

HELD AT THE KEMPTON PARK CIVIC CENTRE

JOHANNESBURG

**THE COMMISSION OF INQUIRY INTO HIGHER EDUCATION AND TRAINING  
("THE FEES COMMISSION")**

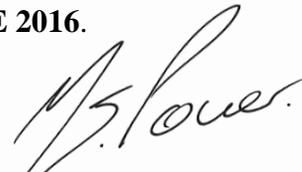
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**FILING SHEET**

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**KINDLY TAKE NOTICE THAT** *written submissions* on behalf of Students for Law and Social Justice ("SLSJ") are hereby presented for filing.

DATED AT JOHANNESBURG ON THIS THE 30<sup>th</sup> DAY OF JUNE 2016.



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**TO: THE SECRETARY OF THE FEES COMMISSION**

HELD AT THE KEMPTON PARK CIVIC CENTRE

JOHANNESBURG

**THE COMMISSION OF INQUIRY INTO HIGHER EDUCATION AND TRAINING**

**(“THE FEES COMMISSION”)**

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**WRITTEN SUBMISSIONS ON BEHALF OF STUDENTS FOR LAW AND SOCIAL**

**JUSTICE (“SLSJ”)**

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## 1. OVERVIEW OF SUBMISSIONS

- 1.1. Students for Law and Social Justice (“**SLSJ**”) is a South African students organisation dedicated to protecting human rights, preventing discrimination and promoting social justice and the rule of law in public higher education institutions (“**institutions**”) across the country. SLSJ was formed in 2008, and has 15 branches at 11 institutions, with approximately 3 500 members. The partnerships between the students of diverse institutions continue to be forged with the aim of access to justice and transformation of the educational sector.
- 1.2. These submissions are made with a view to provide a student-driven perspective on the constitutional and social issues being considered by the Commission of Inquiry into Higher Education and Training (“**Fees Commission**”), and they are the product of provincial and national consultations as well as calls for submissions from individual members (see para 2.15). SLSJ considers it part of its mandate, as well as its duty, to contribute positively towards the full realisation of the right to higher education. It must be emphasised that SLSJ does not, however, purport to speak on behalf of all students, and acknowledges that the experiences of students across the country differ significantly.
- 1.3. SLSJ recognises that education has the ability to alter the lived realities of the historically oppressed, as well as open the doors of opportunity to those whom society has traditionally relegated to subservience and poverty. Thus, universal availability and access to further education is an aspiration all peoples should seek to realise. Education yields the benefit of bearing returns on investments made for the proliferation of this right. Significantly, education edifies the human existence in enabling individuals to pursue lives in which they can maximise their potential. While basic education is key in this regard, accessing opportunities for further education significantly enhances a person’s prospects of a meaningful existence.
- 1.4. The Constitution of the Republic of South Africa, 1996 (“**the Constitution**”), the basis of SLSJ’s submission, envisions a society that improves the quality of life of all people and

frees their potential. The continued marginalisation of people based on their circumstance and position in society is abhorrent and must be addressed as matter of urgency. The right to further education is located in section 29(1)(b) of the Constitution and, importantly, it also finds reference in international law (**see sections 3 and 4**). It is in the light of these empowering provisions that SLSJ has envisioned and proposed its suggested model of financial funding -- a sliding-scale -- and its recommendations (**see section 7**). SLSJ's engagement with this issue is grounded in the understanding that the right to further education must be made progressively available and accessible (**see sections 5 and 6**), and that it is a constitutional imperative and obligation under international law that further education become universally available and accessible, over time.

- 1.5. As a starting point, *admissions policies* are vital to the success of the proposed sliding-scale in facilitating redistributive access to institutions. Spaces in institutions must be awarded with the goal of transforming a vastly unequal society. It is submitted that the admissions policies of various institutions must be reviewed as a space in which to effect redress of past and present injustices. It is submitted that only when the student body is racially representative that redistribution of access will be constitutional. Further, it is an imperative that marginalised groups are afforded the protection guaranteed by the Constitution in admissions. This is vital to the promotion of human dignity and ensuring that the best interests of the student are protected and promoted.
- 1.6. Importantly, the *affordability* of further education is a barrier to access to the majority of prospective students and is a system that requires redress. SLSJ submits that the implementation of a progressive sliding-scale model of governmental subsidisation directly to students, not as a collective but as individuals, must ensure that personal circumstances of a student (including the best interests of the student, any forms of disadvantage, socio-economic disparities, and historic or continuing social systems or structures) must be accurately accounted for. This model, inversely-proportionate in its nature, gives effect to progressive realisation of the right to further education as mandated by the Constitution. The model also serves as a useful mechanism in addressing the unequal realities of prospective and current students, and should be implemented, as a matter of *urgency*, in the

short-, medium- and long-terms by the *implementation team* suggested by SLSJ (see **recommendation 7.3.1**).

- 1.7. SLSJ views *fee-free* further education as a term that must be understood relatively. SLSJ submits that immediate realisation of fee-free further education *for all* would serve to benefit the advantaged in society to the detriment of the overburdened poor. SLSJ submits that a progressive system aimed at redress, redistribution of wealth and the provision of access to education to those most in need, implemented as a matter of urgency, is a pragmatic solution to South Africa's harsh economic reality. SLSJ submits that government can make use of a model based on substantive equality where those most in need are assisted at the justifiable expense of those wholly able to pay, but that no retrogressive measures should be implemented in the pursuit of realising the right to further education, save for measures designed to redress the injustices of the past.
- 1.8. On the question of availability of resources, SLSJ submits that it is not appropriate to read the availability of resources into section 29(1)(b) as a justification, in and of itself, that can be relied on by the state for non-fulfilment of the right but it may be a component in assessing the reasonableness of measures taken. It should therefore be incumbent on the state and all relevant stakeholders, including the institutions, involved in realisation of the higher education framework, to work to constantly develop a system that accommodates legitimate concerns, needs and aspirations of students.
- 1.9. SLSJ calls for public involvement and transparency in the Fees Commission and stresses the importance of the role of civil society. It calls on the President to urgently consider the findings and recommendations of the Fees Commission and to report to the public on the implementation of its recommendations.

## 2. INTRODUCTION

### *Background*

2.1. In *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another*,<sup>1</sup> Deputy Chief Justice Dikgang Moseneke (as he then was) stated poignantly as follows:

“[1] Teaching and learning are as old as human beings have lived. Education is primordial and integral to the human condition. The new arrivals into humankind are taught and learn how to live useful and fulfilled lives. So education’s formative goodness to the body, intellect and soul has been beyond question from antiquity. And its collective usefulness to communities has been recognised from prehistoric times to now. The indigenous and ancient African wisdom teaches that “*thuto ke lesedi la sechaba*”; “*imfuno yisibani*” (education is the light of the nation) and recognises that education is a collective enterprise by observing that it takes a village to bring up a child.

[2] Of this Aristotle, Immanuel Kant, Karl Marx, Mahatma Gandhi, Helen Keller, Nelson Mandela, Kofi Annan, Malala Yousafzai, the Holy Bible, Buddha, and the Holy Quran have said:

“Education is an ornament in prosperity and a refuge in adversity.” – Aristotle

“How then is perfection to be sought? Wherein lies our hope? In education, and in nothing else.” – Immanuel Kant

“The education of all children, from the moment that they can get along without a mother's care, shall be in state institutions.” – Karl Marx

“If we want to reach real peace in this world, we should start educating children.”  
– Mahatma Gandhi

“Education should train the child to use his brains, to make for himself a place in the world and maintain his rights even when it seems that society would shove him into the scrap-heap.” – Helen Keller

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<sup>1</sup> [2016] ZACC 14 at paras 1-3.

“Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mineworker can become the head of the mine, that a child of a farmworker can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another.” – Nelson Mandela

“Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy and sustainable human development.” – Kofi Annan

“There are many problems, but I think there is a solution to all these problems; it’s just one, and it’s education.” – Malala Yousafzai

“My people are destroyed for lack of knowledge.” – The Holy Bible: Hosea 4:6

“To have much learning, to be skillful in handicraft, well-trained in discipline, and to be of good speech – this is the greatest blessing.” – Buddha

“Are those equal, those who know and those who do not know? It is those who are endowed with understanding that receive admonition.” – The Holy Quran: Surah Al Zumar 39:9

[3] Despite these obvious ancient virtues, access to teaching and learning has not been freely and widely accessible to all people at all times. All forms of human oppression and exclusion are premised, in varying degrees, on a denial of access to education and training. The uneven power relations that marked slavery, colonialism, the industrial age and the information economy are girded, in great part, by inadequate access to quality teaching and learning.”

2.2. It is through this lens that we ask that these submissions be considered. There has been a reawakening of consciousness in higher education institutions (“**institutions**”) in South Africa. This reawakening has harkened the aspirations of people oppressed as expressed in their remembrance of the Freedom Charter:<sup>2</sup> “The doors of Learning and Culture shall be Opened!”<sup>3</sup> Yet the lived reality of many is that these doors to learning remain closed and inaccessible.

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<sup>2</sup> The Freedom Charter, adopted at the Congress of the People, Kliptown, 26 June 1955.

<sup>3</sup> Id.

