

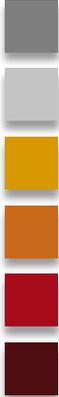
## **Working Paper Series 4: Should prisoners and pensioners be funded?**

**NSFAS Policy Brief 1**

22 March 2016

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## LIST OF ABBREVIATIONS

|        |  |
|--------|--|
| AET    | Adult Education and Training   |
| ATD    | Awaiting Trial   |
| DJCS   | Department of Justice and Correctional Services                            |
| DHE    | Department of Higher Education and Training                                |
| DMV    | Department of Military Veterans  |
| GEPF   | Government Employees Pension Fund  |
| HEMIS  | Higher Education Management Information System                             |
| NDP    | National Development Plan  |
| NICRO  | National Institute for Crime Prevention and the Reintegration of Offenders |
| NPHE   | National Plan for Higher Education   |
| NSFAS  | National Student Financial Aid Scheme                                      |
| RPL    | Recognition of Prior Learning  |
| UNISA  | University of South Africa   |
| UNIZUL | University of Zululand   |

### EXECUTIVE SUMMARY

South Africa's constitution received international acclaim for its stance on the inclusion of socio-economic rights as justiciable on the same basis as political and civil rights. However, it does not clearly articulate a unique position as to whether prisoners and pensioners have the right to funding for access to higher education. The Constitutional Court jurisprudence notes that the State owes a duty only to those sections of the population without the means to ensure access to health care, education and social security. It supports the notion that the State 'must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights'.

What remains a moot point is whether NSFAS should continue funding both prisoners and pensioners. The purpose of this study is therefore to investigate whether prisoners and pensioners should be funded by the National Student Financial Aid Scheme (NSFAS). The funding of prisoners and pensioners needs to be understood against the reality that the demand for funding of higher education for first-opportunity youth not in employment, education and training already exceeds its supply.

For the prisoners, the issues that arise through this review include the need to consider the qualification criteria to fund them, how to means-test prisoners and the prospects of recovery of loans from those who were funded and who are serving longer terms. While it can be argued that prisoners who are currently awaiting trial could be funded on the basis that they have not yet been convicted, this raises question of appropriate criteria and processes to assess their eligibility. Is it possible to develop a direct link with them while still awaiting trial given that the new student centred model seeks to have direct contact with a student? As such, in terms of a policy framework, the salient question remains whether or not there is a legal and constitutional imperative to fund prisoners.

For pensioners, this paper addresses two elements: the likelihood of recovery of loans after completion of their studies, and the human capital contribution to be leveraged off the funding of older students or State-subsidized pensioners. There is no evidence that suggests that the country's future economic success would depend on the skills and contributions of pensioners as they are already not engaged in the main stream economy. From anecdotal reports, the view has been expressed that most of the pensioners usually register to study for leisure purposes. The argument to be considered in respect to this policy question is whether or not someone who is unlikely to repay the loans due to limited prospects of long-term employment should be funded.

### INTRODUCTION

Over the years, there has been a dramatic increase in the demand for higher education funding. According to Salmi and Hauptman<sup>1</sup>, this increasing demand on higher education has placed enormous pressure on the demand from the State to provide sufficient funds. It is important to acknowledge that the government has made advances in expanding access in higher education since 1995, most notably towards the previously disadvantaged groups through the establishment and implementation of the National Student Financial Aid Scheme (NSFAS)<sup>2</sup>. NSFAS was established under the NSFAS Act No 56 of 1999 to provide financial aid to eligible students who meet the criteria for admission to a higher education programme<sup>3</sup>.

The purpose of this research study is to investigate whether prisoners and pensioners should be funded by the National Student Financial Aid Scheme (NSFAS). The funding of both prisoners and pensioners need to be understood against the rapid shifts and challenges confronting the supply of, and demand for, funding to access higher education; against a context of human rights as enshrined within the Constitution; against the human capital development objectives of government and against NSFAS' role in recovery of loan funding.

In South Africa, prison education is not only seen as a constitutional right but also as a foundation stone for rehabilitation. According to Salmi and Hauptman<sup>4</sup>, prison education therefore seeks to equip prison inmates with knowledge and skills that may assist them to reintegrate into their respective communities and to find employment and in this way to prevent future crimes. Although prison education may not be the panacea to crime, the general assumption is that once prison inmates are equipped with the basic knowledge and relevant skills, most of them could engage in self-employment activities instead of criminal activities.

