Caught in the spider’s web: the collateral consequences of the criminal record on higher education, professional registration, and employment opportunities

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ABSTRACT

Although significant research has already been conducted on the intricacies of the criminal record in South Africa and internationally, literature points to a disjuncture between research and policy, especially around topics relating to access to higher education (HE) and admission to professional registration councils by formerly incarcerated students (FIS) with a criminal record. This qualitative case study incorporated a discourse analysis approach to determine the tone of 23 policy documents. In addition, twelve participants were purposefully sampled to share their lived experiences regarding the regulation and reintegration of FIS when applying for admission to HE and professional registration councils and potential employment upon completion of their studies. The findings indicate that the construction of legal documents and application forms allows higher education institutions and professional registration councils to access students’ personal data, such as their criminal records. This leads to implementing measures that exclude certain individuals, which in turn obstructs the effective social reintegration of formerly incarcerated individuals into the workforce. The study recommends the implementation of a South African research-based HE policy aimed at addressing the systemic injustices that regulate the simultaneous admission and rejection of FIS when applying to access HE and admission to professional registration councils.

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Introduction

Across the world, there has been a significant increase in the demand for criminal record checks to evaluate individuals’ suitability for specific roles, particularly employment purposes. This surge has occurred despite the fact that such checks have the potential to bar former offenders from securing meaningful employment. Consequently, there is a world-wide paradigm shift, with a number of scholars and private entities advocating for the abolition of criminal record checks, particularly the premature declaration of criminal records that have been sealed (Cerda-Jara et al., 2024; Mdakane, 2022). Prior research shows that a criminal record constructs a negative credential and many employers, including institutions of higher learning are becoming more averse to hiring and/or accepting people with convictions (Sugie et al., 2020). Nevertheless, in South Africa, the use of vetting procedures for hiring remains detached from research evidence and international instruments on policy-implementation (Mugume, 2017). For example, in July 2008, South Africa’s Public Service Commission (PSC) (2009) found that only 223 persons with a criminal record were permanently employed in the Service, representing a mere 0.02% of the 1.1 million public servants employed. This statistic, considered with the finding that the total number of South African citizens with a criminal record remains unknown, yet estimated to be around millions (Mujuzi, 2014; Mujuzi & Tsweledi, 2014). They support the view that a considerable number of people are affected by their criminal record, which contributes to unemployment (ibid). Thus, against this backdrop and owing to a dearth of literature detailing the

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secondary effects of having a criminal record on pursuits such as higher education, professional registration, and employment, this study examines the lived experiences of previously incarcerated individuals seeking access to higher education, professional registration, and job opportunities. Additionally, the study investigates the approach taken by higher education institutions, professional registration councils, and employers in South Africa when evaluating applicants with criminal records. The study answers the following research questions:

i. What do higher education admission forms reveal about how FIS who have had previous criminal convictions are evaluated?

ii. What do professional councils admission forms reveal about how FIS who have had previous criminal convictions are evaluated?

iii. To what extent does a criminal record affect FIS’ integration into professional occupations?

In the next sections, the authors discuss convergent and divergent literature perspectives, followed by discussions of the research methodology, results and conclusion as well as recommendations and limitations of the study.

Literature Review

Globally, the request for a criminal record check to assess a person’s suitability to a particular position has grown quite tremendously over the few years, even though the practice has the ability to exclude ex-offenders from meaningful employment (Saliba, 2012), it has not been flagged as a potential violation to human rights. Instead of considering job applicants on merit with both negative and positive credentials being given equal weight, somehow, the existence of a criminal record as a negative credential takes precedence (Lephale, 2016; Saliba 2012). Within the context of HE, Mugume (2017) asserts the main purpose of introducing criminal record checks and formalising applicant screening processes during college admissions is to ensure the safety of the campus community. Furthermore, it seeks to provide confidence in specific academic programmes by guaranteeing that students will fulfil licensing criteria upon completing their studies. However, social reintegration studies posit that the practice of using criminal record checks culminates into unwarranted record-based discrimination (Love & Schlusssel, 2019; Mujuzi & Tsweledi, 2014,). For example, research emanating from Australia suggests that having a criminal record is rated the fourth highest of five disadvantageous conditions, indicating that people with a criminal record are perceived as less likely to obtain and maintain employment than people in other disadvantageous conditions (Graffam et al., 2008). Similar research from the USA suggests that criminal record checks are used with a specific intent, and that intent is disproportionately aimed at identifying those who were previously in conflict with the law (Jay, 2013).

In some European countries such as the Czech Republic, France, Germany, and Spain, it is unlawful for employers to ask for a criminal record unless there is a clear connection between the job applied for and a criminal record (Voronin, 2020; Zand-Kurtovic & Rovira, 2017). Even so, research suggests mounting evidence of unlawful criminal record screening, even for low-entry jobs, regardless of clear stipulations indicating which jobs require employees without a criminal record. For instance, Hammad (2012) reports that criminal record screening in Egypt results in collateral consequences for textile industry workers with a criminal record, and also for workers in the urban transportation business. Hammad (2012) elaborates that as far back as the 1950s, Uber and career drivers were subjected to a criminal background check to mitigate risk, so that licences were granted to applicants with no criminal record as a sign of trust.