- 2.3. South Africa's democratic project has liberated it from the inhumanity of apartheid, yet the pervasive degradation of the regime's policies continue to erode one of the South Africa's founding constitutional values: dignity. The apartheid administration systematically disenfranchised and dispossessed the majority of South Africans, condemning future generations to the inheritances of substandard education and concomitant poverty. In this regard, the apartheid education policy of Bantu Education has been described as having "fostered an entire lost generation of unskilled and angry black people in the townships of South Africa."<sup>4</sup>
- 2.4. Education is integral to restoring dignity to the many who continue to be disempowered. The importance of education cannot be gainsaid. In addition to being a right in and of itself, it is further an empowerment tool and a conduit to the realisation of other human rights. It is necessary to ensure that further South African generations do not fall into an educational vacuum.
- 2.5. The Fees Commission was established during a period of high tumult in our country, with wide-spread student protests, the likes of which had not been seen in South Africa in the post-democratic era. The message from the students was clear: business as usual would no longer be tolerated, and that the time for change was now.

*The proper approach of commissions of inquiry generally*

- 2.6. Commissions of inquiry in South Africa are established by proclamations of the President under section 84(2)(f) of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"). They are also governed by the Commissions Act.<sup>5</sup> The mandate of each commission of inquiry is set out in its terms of reference, in this case Terms of

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<sup>4</sup> Devenish "Aspects of the right to education in the Constitution" (1998) 31 *De Jure* 224 at 225.

<sup>5</sup> 8 of 1947.

Reference of the Commission of Inquiry into Higher Education and Training<sup>6</sup> (“**Terms of Reference**”). Commissions of inquiry are given various powers, and are typically empowered to issue regulations detailing the procedures to be followed.

- 2.7. For the purposes of the Fees Commission, the Commissioners are called upon to ascertain one key question: *the feasibility of making higher education fee-free in South Africa*. The role of the Fees Commission can therefore best be described as investigative, rather than adjudicative. The Fees Commission is enjoined to adopt a flexible approach to assessing the factual issues and making findings accordingly; it is not required to make determinations in line with a burden of proof that would be required in court proceedings.<sup>7</sup>
- 2.8. This approach is consistent with the legal standards used by commissions of inquiry generally, and is also an approach which best gives effect to the role of a commission as a mechanism to assist the President in the discharge of his or her obligations under the Constitution. The following passage from a decision of the Constitutional Court sums up the role of a commission of inquiry:

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<sup>6</sup> Terms of Reference of the Commission of Inquiry into Higher Education and Training, attached to Proclamation No. 1 of 2016 (GN 39608, 22 January 2016). The Terms of Reference state, in relevant part, that:

“The [Fees] Commission shall enquire into, make findings, report on and make recommendations on the following:

1. The feasibility of making higher education and training (higher education) fee-free in South Africa, having regard to:
  - 1.1 the Constitution of the Republic of South Africa, all relevant higher and basic education legislation, all findings and recommendations of the various Presidential and Ministerial Task Teams, as well as all relevant education policies, reports and guidelines;
  - 1.2 the multiple facets of financial sustainability, analysing and assessing the role of government together with its agencies, students, institutions, business sector and employers in funding higher education and training; and
  - 1.3 the institutional independence and autonomy which should occur vis a vis the financial funding model.”

<sup>7</sup> This was accepted, for instance, by the Marikana Commission of Inquiry, *Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin mine in Marikana, in the North West Province*, 31 March 2015 at 20.

“A commission of inquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he or she can obtain information and advice.”<sup>8</sup>

2.9. In addition to the information gathering and advice-giving role, commissions play a deeper public purpose. The Constitutional Court has explained that:

“In addition to advising the executive, a commission of inquiry serves a deeper public purpose, particularly at times of widespread disquiet and discontent. In the words of Cory J of the Canadian Supreme Court in *Phillips v Nova Scotia*:

‘One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover ‘the truth’ . . . In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.’”<sup>9</sup>

2.10. While the information gathered before the Fees Commission must be credible and subject to proper assessment, it is submitted that this need not necessarily satisfy a civil or criminal standard required by a court of law. Adopting such an approach would stultify the information-gathering, advice-giving, and the public purpose which lie behind the establishment of a commission. When a commission adopts a standard of proof, it should be a standard which is best suited to the underlying objects of the commission, as noted in the two decisions of the Constitutional Court mentioned above. We submit that a *prima facie* or ‘sufficiency’ standard is the appropriate standard to be adopted by the Fees Commission.

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<sup>8</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 at para 147.

<sup>9</sup> *Minister of Police and Others v Premier of the Western Cape and Others* 2014 (1) SA 1 (CC) at para 45.

***The meaning of “further education” / “higher education”***

- 2.11. We note at the outset that, while section 29(1)(b) of the Constitution uses the phrase “further education”, the Terms of Reference refer to “higher education”. For the purpose of these submissions, we consider the terms as interchangeable.
- 2.12. In its consideration of these issues, we urge the Fees Commission to adopt a broad, all-inclusive interpretation. We note that the Terms of Reference refer expressly to both “higher education and training”, which we submit is consonant with Bekker’s approach,<sup>10</sup> as well as the Further Education and Training Colleges Act<sup>11</sup> and the Higher Education Act,<sup>12</sup> which should be read together.<sup>13</sup>

***Students for Law and Social Justice and the ambit of its submissions***

- 2.13. SLSJ is a South African students organisation dedicated to protecting human rights, preventing discrimination and promoting social justice and the rule of law in institutions across the country. SLSJ was formed in 2008, and has 15 branches at 11 institutions, with approximately 3 500 members. The partnerships between the students of diverse institutions continue to be forged with the aim of access to justice and transformation of the educational sector.
- 2.14. These submissions are made with a view to provide a student-driven perspective to the constitutional and social issues being considered by the Fees Commission. SLSJ considers

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<sup>10</sup> Bekker “The right to education in the South African Constitution” in Mashava (ed) *A Compilation Of Essential Documents On The Right To Education 2000 (2)* Pretoria: Centre for Human Rights at 9.

<sup>11</sup> 16 of 2006, which defines further education and training as: “all learning and training programmes leading to qualifications from levels 2 to 4 of the National Qualifications Authority Act, which levels are above general education but below higher education.”

<sup>12</sup> 101 of 1997, which defines higher education and training as “any learning programmes leading to qualification higher than grade 12 or its equivalent in terms of the National Qualifications Framework as contemplated in the South African Qualifications Authority Act . . . and includes tertiary education as contemplated in Schedule 4 of the Constitution.”

<sup>13</sup> Id at section 1.

it part of its mandate, as well as its duty, to contribute positively towards the full realisation of the right to higher education. It must be emphasised that SLSJ does not, however, purport to speak on behalf of all students, and acknowledges that the lived experiences of students across the country differ significantly.

2.15. In preparing these submissions, SLSJ has sought to consult extensively within its membership in order to reach this common position. To this end, it is noted that:

2.15.1. SLSJ obtained written submissions from the following branches: the University of KwaZulu-Natal's Pietermaritzburg Campus; the University of KwaZulu-Natal's Howard College; the University of Pretoria; the University of Fort Hare; Stellenbosch University; Varsity College, Durban North; the University of Cape Town; the University of the Witwatersrand; the University of the Western Cape; Varsity College, Westville; the Walter Sisulu University; the University of the Free State; and Varsity College, Sandton. SLSJ also put out a call for submissions from individual members.

2.15.2. Thereafter, the National Executive, chairpersons of the various branches and members of SLSJ held a 3-day national consultation from 24-26 June 2016, in Muldersdrift, Gauteng, in order to discuss and debate the position taken in the submissions, and select the most appropriate approach to take going forward. This consultation followed an engagement at the Nelson Mandela Centre of Memory, at which the participants discussed former President Mandela's legacy on education.

2.15.3. Following the consultation, an advisory committee was established to work alongside legal representatives at the Legal Resources Centre ("**LRC**") in order to finalise this submission.

2.16. SLSJ's submissions are made in accordance with item 1.1 to 1.3 of the Terms of Reference. In this regard, SLSJ seeks to assist the Fees Commission by providing a constitutional vantage point from which to view the salient issues. Informed by its

commitment to the tenets of the Constitution and its interpretation clause, SLSJ seeks to assist the Fees Commission by--

- 2.16.1. constructing the constitutional and international law framework which may inform and guide the political and economic questions in the current debate on fee-free further education;
- 2.16.2. framing the national dialogue on fee-free further education through the purposive and contextual interpretations of the guiding constitutional principles on progressive realisation; and
- 2.16.3. making practicable recommendations, sourced from SLSJ student members, to assist the Fees Commission in fulfilling its mandate.

2.17. These submissions are structured as follows:

- 2.17.1. First, we set out the constitutional framework for further education;
- 2.17.2. Second, we set out the international law framework for further education;
- 2.17.3. Third, we examine the relevant principles regarding progressive realisation;
- 2.17.4. Fourth, we set out the practical considerations relevant to the realisation of the right to further education; and
- 2.17.5. Lastly, we identify that the findings and recommendations that SLSJ seeks the Fees Commission to make.

2.18. We deal with each of these in turn below.

### 3. THE CONSTITUTIONAL FRAMEWORK FOR FURTHER EDUCATION

#### *The relevant constitutional provisions*

- 3.1. Section 1 of the Constitution provides that South Africa is founded on the values of, among other things, “human dignity, the achievement of equality and the advancement of human rights and freedoms”, as well as “accountability, responsiveness and openness”. In terms of section 7(2) of the Constitution, the state is required to respect, protect, promote and fulfil the rights in the Bill of Rights.
- 3.2. As will be dealt with in more detail below, we submit that the rights to human dignity and education are inextricably linked.
- 3.2.1. In relation to dignity, section 10 of the Constitution provides: “Everyone has inherent dignity and the right to have their dignity respected and protected”.
- 3.2.2. In relation to further education, section 29(1)(b) of the Constitution provides: “Everyone has the right to further education, which the state, through reasonable measures, must make progressively *available and accessible*”. (Own emphasis.)
- 3.3. There are three key features of section 29(1)(b) that must be noted:
- 3.3.1. The right to education, both basic education and further education, is the only socio-economic right contained in the Bill of Rights that is not expressly circumscribed in its wording by the availability of resources.<sup>14</sup>
- 3.3.2. In realising the right to further education, the state is enjoined to take measures that are reasonable.