The funding of pensioners to access higher education has been a contested issue as well. In most cases, the pensioners are attracted mostly by on-line and distance education. This is because of their reduced work commitments and their capacity to spend more time studying. Older students take university courses for recreational purposes to keep their minds active and pursue a long-term interest, such as art history

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<sup>1</sup> Salmi, S and Hauptman, A.M. 2006. *Innovations in Tertiary Education Financing: A Comparative Evaluation of Allocation Mechanisms*, Education Working Paper Series No 4, World Bank Regional Universities Association (SARUA). [Online] Available: <http://www.sarua.org> (May 16, 2014).

<sup>2</sup> Civil Reform Initiative (2014). *Prisoners' Rights in South Africa's Higher Education (HE)*. University of the Western Cape (UWC)

<sup>3</sup> Ibid

<sup>4</sup> Ibid

or literature<sup>5</sup>, and not necessarily to pursue long-term careers through undergraduate education.

### THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

#### i. The Constitution of South Africa, Act 108 of 1996

According to the Constitution of South Africa, Act 108 of 1996 as it was adopted:

- (1) “Everyone has the right –  
(a) *to a basic education, including adult basic education; and to further education, which the State, through reasonable measures, must make progressively available and accessible*<sup>6</sup>”.

The progressive realization clauses in the Constitution contemplate that the rights referred to cannot be immediately realized but that the State must take reasonable and necessary steps to progressively achieve these rights. This requires two things: firstly the State must provide programmatic evidence to show that there is an improvement in conditions towards the realization of the rights and cannot back-track on progress made and; secondly, must ensure that such rights are extended to more and more people. This education clause in the Constitution clearly places a long-term commitment on the State to make “progressively available and accessible” higher education, in so far as it is included in the broad definition of “further education”<sup>7</sup>. It also means that the State cannot reverse decisions on assistance to ensure availability and access to higher education until the socio-economic conditions in the country are such that there is affordable access to higher education in one form or another.

#### ii. The Correctional Services Act, Act 111 of 1998

It recognizes the importance of rehabilitative work with prisoners, and to promoting the social responsibility and human development of all prisoners and persons subject to community corrections. The Act gives guidelines on how to implement this, providing for the assessment of every prisoner, as well as the participation of prisoners in designing programmes for their sentences. The Act further states that the Department must provide access to as full a range of programmes and activities as is possible to meet the educational and training needs of a prisoner. A prisoner may also be compelled to

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<sup>5</sup> Zecha G. (2002). *Education is problem solving: Critical rationalism put into practice*. In: P Higgs (Ed.): *Educational Theory and Practice in Meta-theories in Education and Practice*. London: Heinemann Ltd, pp.61-82.

<sup>6</sup> Section 29(1)(a) of the Constitution of South Africa

<sup>7</sup> Ibid

participate in programmes. The procedural and substantive rights of detained, arrested and accused persons are compatible with the essence and spirit of the post-1994 liberal democracy and a constitution of liberty. Section 35(2)(e) of the South African Constitution provides that everyone who is detained, including every sentenced prisoner has the right to ‘conditions of detention that are consistent with human dignity; including at least exercise and the provision, at State expense, adequate accommodation, nutrition, reading material and medical treatment’<sup>8</sup>.

### iii. **White Paper 3, the National Plan for Higher Education (DoE, 2001a) and the National Development Plan (NDP)**

These policy papers present an argument for growing the participation rate of young adults in higher education, more specifically amongst marginalized students and targeted demographic groupings. While the participation rate is generally linked to the 20-24 year old age group, it is an indicator of the growth in enrolment within the sector as a whole. The National Plan for Higher Education advocates for an increase in the general participation rate in public higher education in South Africa, with the aim of facilitating lifelong learning, developing the skills base of the country, and redressing historical inequities in the provision of education. Both the NPHE and the National Development Plan (NDP) suggest that participation rates in public higher education in South Africa could be augmented by recruiting increasing numbers of ‘non-traditional’ learners, identified as workers, mature adults, women and disabled people. Neither specifically presents a position regarding the prisoners in higher education, and therefore needs to be read in conjunction with the Correctional Services Act 111 of 1998, which reflects the general support for prisoner’s access to higher education.

