather considers the evidence presented by other scholars on the positive role of higher education in reintegration into communities and reducing recidivism to propose ways of ensuring improved access for students with criminal records in South Africa.⁶⁶ Moreover, higher education promotes skills development and produces more productive community members as they are able to create or access the available opportunities in a community.⁶⁷ The article does not claim that among the 16 institutions, those which do not request information from applicants about their criminal history, do not admit such students. Rather, the argument is to the contrary: such institutions admit students with criminal records and such students may even prefer applying to those institutions since they do not have to divulge information about their criminal history. However, some of the challenges noted include that such students may not be well advised in relation to programme choices given their circumstances and may end up struggling to get employed after graduating due to their criminal history.

8 CONCLUSIONS

The article considered information requested from university applicants by 16 South African universities. Evidence shows that few of the 16 institutions even ask students

⁶⁵ See Johnston (2013).

⁶⁶ Sokoloff & Fontaine (2013) at 11.

⁶⁷ Baum & Payea (2004).

about their criminal history, and when they do, there is no clarity provided as to why such information is requested. In addition, processes such as, data storage, access and sharing, are not mentioned. However, the POPI Act of 2013 outlines the minimum requirements and processes for data handling, even though no institution refers to the Act in the process of requesting information about students' criminal history. Institutions which do not request information on applicants' criminal records may even get more applicants with criminal records since this information is not needed, those students may not be well advised in relation to programme choices, and also the necessary support may not be in place to ensure that they can adapt to university life.

In proposing the way forward, it is argued that institutions would be better off with a student administration or institutional research unit/department⁶⁸ responsible for the centralised collection and storage of all information on students' criminal records, a POPI Act office that liaises with any actor, internal or external, in relation to the sharing of students' data. It is noted that with these structures in place and with properly trained staff members, institutions requesting such information will be better equipped to ensure better access for students with criminal records.⁶⁹ Furthermore, a research agenda is proposed to inform such changes. It is finally noted that the study is limited by its reliance on data generated from 16 application forms of South African universities.

⁶⁸ See Muller, Langa & Dlamini (2016).

⁶⁹ See also Boon (2012).