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<sup>14</sup> This distinguishing feature is noted by Budlender, who stated that: “[W]ith the exception of the right to education, the social and economic rights define the positive obligation of the state as follows: it is an obligation to ‘take reasonable legislative and other measures, within its available resources, to achieve progressive realisation’ of the right.” See Budlender “20 Years of Democracy: The State of Human Rights in South Africa” (2014) *Stell LR* 439 at 441.

- 3.3.3. The right to further education must be made progressively available and accessible.
- 3.4. When interpreting section 29(1)(b), as read with the right to dignity in section 10, the Fees Commission is required to have regard to the interpretation clause contained in section 39 of the Constitution, which states:
- “(1) When interpreting the Bill of Rights, a court, tribunal or forum—
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law”.
- 3.5. There are two key aspects of section 39 that are relevant to the Fees Commission: (i) in conducting its work in interpreting the right to further education, the Fees Commission is required to promote the values underlying an open and democratic society; and (ii) the Fees Commission is required to consider international law when interpreting the relevant provisions under the Constitution, which includes both binding and non-binding instruments.<sup>15</sup>

***The drafting history of the right to further education as contained in section 29(1)(b)***

- 3.6. According to Malherbe,<sup>16</sup> an account of the various significant stages during the formulation of the education clause may assist in a better understanding of the section. Malherbe postulates that the section found its beginnings in the South African Law Commission on Group and Human Rights.<sup>17</sup> The latter’s initial working paper espoused the view that socio-economic freedoms, capacities and competencies were not to impose

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<sup>15</sup> *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391; 1995 (6) BCLR 665 at para 35.

<sup>16</sup> Malherbe, “Reflections on the background and contents of the education clause in the South African Bill of Rights” (1997) *TSAR* (1) 85.

<sup>17</sup> *Id.*

positive obligations on the state.<sup>18</sup> This view found disfavour as it was inimical to accepted international norms and practices at the time. The revised offering envisaged, amongst other things, free education at primary level and equal access.<sup>19</sup> The most significant aspect of the Law Commission's contributions, at that stage, was the introduction of the notion of a bill of rights more than an extensive account of the right to education. This provided an entry point for political considerations on socio-economic rights in general, and the right to education in particular. Political submissions either couched the right within a broad conception of rights or made specific reference to the right as contextualised by contested political spaces.<sup>20</sup>

- 3.7. During the negotiation process at Kempton Park in 1993, the technical committee on a bill of rights advised negotiators on a right of equal access to state or state-aided institutions.<sup>21</sup> The Technical Committee deemed it necessary to make remarks on the right, given the urgent need for redress of the inequalities in the educational sector. As a result, the Interim Constitution contained the right to basic education and equal access to educational institutions.<sup>22</sup> Subsequently, in October 1995, section 23 of the first draft Bill of Rights (“**the October draft Bill**”) encapsulated the right to further education, which “the state must take reasonable and progressive legislative and other measures to make generally available and accessible”.<sup>23</sup>
- 3.8. The Constitution's education clause is nuanced. It is a compromise that frustrated negotiations such that the Constitution Bill was published on 22 April 1996 without there being finality pertaining to section 29.<sup>24</sup> The final product, a creature of compromise, is

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<sup>18</sup> SA Law Commission Working Paper 25, Project 58: Group and Human Rights (1989) at 429.

<sup>19</sup> SA Law Commission Project 58: Interim Report on Group and Human Rights (1991) at 495.

<sup>20</sup> African National Congress *A Bill of Rights for a New South Africa* (1990), *Government Proposals on a Charter of Fundamental Rights*, 2 February 1993. Both resources are discussed in Malherbe 16 16.

<sup>21</sup> First Progress Report, Technical Committee on Fundamental Rights during the Transition, 14 May 1993.

<sup>22</sup> Section 32(a) of the Interim Constitution of South Africa Act 200 of 1993.

<sup>23</sup> Constitutional Assembly: Constitutional Sub-committee: Draft Bill of Rights, 9 October 1995.

<sup>24</sup> This was primarily due to political stalemates around section 29(3). There were various proposals yet negotiations could not yield a settled provision. Issues of language, cultural and religion spurred tensions over their use in potential discrimination weighed against their protection as rights. Discussed in Malherbe above n 16 at 94.

the section 29 as it appears in the Constitution. Notably, section 29(1)(b) of the Constitution differs from section 23 of the October draft Bill where the former no longer explicitly requires the state's fulfilment of this obligation to be of a legislative nature. The use of "generally" has also been discarded, indicating a movement toward enshrining a direct right to basic and further education, and not simply a right of access.

### ***Education as an empowering right***

3.9. It has often been recognised that education is indispensable to the achievement of an individual's self-actualisation and broader socio-economic upliftment. In this regard, it has been noted that:

“As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”<sup>25</sup>

3.10. Education has the ability to alter the lived realities of the historically oppressed, as well as open the doors of opportunity to those whom society has traditionally relegated to subservience and poverty. Thus, universal education is an aspiration all peoples should seek to realise. Education yields the benefit of bearing returns on investments made for the proliferation of this right. Significantly, education edifies the human existence in enabling individuals to pursue lives in which they can maximise their potential. While basic education is key in this regard, accessing opportunities for further education significantly enhances a person's prospects of a meaningful existence.

3.11. It follows, therefore, that realising the right to education is also key to living a dignified life:

“[E]ducation shall be directed to the human personality's 'sense of dignity', it shall 'enable all persons to participate effectively in a free society', and it shall promote understanding

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<sup>25</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education (Article 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10.

among all ‘ethnic’ groups, as well as nations and racial and religious groups. . . . [E]ducation shall be directed to the full development of the human personality.”<sup>26</sup>

3.12. According to Liebenberg, dignity centres on “the injunction to respect the intrinsic worth of all human beings.”<sup>27</sup> Education has been widely acknowledged as engendering dignity. Accordingly, giving effect to the spirit, purport and objects of the Bill of Rights, it places an obligation to respect the intrinsic worth of humanity.

3.13. With regard had to the current debate on access to higher education and training, this injunction requires increased access and availability to a wider cohort of the nation. Valuing human beings, a further facet to dignity, implies considering an individual in the context of their lived reality and in view of their potential. This may require engagement outside of proliferated social constructs, as observed by Devenish.<sup>28</sup> An enabling environment must therefore be created to foster the envisaged access and availability. Liebenberg advocates that we must develop appropriate responses to conditions of disadvantage and material deprivation in social policy if we are to uphold ourselves as a society that values human dignity.<sup>29</sup>

3.14. Such response would be akin to the collective acknowledgment that we are diminished as a society to the extent that any of our members are deprived of the opportunities to develop their basic capabilities to function as individual and social beings.<sup>30</sup>

3.15. We therefore urge the Fees Commission to recognise that we are a diminished society where the right to education continues to be encumbered by social and economic considerations which act to the detriment of people seeking to achieve their potential. We turn next to consider the relevant international law framework. Thereafter, we examine the framework and practicalities of realising the right to further education

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<sup>26</sup> Id.

<sup>27</sup> Liebenberg “The Value of Human Dignity in Interpreting Socio-Economic Rights” (2005) 21 *SAJHR* 1 at 31.

<sup>28</sup> Devenish above n 4 at 225.

<sup>29</sup> Liebenberg above n 27 at 12.

<sup>30</sup> Id at 31.

#### 4. THE INTERNATIONAL LAW FRAMEWORK ON FURTHER EDUCATION

##### *The proper approach to international law*

4.1. As mentioned above, the Fees Commission is required to consider international law -- which includes both binding and non-binding instruments -- when interpreting the relevant provisions of the Bill of Rights. The importance and relevance of international law has been recognised on a number of occasions, and has frequently been relied upon by South African courts.

4.2. Dikgang Moseneke has noted that the Bill of Rights merits special attention for its embrace of international standards and norms:

“[The Bill of Rights] arguably represents the most prominent evidence of our subservience to international human rights standards. It is an ambitious, if not eclectic, collection of guarantees drawn freely from international human rights instruments and customary international law. The very text of most of the entrenched rights in the Bill tracks the language of international instruments in a way that affords us the facility to consider precedent and other prior authority. What is more, many of the rights echo our indigenous human values of ubuntu and the grundnorm of the Roman Dutch law. It must be said that our recognition and enforcement of socio-economic rights well surpass the social justice imperatives of international law.”<sup>31</sup>

4.3. While the Constitution remains the supreme law of South Africa, the provisions relating to international law nevertheless reflect an intentional shift away from pre-democracy disinclination to look to international law, to an express requirement to consider it.

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<sup>31</sup> Moseneke “The role of comparative and public international law in domestic legal systems: a South African perspective” *Advocate* (formerly *Consultus*) at 63-6, December 2010.