## **PRISONERS IN HIGHER EDUCATION**

The South African prison population is 162 162, of which 49 695 (31%) are ATD and 112 467 (69%) are sentenced offenders. There are 241 correctional centres across South Africa. Eight are for women only, 13 are for youths and 129 are for men only. According to the 2012/2013 Department of Correctional Services (DCS) annual report, there are 3 380 female prisoners. The total capacity of prisons is 118 154 people, with 25 000 places being reserved for awaiting trial prisoners (ATD)<sup>9</sup>. There are different categories of prisoners, including ATD, juveniles, parolees and maximum security prisoners. Children under the age of 18 are not permitted to be held in prisons, and instead are held in juvenile centres. Research shows that most of the ATD have been in custody for the period of two to five years. The majority of sentenced offenders are serving

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<sup>8</sup> Ibid

<sup>9</sup> Civil Reform Initiative (2014). *Prisoners’ Rights in South Africa’s Higher Education (HE)*. University of the Western Cape (UWC)

sentences for aggressive crimes; this is followed by economic offences such as fraud and theft and sexual offences. It is not clear what the category “other” refers to and narcotic-related sentences constitute 2%.

According to the National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO), the average education level of offenders is grade six. From 2009 to date, more than 108 321 inmates participated in formal education programmes. From April 2013, it was compulsory for every inmate, without a qualification equivalent to Grade 9, to complete Adult Education and Training (AET) level 1 to 4. Education is free for inmates up to Grade 10. This goes a little beyond what is prescribed in the South African Schools Act of 1996, which makes education compulsory for all South Africans from the age of seven, or Grade 1, to age 15, or the completion of Grade 9. After Grade 10, prisoners must enroll in independent correspondence colleges and universities to study further and must pay for it themselves<sup>10</sup>.

### **i. A conceptual argument for prisoner education**

There are two schools of thought that focus on the funding of prisoners in higher education. These are the humanism and critical rationalism. According to Quan-Baffour and Britta<sup>11</sup>, ‘humanism is a theory developed by thinkers who stress the overriding importance of ‘the self’ as the integrative, consolidating tendency in development that is a source and growth of the individual’. According to Quan-Baffour and Britta<sup>12</sup>, prison education often promotes humanness in line with the true African virtues and values of *Ubuntu* - love, kindness, compassion, forgiveness, care and benevolence. The implication is that through a proper education, people who profess a lack of knowledge and skills and therefore find themselves on the wrong side of the law could be forgiven and taught relevant socio-economic skills, knowledge, moral norms and virtues of courtesy, compassion, respect for life and the property of fellow humans. This shows that through education, the prisoners need to learn how to be humane and show genuine remorse and display an element of respect. The significance of this is that education should inculcate to the prisoners the importance of economic skills for future potential employment and the values of *Ubuntu botho*<sup>13</sup>.

Although prison education may have been established from the humanist point of view - the need to show compassion for law breakers and provide them with education and training - prison inmates must also take a critical view of their lives and behaviour through introspection, self- evaluation and self-criticism. This critical self-evaluation links to a discussion on the theory of Critical Rationalism, introduced by the philosopher Karl

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<sup>10</sup> Ibid

<sup>11</sup> Quan-Baffour and Britta E. Zawada (2012) Education Programmes for Prison Inmates: Reward for Offences or Hope for a Better Life?, *Journal of Sociology Social Anthropology*, 3(2): 73-81

<sup>12</sup> Ibid

<sup>13</sup> Ibid

Popper (1902-1994). The theory begins with the insight that humans have to learn how to act and react in their environment in order to survive<sup>14</sup>. The theory aims at self-criticism and evaluation because it is based on the premise that education is both self-criticism and problem solving. The Critical Rationalists see education as a process of helping humans to learn and become responsible members of their society<sup>15</sup>.