*The relevant international law instruments*

4.4. The right to education has been incorporated as a human right in various international law instruments. For instance, Article 26 of the Universal Declaration on Human Rights (“**UDHR**”) espouses that technical and professional education shall be made generally available, and higher education shall be equally accessible to all on the basis of merit.<sup>32</sup> The provision thereby introduces the concept of accessibility in the context of equitable vindication of the right. Such is the rhetoric employed by international and regional instruments in the construction of the right to education.<sup>33</sup> Notably, Article 26 states further that:

“Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.”

4.5. The right to education, specifically the right to higher education, is arguably set out most comprehensively in the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”).<sup>34</sup> In ratifying the ICESCR, South Africa voluntarily undertook the obligation -- to its citizens and to the international community -- to respect, protect and fulfil each of the rights within the Covenant. However, at the time of ratification, South Africa made the following reservation:

“The Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13(2)(a) and Article 14, within the framework of its National Education Policy and available resources.”<sup>35</sup>

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<sup>32</sup> Article 26 (1) of the Universal Declaration of Human Rights, 1948.

<sup>33</sup> Article 4(iii) of the UNESCO Convention against Discrimination in Education, 1960; Article 17(1) of the African Charter on Human and Peoples’ Rights, 1981; Article 11 (3)(c) of the African Charter on the Rights and Welfare of the Child, 1990; and Article 13(4)(f) of the African Youth Charter, 2006.

<sup>34</sup> The ICESCR was ratified by South Africa in 2015. See *Country Profile: South Africa*, Status of Ratification Interactive Dashboard: UN Office of the High Commissioner on Human Rights, 1996-2016.

<sup>35</sup> *Id.*

4.6. Article 13(1) of the ICESCR provides as follows:

“The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”<sup>36</sup>

4.7. Importantly, the language defines the right broadly, setting a framework of ideals for states to fully realise over time based on its available resources. As a state develops, it must take measurable steps to reach the next goal in fully realising the right to education. In the context of education, states have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of the right to education as laid out by the ICESCR and by national policies.<sup>37</sup> While states must prioritise the provision of free and compulsory primary education, they also have an obligation to take concrete steps towards achieving fee-free secondary and higher education for all.<sup>38</sup>

4.8. Article 13(2)(c) provides further -- in an aspirational tenor -- that “[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.”

4.9. The import of international law will be considered further below when interpreting the extent of the obligation relating to further education.

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<sup>36</sup> Article 13(1) of the ICESCR.

<sup>37</sup> General Comment No. 3 above n 25 at para 44.

<sup>38</sup> *Id.*

## 5. THE RELEVANT LEGAL PRINCIPLES RELATING TO THE REALISATION OF THE RIGHT TO FURTHER EDUCATION

### *Conceptualising progressive realisation*

- 5.1. As has been noted above, the wording in section 29(1)(b) differs from the other socio-economic rights provisions in the Constitution. Notably, it does not refer to “progressive realisation”, but rather to the obligation on the state to make further education “progressively available and accessible”; it also does not circumscribe the realisation of the right by the availability of resources. That said, in the absence of clear jurisprudence on the meaning and ambit of section 29(1)(b) specifically, it is nevertheless useful to examine what our courts have said regarding the progressive realisation of other socio-economic rights – bearing in mind that the duty on the state must be considered with regard to the fact that any failure to realise the right cannot be excused by resource constraints alone. Furthermore, we would emphasise that, given that there is no hierarchy of rights created under the Constitution, the realisation of the right to further education is as important, and as urgent, as the realisation of any other socio-economic right, not least of all because of the important role that education plays as an empowering right.
- 5.2. The Constitutional Court recognises that socio-economic rights have to be realised over time and the progress towards full realisation is dependent on a number of factors. Yet, this realisation has manifested differently in the Court’s adjudication of socio-economic cases with varied effect on the vindication of such rights. The key questions to be answered are the degree of obligation or expectation for immediate implementation; and the steps required of the state to satisfy its obligation to strive towards the enjoyment of the right to the fullest extent possible, even in the face of resource constraints. Both of these questions are squarely before the Fees Commission.
- 5.3. The importance of contextual considerations and its bearing on the realisation of socio-economic rights has been expressly recognised by the Constitutional Court. For instance, it was stated in *Soobramoney* that:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”<sup>39</sup>

- 5.4. In understanding the state’s performance in progressively realising rights, factual considerations need to be taken into account, including the actual socio-economic rights people enjoy at a given moment, as well as the state’s capacity of fulfilment.<sup>40</sup> For instance, existing levels of enjoyment of rights may act as a basis from which the state must work to further the reach and scope of the right; this is underpinned by observations that progressive realisation obligates the state to improve the nature and the quality of the services to which people have access.<sup>41</sup>
- 5.5. The Constitutional Court in *Government of the Republic of South Africa v Grootboom* (“**Grootboom**”) has held that the meaning of progressive realisation as used in the Constitution accords with the meaning espoused by the United Nation’s Committee on Economic, Social and Cultural Rights’ (“**the Committee**”) in General Comment No. 3.<sup>42</sup> The Committee’s definition indicates that the nature of progressive realisation comprises an element of flexibility in terms of the obligations of states and also in the enforcement of rights. The concept under the Committee’s formulation acknowledges that the

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<sup>39</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 SA 765 (CC) at para 8.

<sup>40</sup> Fukuda-Parr, Lawson-Remer & Randolph “Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfilment” (2008) 22 *Department of Economics Working Paper Series 7*.

<sup>41</sup> Liebenberg “Socio-Economic Rights Adjudication under a Transformative Constitution” (Juta, Cape Town 2010) 190.

<sup>42</sup> [2000] ZACC 19; 2001 (1) SA 46 (CC) (“**Grootboom**”) at para 45; UN Committee on Economic, Social and Cultural Rights *General Comment No. 3 The Nature of States Parties Obligations (Art 2, Para 1 of the Covenant)*, 14 December 1990, E/1991/23 at para 9.

implementation of such rights may not be immediate. There is nonetheless an obligation on states “to move as expeditiously and effectively as possible”<sup>43</sup> towards full realisation.

5.6. There are certain key components that may be distilled that are relevant to the considerations before the Fees Commission:<sup>44</sup>

5.6.1. **Both an immediate and a continuing obligation:** Although the Constitutional Court has shied away from the use of the term “minimum core”, it has recognised

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<sup>43</sup> General Comment No. 13 above n 25 at para 44.

<sup>44</sup> According to Currie & De Waal “The Bill of Rights Handbook” 5ed (Juta, Cape Town 2005) 576, the following four principles have emerged from international practice:

- “1. The fact that the full realisation of socio-economic rights can only be achieved progressively does not alter the obligation on the state to take those steps that are within its power immediately and other steps as soon as possible. The burden is on the state to show that it is making progress toward the full realisation of rights.
2. While the requirement that a state take ‘appropriate’ steps towards the realisation of the rights confers a considerable margin of discretion on states, there is nevertheless an obligation to justify the appropriateness of the measures adopted. The determination whether a state has taken all appropriate measures remains one for the Committee to make.
3. Resource scarcity does not relieve states of what the [Committee] terms ‘core minimum obligations. Violations of socio-economic rights will occur when the state fails to satisfy obligations to ensure the satisfaction of minimum essential levels of each of the rights, or fails to prioritise its use of its resources so as to meet its core minimum obligations. These core minimum obligations apply unless the state can show that its resources are ‘demonstrably inadequate’ to allow it to fulfil its duties. However, even when resources are scarce the obligation remains on the state to ‘strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances’.
4. It is important to distinguish the inability from the unwillingness of a state to comply with its obligations. The fact that obligations are to be realised progressively does not mean that the state may postpone its obligations to some distant or unspecified time in the future. A state claiming that it is unable to carry out its obligations because of resource scarcity is under a burden of proving that this is the case.”

In relation to minimum core obligations, see the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986 (“**the Limburg Principles**”), and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997 (“**Maastricht Guidelines**”). As stated at para 10 of the Maastricht Guidelines:

“In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.”

a basic standard of rights realisation; significantly, in *Khosa*,<sup>45</sup> it was stated that “[a] society must seek to ensure the *basic* necessities of life are accessible to all”.<sup>46</sup> This points to immediate action by the state in order to ameliorate desperate circumstances. This is further evident in constitutional pronouncements on alternative accommodation within the purview of section 26 of the Constitution.<sup>47</sup> It is apparent, therefore, that progressive realisation is both an immediate and continuing obligation: there is an immediate obligation to realise the right of those who are in acute positions of vulnerability; and a further obligation to roll out the right on a continuing basis to a wider demographic.<sup>48</sup> In *New Clicks*,<sup>49</sup> the Constitutional Court described the duty as one to “accelerate reasonable and progressive schemes to ameliorate vast areas of deprivation”.<sup>50</sup>

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<sup>45</sup> *Khosa v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (“**Khosa**”).

<sup>46</sup> *Khosa* id at para 52. In *Grootboom* above n 42 at para 33, the Court stated that “[t]here may be cases where it may be possible and appropriate to have regard to the content of here may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context.” However, on the facts before the Court, it was held that “[i]n this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution.”

According to Bilchitz, in attempting to avoid recognising a minimum core obligation, the Court has in fact incorporated an obligation to meet, at the very minimum, the short-term needs into the notion of reasonableness. See Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” 2003 *SAJHR* 111 at 149.