According to the World Brief, governments must not lose sight of the higher education needs of the world's 10 million detained people<sup>16</sup>. Access to education needs to be broadened and harnessed to deliver cost-effective quality programmes to enhance prisoners' chances of rehabilitation, employment and reintegration into society. In South Africa, there are people who argue for prison education as a constitutional imperative. To this group of people, prison inmates have the right to education like all other citizens of the country. When educational opportunities are viewed from a human dimension, they can become the centre of the prison's function and make incarceration more than a physical storehouse for society's legal rejects. A vast majority of inmates enter prison without basic education, literacy or any practical skills for employment.<sup>17</sup>

Bracken<sup>18</sup> (2011) affirms that many offenders enter prison with an entirely negative experience of education and work and the majority of them have lower literacy rates. To holistically rehabilitate inmates, it therefore becomes crucial to teach them basic knowledge and skills to ensure self-employment and the reduction in recidivism. Although data on recidivism in South Africa may not be available, it is common knowledge that many inmates commit other crimes when they are granted parole or complete their sentences. This may be due to a lack of compulsory rehabilitation programmes through relevant education and training. Studies have demonstrated that college-in-prison programmes reduce arrest, conviction and re-incarceration rates among released prisoners more than any other prison-based interventions<sup>19</sup>.

According to the Maseko<sup>20</sup>, the educational system that prisoners undertake has to be integrated with that of the entire country with the purpose that upon their release they

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<sup>14</sup> Zecha, G. (2002). Education is problem solving: Critical rationalism put into practice. In: P Higgs (Ed.): Educational Theory and Practice in Meta-theories in Education and Practice. London: Heinemann Ltd, pp.61-82

<sup>15</sup> Quan-Baffour and Britta E. Zawada (2012) Education Programmes for Prison Inmates: Reward for Offences or Hope for a Better Life?, *Journal of Sociology Social Anthropology*, 3(2): 73-81

<sup>16</sup> World Brief 2014

<sup>17</sup> Super, G. (2013). *Prisoner Rehabilitation in South Africa*. University of Cape Town (UCT). Centre for Criminology

<sup>18</sup> Bracken, C. (2011). *Prison Education is Ripe for Reform*. The Mail and Guardian, Tuesday June 7, P.1.

<sup>19</sup> Erisman and Contardo. 2005. *Learning to reduce recidivism. A 50 state analysis of post-secondary correctional education policy*. The Institute for Higher Education Policy.

<sup>20</sup> Maseko, T.W. (2014). *Prison inmate's socio-economic rights in South Africa: Compatibility of domestic law with international norms and standards*. University of South Africa

may further their education without hardships. Erisman and Contardo<sup>21</sup> indicate that evidence shows that access to higher education can achieve a variety of important purposes for prisoners. Higher education can improve conditions within correctional facilities, enhance prisoner self-esteem and prospects for employment after release, and function as a cost-effective approach to reducing recidivism. The provision of education for prisoners offers them a chance to break the cycle of inequality<sup>22</sup>.

### ii. NSFAS-funded prisoners

From 2012 to 2014, there were 1 482 inmates registered with University of South Africa (UNISA) and University of Zululand (UNIZUL) funded by the NSFAS. In 2015, the number had decreased to 482 and there only 45 females. This sudden decrease was attributed to a number of factors such as drop-outs, poor academic performance and the high mortality rate. In 2013/14 financial year, the DJCS entered into a collaborative agreement with the UNIZUL and 64% prisoners completed their degrees in regulation time. On the other hand, the completion rates at UNISA were lower at 38%. It should be noted that there is no specific criteria for means testing the prisoners in order to be granted NSFAS loans. There are 64 juveniles in juvenile detention centers funded by the NSFAS.

## PENSIONERS IN SOUTH AFRICA

A pensioner is a person who collects a pension, most commonly because of a retirement from the workforce. In South Africa, 60 years is regarded as the entry point to qualify for the pension for males while for females it is 55 years. According to the Government Employees Pension Fund (GEPF), there are more than 1, 2 million active members from 325 government departments and 300 000 pensioners and beneficiaries. Most of them are ordinary pensioners who have retired from service and receive monthly pension benefits. There are also other pensioners who receive special pensions, namely medical pensions, disability pensions or military pensions. Government currently provides more than 3 million elderly people with a monthly pension grant of up to R1, 400.

In the mid-year Population Estimates released by StatsSA in 2015<sup>23</sup>, it is estimated that 8% of the population is over the age of 60 years, amounting to approximately 4, 42 million people. In this publication, the view was expressed that the “proportion of elderly persons aged 60 years and older is increasing over time”. The table shows this by

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<sup>21</sup> Erisman and Contardo. 2005. *Learning to reduce recidivism. A 50 state analysis of post-secondary correctional education policy*. The Institute for Higher Education Policy.

<sup>22</sup> South African Human Rights Commission 2013

<sup>23</sup> Statistics South Africa (2015). Mid-year population estimates.  
<https://www.statssa.gov.za/publications/P0302/P03022015.pdf>

population group – it was observed in the data that there are more females in each age category than males, and in some instances, the difference is fairly significant:

| Age          | African   | Coloured | Indian/Asian | White   | Total     |
|--------------|-----------|----------|--------------|---------|-----------|
| <b>60-64</b> | 1 039 301 | 152 698  | 57 879       | 290 075 | 1 539 953 |
| <b>65-69</b> | 737 581   | 105 403  | 44 357       | 265 818 | 1 153 159 |
| <b>70-74</b> | 511 723   | 65 465   | 28 949       | 198 976 | 805 114   |
| <b>75-79</b> | 313 800   | 41 978   | 17 552       | 128 675 | 502 005   |
| <b>80+</b>   | 249 431   | 31 698   | 13 210       | 124 762 | 419 100   |

According to the South African Social Security Agency (SASSA), there were 3 184 477 old age grants paid out to pensioners in February 2016,<sup>24</sup> with the highest number paid out in KwaZulu-Natal, followed by the Eastern Cape and Gauteng province. Both these sets of statistics reveal that the number of persons over the age of 60 living in South Africa currently is likely to be greater than 4,4 million, of which 3,1 million may qualify financially on the basis of the means test for funding. According to the StatsSA General Household Survey 2013<sup>25</sup>, although the percentage of males and females over the age of 40 years with no formal education/educational attainment level less than grade 7 has decreased over time from 2002 to 2013, it was still relatively high in 2013 (see below):

|                            | 2002 | 2013 |
|----------------------------|------|------|
| <b>Males 40-59 years</b>   | 35.0 | 20.4 |
| <b>Females 40-59 years</b> | 40.3 | 23.0 |
| <b>Males 60+years</b>      | 52.6 | 39.7 |
| <b>Females 60+years</b>    | 59.4 | 47.9 |

The implication of this is that although the number of persons over the age of 40 years who would be academically eligible for funding is substantially lower than the number that may be eligible on the basis of their financial means; this still represents a relatively high number of persons.

### i. Types of pensioners – as defined by the GEPF

#### a. Ordinary Pensioners

Ordinary pensioners are retired government employees who have saved for their retirement throughout their careers by paying monthly contributions to GEPF. In return, when they retire, they are guaranteed certain pension and other benefits. When an ordinary pensioner dies after retiring, his or her beneficiaries also receive specific benefits.

<sup>24</sup> SASSA (2016). Fact Sheet Issue 2 of 2016. Downloaded from <http://www.sassa.gov.za/index.php/knowledge-centre/statistical-reports>

<sup>25</sup> <http://www.statssa.gov.za/publications/P0318/P03182013.pdf>

### *b. Medical Pensioners*

These benefits are paid to government employees whose service is ended for medical reasons or because of an injury on duty.

### *c. Military Pensioners*

These pensions are paid to members of the South African National Defense Force (SANDF) who are injured or disabled while performing military service. Benefits depend on the extent of the disability. A gratuity (a once-off cash lump sum) is paid if the degree of disability is less than 20 percent, while an annuity (monthly pension) is paid if the degree of disability exceeds 20 percent. Military pensioners are also entitled to medical treatment and appliances for their disabilities.

## **ii. Funding of older students and pensioners**

According to the South African Higher Education Management Information System (HEMIS) data in 2012, it shows that 10% of NSFAS funded students are over the age of 45:

- There were 113 837 students over the age of 45 years in 2012;
- Of these, 23 480 were over the age of 55 years, and
- 1 542 students were over the age of 65 years.

While there is little literature on the academic success and employability of older adult students available, an argument could be made that their interest in studying is primarily for recreational purposes rather than in furthering their careers. In the United Kingdom, students were eligible for a loan to cover tuition fees only if they were younger than 54 years age. As such, consideration may need to be given to determining an age limitation for NSFAS funding.