<sup>47</sup> *Occupiers of Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC); and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

<sup>48</sup> To this end, the Committee has noted that progressive realisation implies a specific and continuing obligation on states to, as much as possible, be expeditious and effective in working towards the full realisation of the right to education. See General Comment No. 13 above n 25 at para 44. Similarly, in *Grootboom*, above n 42 at para 45, the Constitutional Court observed that, despite the fact that the right to housing enshrined in section 26 could not be effected immediately, the state was nonetheless mandated to take steps toward ensuring that “the basic needs of all in our society be effectively met”.

<sup>49</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 8 BCLR 872 (CC) (“**New Clicks**”).

<sup>50</sup> Id at para 705. See also Chenwi, “Unpacking ‘Progressive Realisation’: Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Accessing Compliance” (2013) *De Jure* 39 at 47; and *Mazibuko v City of Johannesburg* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) (“**Mazibuko**”) at paras 40 and 67.

- 5.6.2. **The lowering of hurdles:** In line with the Constitutional Court’s interpretation, it is required that “legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time”.<sup>51</sup> For the Court, the concept necessitates the right being made more accessible to a greater number of people. This was not to be a purely quantitative exercise; instead, qualitatively, availability of the right is to extend to a wider range of people over time.<sup>52</sup>
- 5.6.3. **Reasonableness:** In *Grootboom*, the Constitutional Court confirmed that progressive realisation invoked a standard of reasonableness which was to be applied to state policy.<sup>53</sup> The Court also pronounced on instances where such policy is rendered unreasonable and that would be, in effect, deficient of what is conceptualised as progressive realisation. This is dealt with further below.
- 5.6.4. **Procedural fairness:** Progressive realisation entails inherently procedural government policies to address the substantive areas of socio-economic deficiencies. For instance, *Modderklip* states that “[t]he progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital”.<sup>54</sup>
- 5.6.5. **Policy review:** All policies adopted by the state to progressively realise rights require flexibility and adaptability, as well as proper implementation.<sup>55</sup> To this

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<sup>51</sup> *Grootboom* above n 42 at para 45.

<sup>52</sup> The Court has, however, been criticised on its apparent failure to engage this qualitative aspect in subsequent jurisprudence. See *Chenwi* above n 50.

<sup>53</sup> *Grootboom* above n 42 at paras 39-45.

<sup>54</sup> *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at para 48.

<sup>55</sup> *Id.* In *Grootboom* above n 42 at para 42, the Court stated that:

“Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and in their implementation. The formulation of a programme is only the first stage in meeting the state’s

end, it has been recognised that “policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved”.<sup>56</sup> As stated by the Constitutional Court, “[a] policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution”.<sup>57</sup>

- 5.7. With this in mind, we turn next to consider the specific requirements of section 29(1)(b) of the Constitution: firstly, the state’s obligation to take reasonable measures and, secondly, the obligation to make further education progressively available and accessible.

***The state’s obligation to take “reasonable measures”***

- 5.8. Section 29(1)(b) of the Constitution specifically requires the state to take “reasonable measures”. As mentioned above, reasonableness has been recognised as an element of progressive realisation. Of key importance in this regard is the Constitutional Court decision in *Grootboom*, in the context of section 26(1) of the Constitution.

- 5.9. In that case, Yacoob J held that the right of *access* to adequate housing differed from the right to adequate housing. The latter is a direct right whereas the former is a right of access. Particularly, the right of access conveys that the state must, through legislative and other measures, enable others in society, including individuals, to provide housing.<sup>58</sup> Those in positions of economic vulnerability require specific attention.<sup>59</sup> This acknowledgment feeds into the creation of an enabling environment for the continued realisation of the right. The content of progressive realisation under the auspices of section

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obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations.”

<sup>56</sup> *Mazibuko* above n 50 at para 40.

<sup>57</sup> *Id* at para 162.

<sup>58</sup> *Grootboom* above n 42 at para 35.

<sup>59</sup> *Id* at para 36.

26(2) contemplates a positive obligation on the state to devise a comprehensive and workable plan towards realisation of the right of access to adequate housing.

5.10. The Court qualified the obligation in identifying an internal limitation of the right. That is, the obligation is not absolute; it is qualified by reasonableness. This is in conjunction with the progressive nature of the right which the Court seems to read as implicating the resources available to the state.<sup>60</sup> Reasonableness in this context comprised clear allocation of responsibilities across the spheres of government with national government retaining overall responsibility.<sup>61</sup> This was coupled with a call for capacitation through financial means and human capital.<sup>62</sup> As such, the state is obliged to formulate a coherent and capable programme or policy that is aimed at the realisation of the right.<sup>63</sup> The standard of reasonableness does not take into account more favourable alternative policies in challenging the existing framework; rather, the enquiry is confined to the reasonableness of the measures taken in that context.<sup>64</sup>

5.11. The positive obligations on the state as imposed by the socio-economic clauses require more than mere legislative measures. In mandating the government to act, it is expected that legislative measures are buttressed by appropriate, pointed, executive-led and implemented policies and programmes.<sup>65</sup> The reasonableness standard applies to the implementation of the policy, not only to the policy itself. Further, effective implementation calls for “adequate budgetary support by the national government.”<sup>66</sup> Reasonableness considers the social, economic and historical context in which the right is to be realised.

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<sup>60</sup> Id at para 38.

<sup>61</sup> Id at para 40.

<sup>62</sup> Id at para 39.

<sup>63</sup> Id at para 41.

<sup>64</sup> Id.

<sup>65</sup> Id at para 42.

<sup>66</sup> Id.

5.12. The Court invoked the Bill of Rights during its reflections, more precisely the value it places on a human's inherent worth and dignity. There must thus be an endeavour to acknowledge and protect this intrinsic dignity by affording persons the basic necessities of life.<sup>67</sup> In terms of the section 26 right, the Court found no obligation on the state to do more than what was achievable within its resources.<sup>68</sup> However, progressive realisation of a right cannot be said to be reasonable where it does not make provision for the "immediate amelioration of the circumstances of people in a crisis situation."<sup>69</sup> The Court therefore dispelled the false dichotomy between immediate need and medium- and long-term objectives as both are envisaged in the progressive realisation of a right.<sup>70</sup> In sum, attention must be given to providing immediate relief, yet this is not to come at the cost of long-term continual measures.<sup>71</sup>

5.13. The constitutional formulation of the right of access to adequate housing and the right to further education reveal certain similarities, and differences. First, both are subject to reasonable measures to be introduced by the state for their realisation. Second, both are subject to progressive implementation. In as far as these similarities hold, it may be that the Court's prescribed treatment of the right of access to adequate housing, as with other socio-economic rights pronounced on, are applicable to the right to further education. However, the right to further education is distinguishable in that it is not constitutionally formulated to be contingent on resources available to the state. Neither is the right guaranteed one of access alone. Rather, it is a direct right to further education that is to be made progressively accessible and available by the state, through reasonable measures.<sup>72</sup> We turn next to consider the meaning and content of these terms.

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<sup>67</sup> Id at paras 43-4.

<sup>68</sup> Id at para 46.

<sup>69</sup> Id.

<sup>70</sup> Id at para 44.

<sup>71</sup> Id.

<sup>72</sup> Seleokane, "The Right to Education: Lessons from Grootboom" 2003 (7) *Law Democracy & Dev.* 137 at 150.

*The meaning and content of the terms “available” and “accessible”, and the related matter of affordability*

5.14. General Comment No. 13 on the right to further education as contained in the ICESCR states that:

“While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:

- (a) Availability - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;
- (b) Accessibility - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:
  - (i) Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds . . . ;
  - (ii) Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme);
  - (iii) Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13(2) in relation to primary, secondary and higher education: whereas primary education shall be available “free to all”, States

parties are required to progressively introduce free secondary and higher education;

- (c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13(1) and such minimum educational standards as may be approved by the State (see article 13(3) and (4));
- (d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

When considering the appropriate application of these “interrelated and essential features” the best interests of the student shall be a primary consideration.”<sup>73</sup>

5.15. As has been noted, section 29(1)(b) of the Constitution makes explicit reference to two of the four factors above: availability and accessibility. The question of affordability of further education is integral when considering the availability and accessibility of the right. This has been suggested by the Department of Higher Education and Training (“**DHET**”), which has further acknowledged the need for an expanded approach to dismantling the barriers to higher education as erected by financial constraints and the ancillary social constructs.<sup>74</sup>

5.16. In its simplest terms, we submit that affordability should be understood as being that “individuals should not be denied access on the basis of financial need.”<sup>75</sup> This ‘principled’ position, adopted in 1997, is expressed in White Paper 3.<sup>76</sup> Here it is acknowledged that higher education is both a private and a public good, and that “[t]he

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<sup>73</sup> General Comment No. 13 above n 25 at paras 6-7.

<sup>74</sup> Parker “What Does Free Education For All Really Mean” (2015) 2 *Independent Thinking* at 3, available at <http://www.dhet.gov.za/SiteAssets/Latest%20News/Independent%20Thinking%20Second%20Edition/dhetpage3.pdf>.

<sup>75</sup> *Id.*

<sup>76</sup> White Paper on Higher Education (1997) as in Parker above n 74. See also DHET “Report of the Working Group on Fee Free University Education for the Poor in South Africa” (2012).

knowledge and skills acquired in the course of achieving higher education qualifications generate significant lifetime private benefits for successful students as well as long-range social benefits for the public at large.”<sup>77</sup> It was through this lens that the issue of “access” was considered.