The provision of higher education for pensioners in South Africa is not well documented because institutions are cautious about granting access through the route of the Recognition of Prior Learning (RPL). RPL is a process of identifying knowledge and skills against a qualification or part thereof. The process involves the identification, mediation, assessment and acknowledgement of knowledge and skills obtained through informal, non-formal and/ or formal learning. This may be useful to gain entry into the formal qualification in the university. Adult learners and pensioners - whether part-time, full-time, occasional or continuing education students - have largely gone unnoticed in the literature on RPL and higher education access.<sup>26</sup>

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<sup>26</sup> Ramashala, (2002). Report on Ageing Africa Region. United Nations Economic Commission For Africa

### LESSONS FROM CASE LAW

A retired colonel, unionist and military veteran of the South African National Defense Force (SANDF), Mr Phillip Dhlamini<sup>27</sup>, aged 63, took the University of Limpopo (UL) and the Minister of Higher Education and Training to court demanding the right to register and study for a law degree. The military veteran did not have a formal matric exemption or any requirements that qualified him for enrolment. He had completed only Standard 6 (now equivalent to Grade 8). He submitted in *limine* that his application must be processed under the conditional exemption in terms of the national rules. This means that consideration had to be made on the basis of his on-the-job-learning and not just school qualifications. He stated that the university should apply the policy of recognition of prior learning (RPL), acknowledge his alternative experience and knowledge in industrial relations and his position as chief negotiator at the Bargaining Council for the SANDF before his retirement. The Minister, as the custodian of higher education, had to ensure that there were no potential barriers for him to access to Higher Education.

Significantly, the case was settled amicably between the parties; however, Judge Francis Legodi conditionally ordered the university to process his application to enroll as a law student next year. The salient feature of the case was that it did not impose any measures or guarantees that the university should accept him, but only a guarantee that the institution will process his application to study. The university had earlier rejected his initial application, because he did not have a matric which was the qualifying entry point to consider his application for admission. Of utmost importance was that NSFAS was ordered to grant him a loan.

The Department of Defense and Military Veterans (DMV) had deposed an affidavit in support of his application. In its submissions, it stated that the university should admit him in terms of the legal standards for university requirements. This allowed universities to accept candidates without required educational qualifications provided that the candidate is 45 years old and may be expected to complete the qualification. It indicated that there are currently 3 650 military veterans and their dependents who receive educational support. Of these, 1 822 are in higher education<sup>28</sup>. It stated that the retired military veteran aged 63 (who would have been 64 years old in the following year), if accepted for admission at university, is eligible for funding from NSFAS in terms of Act 56 of 1999. The critical factor that calls for closer scrutiny is the age of the applicant, the prospects of recovery and the *parameters of the means test*.

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<sup>27</sup> Reported Case

<sup>28</sup> Department of Defence and Military Veterans, 2012-16 Strategic Plan

### **POLICY BRIEF: SHOULD PRISONERS AND PENSIONERS CONTINUE TO BE FUNDED?**

#### **i. Prisoners**

Access to higher education for the prisoners can in fact help to break the cycle of inequality, while at the same time reduce the likelihood of recidivism by preparing incarcerated men and women for productive lives after their release from prison<sup>29</sup>. However, this has not been the case for South Africa. There is a consistent pattern of repeat offenders and this raises the question of whether there is a need for them to be funded by NSFAS.

In the post-1994 era, South African prisoners have increasingly become aware and educated about their rights as prisoners as expressed in the Constitution, but more specifically about the provisions of the Correctional Services Act and, more recently, of the aspirations of the White Paper on Corrections. The risk is that prisoners may become frustrated at the gap between their rights and the reality, which may contribute to increased tension levels at operational level. Funding prisoners might be challenging in many ways, factors such as how will the funds get to the facilities, who will qualify for NSFAS funding while in prison and the moot point on the prospects of recovery.

The Open Society Foundation of South Africa 2015 maintains that it is unfair for prisoners to benefit from funding by NSFAS when law-abiding young people find it difficult to pay for higher education. Others simply believe that the purpose of incarceration is to punish criminals and that to offer funding to higher education will mitigate this punishment and perhaps reduce the deterrent value of a prison sentence. Recent studies have tried to account for this effect by comparing individuals who participated in educational programming while in prison with those of similar background and motivation levels who did not. Research shows that in the period of three years, most of the ex-offenders after their release from prison, committed crime and went back to prison. The Open Society Foundation 2014 states that in South Africa, about 54 % of the ex-offenders return to prison in a period of three years due to the socio-economic conditions (poverty, inability to find employment and rejection among the societies).

However, caution must be made that the majority of those who re-offend never furthered their studies in higher education whilst in prison. The study further shows that the majority of those who re-offend do not possess a post-matric qualification. According to University of Cape Town (UCT), over 68% of the prisoners who have served their terms between 2010 to 2013 are on parole and under correctional supervision - they are not

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<sup>29</sup> Canadivo, M. & Dignan, J. (1992). *The Penal System: An Introduction*. London: Sage Publications

formally employed. This raises the question of recovery from such previously funded students. The paper does not however, suggest that prisoners should not be granted funding. The reality of the situation is that the issue of recovery of loans to further assist more students is topical.

The salient question: how does the NSFAS treat the funding of the juveniles who are likely to be released and employed again? This again shows that there is a need to ring fence the funding of prisoners. The UNIZUL cooperation agreement is another example that shows how this could be undertaken. While research shows that this is likely to pose a host of challenges for NSFAS especially in light of the new student centred model where the purpose is to develop a direct relationship with students, especially for students registered with UNISA, where they cannot access basic services such as internet.

### ii. Pensioners

Many pensioners' are enrolling in higher education due to their reduced work commitments and their ability to spend more time studying. They enroll for university courses for recreational purposes to keep their minds active and pursue a long-term interest, such as art history or literature. Their participation in higher education is not about furthering their careers, but the sense of widening knowledge through reading and learning. If the funding of the pensioners is to continue, there may need to be some consideration given to how this funding can be used to “pay it forward”, particularly given the likelihood of recoverability. For example, should the age of retirement for these students be reviewed, funded pensioners may then provide advice and retraining through the national skills strategy and a new “all-age” careers service could be set up to help people find jobs.

## LESSONS FROM ELSEWHERE

### i. The funding of prisoners

The United States of America (USA) has what is known as the Pell Grants. Pell Grants have been directed to funding prisoners in higher education. Below are some useful lessons from these:

- Providing higher education improves formerly incarcerated people's chances of getting a job and teaches critical thinking skills, boosts self-respect and self-esteem, and improves judgment;
- It increases the likelihood that children of formerly incarcerated people get a good education; and

- When ex-prisoners incarcerated students return to the community they commit fewer crimes, are more likely to start their own businesses, and have a higher level of civic engagement.

Policymakers are often reluctant to take positions that could be labelled “soft on crime.” From their perspective, the idea of offering funding to prisoners to higher education can be a hard sell. Nonetheless, research provides strong evidence that it can improve conditions within correctional facilities, enhance prisoner self-esteem and prospects for employment after release from prison, and function as a cost-effective approach to reducing recidivism.

### ii. The funding of older students

In England, access to higher education is not only reserved for younger people. All those who want to study are eligible for funding under what is described as lifelong learning. This is important as previously, students in England were eligible for a loan to cover tuition fees only if they were younger than 54. Latest figures show that only 1,940 undergraduates in 2014 who began studying for higher education were older than 60, out of a total of 552,240 students in Britain. Some 6,455 were aged between 50 and 60<sup>30</sup>. Older students take university courses for recreational purposes to keep their minds active and pursue a long-term interest, such as art history or literature. However, caution needs to be made to the fact that England has a developed economy; its socio-economic background is far different from South Africa.

## RECOMMENDATIONS

### i. The funding of students who are awaiting trial or incarcerated

The need for NSFAS to determine policy on this issue will be tested by the current application by Zithulele Mpange<sup>31</sup> and others to the South Gauteng High Court for non-funding and apparent “mistreatment” of prisoners by NSFAS administrators. The basis of this application is that the terms of their sentences are less than 10 years, with some of the applicants having served between 1 and 4 years. While they are arguing their case on the basis of the Constitution, section 29 1a, precedent was set in the Dhlamini case wherein it was argued that government needs to “redress the imbalances and legacies of the past” and in which it was indicated that - in the absence of a specific clause in any of the NSFAS rules - prisoners should be funded. Prior case law on this

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<sup>30</sup> Institute for Higher Education Policy. 1994. Pell Grants: Are Prisoners the Program’s Biggest Problem? *Policy Steps* 1(1): 1-2, 7.

<sup>31</sup> See *Zithulele Mpange and others vs National Student Financial Aid Scheme, 2014/05444*.

issue shows that where the rights of prisoners to access further education (and by extension, the right to use the internet to access teaching and learning support materials) are concerned, the courts find in favour of the applicant<sup>32</sup>. The need for NSFAS to determine policy on this issue is therefore clear.