5.17. What resulted was the introduction of a state-funded student financial assistance system - the National Student Financial Aid Scheme (“NSFAS”).<sup>78</sup> Notwithstanding various concerns with NSFAS, including its effectiveness and oversight, SLSJ acknowledges its establishment as an important measure in the realisation of the right to further education. It is not SLSJ’s contention that no measures have been taken by the state; rather, SLSJ submits that the state has taken insufficient measures to discharge its obligation under section 29(1)(b) of the Constitution.<sup>79</sup>

5.18. Lastly, on the question of availability of resources, we submit that it is not be proper to read the availability of resources into section 29(1)(b) as a justification, in and of itself, that can be relied on by the state for non-fulfilment of the right. While, as has been described above, section 29 may have been the product of compromise, it is infused with potential. It should therefore be incumbent on the state and all relevant stakeholders, including the institutions, involved in realisation of the framework, to use it as a basis for developing a system that accommodates legitimate concerns, needs and aspirations in the journey toward the “lofty educational ideals [envisaged] for all South Africans.”<sup>80</sup>

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<sup>77</sup> Id at 4-5.

<sup>78</sup> Id at 5-6.

<sup>79</sup> We note that at the ANC National Executive Committee Lekgotla, held on 25-27 January 2016, the Secretary General of the ANC, Gwede Mantashe, maintained that free education was an ANC policy. Moreover, the Lekgotla recognised that the high level of fees at the higher education level in particular were exclusionary. The Lekgotla thus supported the interventions put in place by government including the non-increment of fees for the 2016 academic year and the establishment of this Commission. See “Statement following the NEC Lekgotla held from the 25<sup>th</sup> to the 27<sup>th</sup> January 2016”, available at <http://www.anc.org.za/show.php?id=11898>.

<sup>80</sup> Malherbe above n 16 at 98. See, also, Ferreira, “Feasibility Constraints and Human Rights: Does ‘Ought’ Imply ‘Can’?” (2012) 28 *SAJHR* 483 at 492. Of relevance, Ferreira discusses the question of feasibility in the context of resource constraints, and its use as a misnomer for the maintenance of privilege, power and the status quo. In discussing social security, Ferreira, citing Waldron *Liberal Rights: Collected Papers 1981 -1991* (CUP, Cambridge 1993) 207, states that:

“When South Africans say that it is infeasible to provide their unemployed countrymen with a comprehensive social security network due to resource scarcity, it should be remembered that resources are only too scarce to provide such social security if wealthy elites are permitted to retain the substantial

5.19. However, to the extent that the availability of resources has bearing on the determination of the reasonableness of the state's measures, we note that "progressive achievement exists independently of the increase in resources; it requires the effective use of resources available. Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realisation by everyone of the rights recognised in the ICESCR".<sup>81</sup>

5.20. In the next section, we set out SLSJ's key proposals for the realisation of the right to further education in practice.

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proportion of wealth that they currently control. Jeremy Waldron says: "Once matters are put in this way, it becomes pretty clear that the "ought" of human rights is being frustrated, not by the "can't" of impracticability, but usually by the "shan't" of selfishness and greed."

<sup>81</sup> Limburg Principles above n 44 at paras 21 and 23-4, as discussed in Bekker, above n 10 at 9. See, also, Craven *The International Covenant on Economic, Social, and Cultural Rights* (Oxford, Clarendon Press 1997), as cited in Seleokane above n 72, in which the view is taken that, where rights are subject to progressive realisation, resource constraints are not an adequate answer to non-compliance; rather, an appropriate solution stretches beyond thinking confined in budgetary terms.

## 6. REALISING THE RIGHT TO FURTHER EDUCATION IN PRACTICE

### *Framework of SLSJ's proposals*

- 6.1. The Constitution envisions a society that improves the quality of life of all people and frees their potential.<sup>82</sup> The continued marginalisation of people based on their circumstance and position in society is abhorrent and must be addressed as a matter of urgency. In this section, we briefly set out what SLSJ envisions for the future of higher education in its move towards further education that is universally available and accessible.
- 6.2. SLSJ views *fee-free* higher education as a term that must be understood relatively. The current financial resources available to the state do not occasion an immediate shift toward fee-free further education *for all*.<sup>83</sup> In this regard, SLSJ advances a progressive system aimed at redress, redistribution of wealth and the provision of access to education to those most in need, both financially and politically, as a pragmatic solution to a harsh economic reality. SLSJ submits that government can make use of a model based on substantive equality where those most in need are assisted at the justifiable expense of those wholly able to pay; with the ultimate aim of achieving higher education that is universally available and accessible.
- 6.3. SLSJ is clear that fees entail more than just the costs of registration and tuition, but rather that fees should be understood holistically, including, among other things, the costs of residence and the provision of academic materials as necessary in the process of equal access to education. A student enrolled without the ability to live a dignified life, or the resources required to study fully, cannot be said to have equal access to education.

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<sup>82</sup> Preamble of the Constitution.

<sup>83</sup> Chantelle Presence “Nzimande: SA can’t afford fee-free universities” *IOL Online* (21 April 2016), available at <http://www.iol.co.za/news/politics/nzimande-sa-cant-afford-fee-free-universities-2012885>. South Africa is spending R256.7 billion on education, 28.1% of which is on higher education, skills development and adult education, NSFAS and educational administration. See National Treasury, *Budget Review 2015*, 25 February 2015, Table 5.5, pv. Education for the 2015/2016 financial year accounts for 20.1% of total government spending. See Table 8 at 202-3.

- 6.4. The proposed model entails three key components: (1) a waiver of application fees; (2) a review and possible standardisation of the admissions policies of institutions with an aim of redressing the injustices of the past; and (3) the implementation of a sliding-scale system, inversely-proportionate in its nature, as a redistributive measure. We deal with each of these three measures below, with SLSJ's proposals for interim measures addressed thereafter.
- 6.5. As we have indicated above, SLSJ suggests that the availability of resources cannot, in and of itself, justify non-fulfilment of the right to further education, but may form a part of the assessment of the reasonableness of the measures taken. It is also recognised that the proposals set out below will have budgetary implications for the state and for institutions. It is for this reason that SLSJ's proposals are structured in short-, medium- and long-term. However, progressive realisation of the right to further education must be executive-led and driven, based on a plan that is properly implemented with any non-fulfilment of the right to be justified by the state. Importantly, in the implementation of any recommendations made by the Fees Commission, neither the state nor institutions should be permitted to take any retrogressive measures in the academic or other offerings currently afforded to students, save for measures that are implemented to redress the injustices of the past.

#### ***Waiver of application fees***

- 6.6. SLSJ submits that the imposition of an application fee on prospective students serves as the first barrier of access to institutions and the right to further education. SLSJ therefore advocates for the abolition of application fees, on the basis that the levy is burdensome to prospective students who are not in a financial position to pay. SLSJ submits that prospective students making application is part of the right to further education, particularly in relation to accessibility criterion. The waiver of application fees serves as a progressive measure that is aimed at redressing the results of past racially discriminatory

laws and practices, and, to some extent, addresses the racially discriminatory systems of apartheid that have exacerbated the plight of black people in South Africa.<sup>84</sup>

### *Review of admissions policies*

- 6.7. The Constitution requires that the right to further education be made progressively *accessible and available*. In order for this right to be progressively realised within the constitutional framework that recognises the injustices of the past and frees the potential of each person, the admissions policies of institutions need to address historical inequalities and give effect to substantive equality. When deciding on student admission, institutions must consider in addition to a consideration on merit: race, gender, disability, sex, national racial demographics, and geographic location in furthering the redistributive goals of the Constitution, among other things. It is an imperative that marginalised groups are afforded the protection guaranteed by the Constitution in admissions to institutions -- as a result, admissions policies must progressively advance the interests of vulnerable groups. A student's ability or inability to pay fees should not act as a barrier to being admitted into an institution.
- 6.8. Before the provision of funding can be considered, it is necessary to state that admissions policies will have a significant impact on achieving substantive equality in access to higher education. Assuming that all students will be able to accept the places offered to them, it is important that the allocation of spaces at institutions is considered in the light of the constitutional aim of achieving equality and the advancement of human rights and freedoms.
- 6.9. It is submitted that the admissions policies of all institutions must be reviewed as a space in which to effect redress of past and present injustices. The DHET should ensure the rigorous implementation of a national standardised policy. Education is one of the most

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<sup>84</sup> In 2014, persons aged 20 and older, who have completed post-school education varies drastically by race – Africans and Coloureds at 5.3% each, Indians/Asians at 15.9% and Whites at 27.5%. See Moloï (ed) *2016 South Africa Survey* (Institute of Race Relations, Johannesburg 2016) at 453.

effective means to bring about the attainment of equality.<sup>85</sup> It is suggested that institutions are required to consider the financial position of prospective students to effect redress of current class and societal-structural inequalities, but should be barred from denying admission based solely on the inability to pay fees.

### *Implementation of a sliding scale*

- 6.10. Currently in South Africa's democratic dispensation, fees are relatively affordable to the upper financial sectors of society -- whether by cash payment or loan.<sup>86</sup> Affordability is however a barrier to access to the majority of prospective students and is a system that requires urgent and sustainable redress.<sup>87</sup> In view of this, the current system of governmental subsidisation that funds the relevant institution -- without a constitutionally considered view to the needs of the students in that institution -- unduly benefits the minority of privileged and wealthy in society who are in the majority as registered students, without differentiation based on resources available. This leads to a reality of further inequality, continued marginalisation of the poor, prevented potential to escape from poverty, and the hindered progressive realisation of the right to further education.<sup>88</sup>
- 6.11. SLSJ submits that there be an implementation of a progressive sliding-scale model of governmental subsidisation directly to students not as a collective, but as individuals whose personal circumstances (including the best interests of the student, any forms of disadvantage, socio-economic disparities, and historic or continuing social systems or structures) have been accurately accounted for. This model, it is suggested, gives effect to progressive realisation as mandated by the Constitution and may, if properly implemented,

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<sup>85</sup> Picketty *Capital in the twenty-first century* (Harvard University Press, Cambridge 2014) at 1.

<sup>86</sup> Roshuma Phungo "University fees: free higher education is possible in South Africa" *Daily Maverick* (21 October 2015), available at <http://www.dailymaverick.co.za/article/2015-10-21-university-fees-free-higher-education-is-possible-in-south-africa/>.

<sup>87</sup> Council on Higher Education "A proposal for undergraduate curriculum reform in South Africa: The case for a flexible curriculum structure" (2013).

<sup>88</sup> Wolff "Social equality, relative poverty and marginalised groups" in Hull (ed.) *The equal society* (University College London, London 2015) at section 1. In 2013, 25.4% of school-going aged individuals that are not in attendance was due to no money for fees. DBE, *General Household Survey (GHS) 2013 Report: Focus on schooling*, 2015, Table 20, 29-30.

constitute a reasonable measure in the realisation of the right to further to education. The model also serves as a useful mechanism in addressing the unequal realities of prospective and current students.<sup>89</sup> It would thus firstly mandate an institution to admit students based on not only merit, but must also be cognisant of their circumstances as decisive in the determination of their admission.

6.12. The sliding-scale proposed leads to greater subsidisation of those with an inability to pay, and lesser and subsequently no subsidy to those able to pay, depending on personal circumstances. The system would entail *fee-free* education to those wholly unable to pay; using increased governmental expenditure on higher education coupled with reducing or removing subsidisation of those wholly able to pay. The sliding element of this proposal is realised in students paying varying fees contingent on their available resources. SLSJ suggests that students benefit in an eventual redistribution of wealth, an increase in the earning potential of those from poorer communities, and constitutes a measure in achieving social justice and South Africa's constitutional vision.

6.13. This proposed system is a measure of progressive realisation in that it is a means to an end -- the demand of the Fees Movement stems from the continued systemic inequality, and is a call to government to *urgently* reform the higher education system.<sup>90</sup> The ultimate goal is to exist in an equal society that uses higher education as a place to hone talents without a consideration of income available to a prospective student, not as a site perpetuating the wealth disparity and the inability of a prospective student to afford further education. The model assists in the attainment of the ultimate goal of further education that is universally accessible and availability, including the provision of fee-free education, as appropriate in the circumstances. SLSJ submits that immediate realisation of fee-free

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<sup>89</sup> See South Africa's GINI co-efficient, available at <http://beta2.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf> at 14. Income inequality is rife in South Africa, and is something SLSJ seeks to progressively redress. The average *household* income in 2014 was R102641 for Black Africans as opposed to R594614 for Whites. See Global Insight Southern Africa, *Regional eXplorer* at 832 (2.5q).

<sup>90</sup> Simkins "Funding. From South African higher education reviewed: two decades of democracy" (2016) *Kagisano 10: Student Funding CHE* 39 at 45. In 2014, 98.3% of White matriculants passed, with only 72.7% of Africans passing. Moloi (ed) *2016 South Africa Survey* (Institute of Race Relations, Johannesburg 2016) 492.

further education for all would serve to benefit the advantaged in society to the detriment of the overburdened poor.

- 6.14. Additionally, or in the alternative to the sliding-scale model of subsidisation suggested, SLSJ submits that the implementation of a system of income-contingent loans (“ICLs”) by the state may aid those who fall within a category of the scale requiring payment of fees.<sup>91</sup> It is a common occurrence that prospective students are in need of credit facilities, but fail to meet the surety requirements of private financial institutions.<sup>92</sup> ICLs would be beneficial to the student making use thereof and would, due to its income contingency, prevent financial overburdening, particularly for students with less financial means. The onset of repayment would trigger upon sufficient income being earned exceeding a determined reasonable threshold. This prevents a situation where students are forced to pay more than they can afford at a given time.

### *Interim measures*

- 6.15. SLSJ submits in the interim that the Fees Commission recommend that, until such time as the implementation of short-term reasonable measures has occurred, there be a waiver of application fees which prevents a situation which overburdens students already unable to pay. SLSJ also submits that institutions, and their agencies, maintain the registration and tuition fees freeze. Also, that urgent assistance is given to graduands who, due to current financial difficulties and historic debt, are unable to graduate.
- 6.16. These interim measures are suggested to ensure that reasonable measures are implemented in the short-term and that until such time as they are implemented, students -- some who may not be in an adequate financial position -- are not financially responsible for the current insufficient measures being implemented by the DHET and other relevant public

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<sup>91</sup> Hull “Reconciling efficiency, access, fairness and equality: The case for income-contingent student loans with universal eligibility” (2016) *Kagisano 10: Student Funding CHE* 39 at 198-199. See further Barr “Financing higher education: Lessons from economic theory and reform in England” (2004) 20 *Oxford Review of Economic Policy* 264.

<sup>92</sup> Simkins above n 90 at 94.

and private actors. Such measures, in effect, seek to ameliorate the immediate need of overburdened students until such time as short-term redress is implemented.

### *Implementation of recommendations*

6.17. SLSJ has considered the report and recommendations made by the Working Group in October 2012.<sup>93</sup> However, it is not aware of what steps, if any, were taken by the state to consider and implement the recommendations. SLSJ therefore urges the Fees Commission to be specific in its recommendations to the President, particularly in relation to making its finding on a recommended financial-funding model, and not to defer this prerogative to another body.

6.18. Flowing from this, it is of fundamental importance to SLSJ that whatever may be recommended by the Fees Commission is implemented publically, transparently and as a matter of urgency. To this end, SLSJ calls for the Fees Commission to recommend the establishment of an *implementation team* to facilitate the implementation of the recommendations of the Fees Commission. As set out in SLSJ's recommendations below, the mandate of the implementation team would include both measures to be taken in the short-term, as well as measures in the medium- and long-term.

6.19. Lastly, we note that the responsibility ought not to fall solely on the state, and that, in line with section 8(1) of the Constitution, institutions, as organs of state, should also consider their role and the measures that can be taken to realise the right to further education. Accordingly, SLSJ also urges the Commission to recommend that institutions convene internal working groups to determine what measures can be taken to decrease spending or generate additional revenue. We note that measures taken in this regard should not be premised on outsourcing contracts.

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<sup>93</sup> See above n 76 at 46-51.

*Further considerations relevant to the right to further education*

- 6.20. SLSJ acknowledges the establishment and continuing operations of NFSAS. However, SLSJ is concerned about NFSAS's functioning and effectiveness and urges the Fees Commission to fully investigate the capabilities and governance structures, including oversight mechanisms, of NFSAS, as it one measure in ensuring that the right to further education is progressively available and accessible. However, SLSJ suggests that thus far NFSAS has been an insufficient measure.
- 6.21. It bears mention that the Terms of Reference are relatively narrow in their ambit. Beyond the question of fees, there are a plethora of issues that are of concern to SLSJ and its members, and that have a bearing on the realisation of the right to further education contained in section 29(1)(b) of the Constitution (as well as other relevant rights), that fall outside the Terms of Reference. These issues include, for instance, concerns around the accessibility and quality of basic education, the language policies of institutions, and the rights of students to protest at institutions.
- 6.22. While it falls beyond the purview of this submission, we wish to highlight that there is a pressing need for the state and other stakeholders to review the system of higher education more broadly – and, ultimately, in totality – in order to consider the array of factors impeding students' enjoyment of their rights under the Constitution. Over time, further education must be universally available and accessible to ensure that human potential can be realised and inherent dignity promoted.

## 7. RECOMMENDATIONS

7.1. It is respectfully submitted that in conducting its processes, the Fees Commission should:

- 7.1.1. Make publically available, through its website and at its seat, all written submissions received by its Secretariat and all interim reports and recommendations that it has submitted to the President.
- 7.1.2. Ensure that, within its discretion, all evidence and addresses heard by it should be heard in a public forum as directed in section 4 of the Commissions Act 8 of 1947.
- 7.1.3. Invite all parties who have filed written submissions to present oral submissions / addresses based on their written submissions.
- 7.1.4. Seek, where possible, to facilitate public education and awareness in its processes through, among other things, radio broadcasts, information notes posted on its website, and live streaming.
- 7.1.5. Publish, at its earliest possible convenience, its Rules of Procedure and timeframes; or call for a meeting between the parties who have filed written submissions and their representatives to discuss its suggested Rules of Procedure and timeframes.
- 7.1.6. Rely on written submissions received and / or call for expert evidence in order for it to recommend an appropriate financial funding model (“**recommended financial-funding model**”), which includes the possibility of a *sliding scale* with or without income contingent loans (“**ICLs**”) as submitted by SLSJ.