There is a need for standardized means test that should be used for different categories of prisoners, especially the juveniles. On the other hand, the cooperation agreements have demonstrated the funding of prisoners requires a joint initiative to succeed. Five core elements should be reflected against:

*a. The different categories of prisoners*

There is a need to consider the policy positions within each of the three broader categories of prisoners, namely, those serving on parole, those incarcerated in detention centres and the juvenile centres.

*b. Age*

There is a need to ring-fence the age for the prisoner's applicants.

*c. The value of partnerships in ensuring success*

The UNIZUL success offers useful insights of how these joint initiatives between contact and distance institutions regarding the funding of prisoners can be managed.

*d. Constitutional Position*

The government established NSFAS as a loan and bursary scheme towards fulfilling its constitutional obligation of ensuring access to higher and further education to poor students. Section 29 (1) (a) of the Constitution of South Africa enshrines the fundamental right to basic education, including adult basic education. Section 29(1) (b) provides for the right to further education, (university education and technical education). Significantly, the Correctional Services Act 1998 clearly indicates that it is the responsibility of DJCS to ensure that the justiciability of socio-economic rights and rehabilitation is undertaken. While the government has an obligation, to progressively, through reasonable measures, make this education available and accessible to all. This resonates with the Freedom Charter, which states that "Education shall be free, compulsory and universal for all children"; and "higher education and technical training shall be open to all by means of allowances and scholarships, awarded based on merit. The Constitution (and Freedom Charter) does not identify further and higher education as a fundamental right in the same way it does basic education, nor does it promise "free" further and higher education.

*e. Correctional Services Act 1998*

The Correctional Services Act and the White Paper places a duty on the DJCS not the NSFAS.

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<sup>32</sup> See *Nabolisa vs Minister of Correctional Services* 2013/7446

### ii. The funding of older students

NSFAS does not currently specify an age limit for applicants, and as such, may not currently exclude applicants from applying. However, while the Constitution of South Africa supports the notion that the State should take reasonable measures to achieve the progressive realisation of the availability and accessibility to “a basic education, including adult basic education; and to further education”, this may preclude higher education, particularly given the fiscal constraints in the budget. While the National Development Plan suggests that participation rates in higher education could be augmented by recruiting increasing numbers of “non-traditional” learners – including mature adults, this is further supported by data demonstrating that the proportion of elderly persons – over 60 years age - with completed higher education has increased from 1996 (4, 5%) to 2011 (8.4%), reflecting an appetite for enrolling in higher education amongst the elderly.

There is no evidence that suggest that the country’s future economic success would depend on the skills and contributions of pensioners as they are already not engaged in the main stream economy. The majority of NSFAS funded pensioners are above the 55 years of age. The funding of pensioners should be reviewed as matter of urgency and an age cut-off for applicants needs to be developed.

## CONCLUSION

The notion of offering funding for higher education to prisoners can be a hard sell. Nonetheless, research provides strong evidence that HE can improve conditions within correctional facilities, enhance prisoner self-esteem and prospects for employment after release from prison, and function as a cost-effective approach to reducing recidivism but this is not the case in South Africa.

The idea of offering funding to higher education to prisoners needs to be re-examined in order to provide clear guidelines on how this could be achieved. The joint partnership between the DJCS has proved that it can be successful initiative if it has the input and commitment from all the stakeholders. Again, the higher graduation rates show that the funding of prisoners cannot be historically ignored. In cases of juveniles, there is a strong case if funded, they are likely to be re-employed and could participate productively in the economic sector of the economy. This will need a closer cooperation with the DJCS as to how this could be achieved.

The majority of NSFAS funded pensioners are above the 55 years of age. This raises the question of recovery of the loans that are granted to them. It should be noted that there are different categories of pensioners, for medical pensioners, a case can be made that there needs to be a ring-fenced or certain parameters that they used for their

funding especially in light of the situation where demand has exceeded supply for the funding in higher education. The case of Dhlamini has showed that in the absence of the clear guidelines on or any form of distinction on funding of pensioners this will result in a host of legal challenges especially when read in line with section 29(1) (a) and (b) of the Constitution.

It is therefore necessary for NSFAS to make in-principle policy recommendations for consideration in the 2017 academic year, and to begin the process of communicating these decisions to other stakeholders.

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