7.2. The Fees Commission should **find** that:

- 7.2.1. Affordability, including the implementation of fee-free further education in South Africa, is a primary consideration in determining whether the right to further education, in terms of section 29(1)(b) of the Constitution and international law, is progressively *available and accessible* in South Africa.
- 7.2.2. The inherent dignity of everyone in South Africa wishing to exercise their right to further education must be acknowledged, respected and promoted in terms of section 10 of the Constitution, particularly when making determinations on further education funding.
- 7.2.3. In determining whether the right to further education is progressively available and accessible in South Africa and offered in a dignified manner, regard must be had to, among other things--
  - 7.2.3.1. further education fees, which include, among others, application, admission / registration and tuition fees (including fees associated with tuition, such as course materials);
  - 7.2.3.2. fees such as, among others, living and transport costs;
  - 7.2.3.3. the personal and / or family and / or household income, personal circumstances, existing debts, and any other relevant factors (including the best interests of the student, any forms of disadvantage, socio-economic disparities, and historic or continuing social systems or structures) pertaining to individual students; and
  - 7.2.3.4. the history, geographical location, and ability to generate income or receive subsidies of the various institutions in South Africa, including the socio-economic disparities which exist among institutions.
- 7.2.4. Based on the considerations in 7.2.3.3, further education may only be progressively -- and ultimately, universally -- available and accessible to certain

prospective or current students if it is fee-free or subject to lower fees, as appropriate in the circumstances.

7.2.5. The state is constitutionally obliged to take reasonable measures to ensure that the right to further education is progressively available and accessible.

7.2.6. The state and other relevant public and private actors have taken insufficient measures to make further education progressively *available and accessible* in terms of their obligations under the Constitution and international law.

7.3. The Fees Commission should **recommend** that:

7.3.1. The President, in consultation with the DHET and other relevant public and private actors, urgently appoint an *implementation team* (which should include independent experts, and institutional and civil society members) to develop short-, medium-, and long-term plans of action (based on the recommended financial-funding model) to make further education progressively and, ultimately, universally, available and accessible.

7.3.1.1. In the **short-term**, the implementation team should, *as a matter of urgency and without undue delay*:

7.3.1.1.1. Work with the DHET and other relevant public and private actors to develop and implement the short-term plan of action and recommended financial-funding model to ensure that further education is progressively made available and accessible.

7.3.1.1.2. Determine steps to ensure that application fees are no longer levied against students.

7.3.1.1.3. Determine the measures to be taken to ensure equal access and the possibility of national standardisation in

admissions policies in institutions, including broader considerations on substantive equality in admissions policies which pay due regard to, among others, racial demographics, gender, sex, geographic location, and the need to redress the injustices of the past and all forms of disadvantage of individual students.

- 7.3.1.1.4. Consider the totality of current further education fees, including, among others, application, admission / registration and tuition fees; fees such as, among others, living and transport costs; and the personal and / or family and / or household income, personal circumstances, existing debts, and any other relevant factors (including the best interest of the student, any forms of disadvantage, socio-economic disparities, and historic or continuing social systems or structures) pertaining to individual students who have applied or who have been granted university admission.
- 7.3.1.2. Investigate the possibility of introducing, or expanding, certain distance learning modules and / or courses with the aid of technological advancements to assist with state subsidisation of the recommended financial-funding model and the accessibility of further education.
  - 7.3.1.2.1. Report to the President and other relevant public and private actors, on, at least, a monthly basis on the short-term development and implementation of the plan of action and the recommended financial funding model.
- 7.3.1.3. In the **medium- and long-term**, the implementation team should:
  - 7.3.1.3.1. Work with the DHET and other relevant public and private actors to develop and implement the medium- and long-

term plans of action and the recommended financial-funding model aimed at ensuring that further education is universally available and accessible.

- 7.3.1.3.2. Consider the implementation and effectiveness of the recommended financial-funding model and the short-term plan of action.
- 7.3.1.3.3. Pay due regard to the availability of further education in the light of the expansion of the student population.
- 7.3.1.3.4. Report to the President and other relevant public and private actors on a quarterly basis on the development and implementation of the medium- and long-term of the plans of action and the sustainability of the recommended financial-funding model.

7.3.2. The President, in consultation with the DHET and institutions, should ensure that **institutions** *urgently* convene internal working groups to:

- 7.3.2.1. Investigate how spending can be mitigated or additional funds sourced to lower and / or waive application, admission / registration and tuition fees, and other fees such as, among others, living and transport costs for students most in need of financial assistance.
- 7.3.2.2. Ensure that spending is not mitigated through “outsourcing” agreements.
- 7.3.2.3. Actively and meaningfully engage, and report to, all relevant public and private actors, with a focus on students, periodically on the outcomes of their investigations.
- 7.3.2.4. Report to the President and other relevant public and private actors periodically on the outcomes of the investigations.

7.3.3. The President, in consultation with the DHET and institutions, should ensure that:

- 7.3.3.1. Institutions make all relevant financial information, including interim and annual budgets and financial statements, readily and timeously, available to the public.
- 7.3.4. Until such time as sufficient measures to make the right to further education progressively available and accessible have been implemented and / or the short-term plan of action and recommended financial-funding model have been implemented, the President, in consultation with the DHET, National Treasury and institutions, should:
  - 7.3.4.1. Direct that institutions waive all application fees.
  - 7.3.4.2. Extend the 0% increase in registration and tuition fees.
  - 7.3.4.3. Urgently assist graduands who, due to current financial difficulties and historic debt, are unable to graduate.
  - 7.3.4.4. Assist institutions with short-term funding resulting from the above.
- 7.3.5. The President, in consultation with the DHET and the National Treasury, should ensure that no retrogressive measures, save for measures designed to redress the injustices of the past, are implemented during the short-, medium- and long-term implementation processes of the plans of action -- including, among others things, limiting spending on post-graduate studies, academic research and progression, or educational material.
- 7.3.6. Budget should be sourced to cater for the need for additional spending that may result from realising the constitutional obligation to make further education progressively -- and ultimately, universally -- available and accessible.

- 7.3.7. The President should report to the public within one month of the publication of the Fees Commission Report on which of its recommendations the President will implement and the timeframes for the implementation of the recommendations.

**MICHAEL POWER**

Attorney with Right of Appearance

**AVANI SINGH**

Attorney with Right of Appearance

**MPHO RABOEANE**

Candidate Attorney

Legal Resources Centre, Johannesburg

30 June 2016

## 8. LIST OF AUTHORITIES

### *Constitutions*

- Constitution of the Republic of South Africa, 1996
- Interim Constitution of South Africa Act 200 of 1993

### *Legislation*

- Commissions Act 8 of 1947
- Further Education and Training Colleges Act 16 of 2006
- Higher Education Act 101 of 1997

### *Government notices*

- Terms of Reference of the Commission of Inquiry into Higher Education and Training, attached to Proclamation No. 1 of 2016 (GN 39608, 22 January 2016)

### *Case law*

- *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33
- *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14
- *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19
- *Khosa v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11
- *Mazibuko v City of Johannesburg* [2009] ZACC 28
- *Minister of Police and Others v Premier of the Western Cape and Others* [2013] ZACC 33
- *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14

- *Occupiers of Olivia Road, Berea Township and 197 Mains Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1
- *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5
- *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11
- *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16
- *S v Makwanyane* [1995] ZACC 3
- *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17

### ***International instruments***

- African Charter on Human and People's Rights (1981)
- African Charter on the Rights and Welfare of the Child (1990)
- African Youth Charter (2006)
- International Covenant on Economic Social and Cultural Rights (1966)
- Universal Declaration of Human Rights (1948)
- UNESCO Convention against Discrimination in Education (1960)

### ***Books***

- Craven *The International Covenant on Economic, Social, and Cultural Rights* (Clarendon Press, Oxford 1995)
- Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (Juta, Cape Town 2010)
- Molo (ed) *2016 South Africa Survey* (Institute of Race Relations, Johannesburg 2016)
- Picketty *Capital in the twenty-first century* (Harvard University Press, Cambridge 2014)
- Waldron *Liberal Rights: Collected Papers 1981 -1991* (Cambridge University Press, Cambridge 1993)

### *Chapters in books*

- Bekker “The right to education in the South African Constitution” in Mashava (ed) *A Compilation Of Essential Documents On The Right To Education* (Centre for Human Rights, Pretoria 2000) 2
- Rabin, “Chapter 12: The Many Faces of the Right to Education.” in Barak-Erez and Gross (eds) *Exploring Social Rights: Between Theory and Practice* (Hart Publishing, Oxford 2011)
- Wolff “Social equality, relative poverty and marginalised groups’ in Hull (ed.) *The equal society* (University College London, London 2015)

### *Journal articles*

- Barr “Financing higher education: Lessons from economic theory and reform in England” (2004) 20 *Oxford Review of Economic Policy* 264
- Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) *SAJHR* 111
- Budlender “20 Years of Democracy: The State of Human Rights in South Africa” (2014) *Stell LR* 439
- Chenwi, “Unpacking ‘Progressive Realisation’ its Relation to Resources Minimum Core and Reasonableness, and Some Methodolical Considerations for Accessing Compliance” (2013) *DeJure* 39
- Devenish “Aspects of the right to education in the Constitution” (1998) 31 *De Jure* 224
- Ferreira, “Feasibility Constraints and Human Rights: Does ‘Ought’ Imply ‘Can?’” (2012) 28 *SAJHR* 483
- Fukuda-Parr, Lawson-Remer & Randolph “Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfilment” (2008) *Department of Economics Working Paper Series* 22
- Hull “Reconciling efficiency, access, fairness and equality: The case for income-contingent student loans with universal eligibility” (2016) *Kagisano 10: Student Funding CHE* 39

- Liebenberg “The Value of Human Dignity in Interpreting Socio-Economic Rights” (2005) 21 *SAJHR* 1
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