Notwithstanding the above, a criminal record can be expunged (deleted) to enable the former offender to seek gainful employment which could lead to sustainable living. For instance, in Ethiopia, criminal record expungement is synonymous with “presumed non-existent”. However, in some countries, criminal record expungement may take 10 to 15 years for more serious offences and 3 to 5 years for less severe cases to be expunged (Onuferova, 2016; Voronin, 2021). Voronin (2021) adds that in the East European context, criminal records can be stored even up to a century. Implicitly, even upon expiry of the sentence, a criminal record still becomes registered on the appropriate register, which compounds the reintegration, as well as the resocialisation, of ex-offenders and also significantly affects the possibility of carrying out professional activities. In the same breadth, research from Canada established that although criminal record expungement could be granted in some Canadian states, however, it was not recognised in some US states (Rudell & Winfree, 2006). Furthermore, the same study found that criminal record expungement was not only costly, but equally, those sentenced to life imprisonment did not qualify to have their criminal record expunged. These studies demonstrate the importance of context specific research, especially given the increasingly emerging cohort of people living with the stigma of, and discrimination against, a criminal record. Hence this study explored the policy posture and extent to which persons living with a criminal record have access to a South African higher education institution, professional registration councils and employment.

Research and Methodology

The paper adopted a qualitative research descriptive case study design. The University of South Africa (Unisa) was selected as a single case and the study took place between 1 September 2018 and 30 October 2021. As data collection instruments, semi-structured one-on-one interviews and document analysis were used. In carrying out this study, a total of twelve participants were purposefully sampled to share their lived experiences (see Table 2). They were included in the study to cast light into how they perceived the
receptiveness of educational institutions and professional registration councils towards FIS with criminal records. Interviews with the participants lasted between 30 and 90 minutes. The interview data were transcribed and saved in an encrypted laptop. The transcripts were intensely perused to understand their gist and identify recurring patterns and develop preliminary themes (Braun & Clerk, 2006). Further inspection of the preliminary themes was conducted to ascertain the extent to which they addressed the research objectives. The ones that were deemed as being closely aligned with the research objectives were adopted as formal themes for the study.

The document analysis began by initially choosing academic brochures from the University of South Africa (Unisa) to assess the type of public information accessible to potential students with a criminal record. Following this, application forms focusing on the training, advancement, and enrolment of professionals in Law, Social Work, Psychology, and Education were selected. Finally, vacancy application forms within these disciplines were chosen and analysed to understand their positions on the assimilation of individuals with criminal records (El-Jardali et al., 2014; Muchinda et al., 2021; O’Leary & Hunt, 2017), and to demonstrate how they regulate the simultaneous inclusion and exclusion of individuals with criminal records. After conducting a desktop search, a total of 23 documents were purposefully selected from the initial 69 documents due to their relevance. These documents were selected to illustrate the regulations regarding individuals with a criminal record applying for studies at Unisa and seeking admission to professional registration councils (see Table 1 below):

i. Unisa on-line application and registration forms (available on Unisa’s website)
ii. Vacancy advertisements (that required registration with a relevant professional council)
iii. Unisa vacancy application forms (accessed from Unisa’s intranet)
iv. Public policy documents (available on the internet)

<table>
<thead>
<tr>
<th>Law</th>
<th>Social Work</th>
<th>Education</th>
<th>Psychology</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018 Unisa College of Law brochure</td>
<td>2018 Unisa Social Work brochure</td>
<td>2018 Unisa College of Education brochure</td>
<td>2018 Unisa Psychology brochure</td>
</tr>
<tr>
<td>2021 Unisa Social Work brochure</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2020 Law Society of South Africa (LSSA) application form; 2020 National Bar Council of South Africa (NBCSA) application form</td>
<td>2020 South African Council for Social Services Professions (SACSSP) application form</td>
<td>2020 South African Council for Educators (SACE) application form</td>
<td>2013 Health Professions Council of South Africa (HPCSA) application forms; 2020 (HPCSA) application forms</td>
</tr>
</tbody>
</table>

Ethical considerations

The research presented here was undertaken at Unisa as part of a PhD study. Ethical approval to conduct the study was sought, and subsequently granted by the university on 01 November 2018 (ERC Reference #: PERC-17085). Further ethical considerations entailed orienting participants about the objectives of the inquiry and the importance of their involvement in it. They were also informed of the voluntary nature of their participation and right to withdraw from it. Issues of anonymity were also described at length. Numbers (instead of their real names) were used to protect their real identity during the reporting the findings.

Results and Discussion

The marginalised voices of formerly incarcerated students

Subtheme 1: Sentencing beyond the sentence: denial of reintegration

In the context of South Africa, access to the discipline of Law regarding the teaching and practice of the law, including the administration of justice is regulated by the General Council of the Bar of South Africa (NBCSA). There are twelve Bars affiliated to the NBCSA and each Bar is an independent association governed by an elected Bar Council. According to the Constitution of the NBCSA, associate membership to the Council “is composed of practitioners whose academic qualifications are on par with the academic qualifications required to practice law as an individual member of a constituent Bar of the Council [and] provides systematic
induction to the practice of advocacy consistent with…the Councils pupillage and advocacy training schemes (p. 10)”. Based on the above, the study results confirm that Unisa’s Law qualifications (higher certificates, diplomas, advanced diplomas, master’s and doctoral degrees) are acknowledged and endorsed by the NBCSA. However, institutional discrepancy was apparent in that, on the one hand, while Unisa Law brochures remain silent about the students’ previous criminal conduct, the LSSA and the NBCSA forms, on the other hand, do probe about the criminal conduct of the applicants in addition to satisfying the minimum requirements. For instance, the LSSA form, asks: “Have you ever been found guilty of a criminal offence?”, while the NBCSA form asks applicants to list previous and pending criminal convictions, disciplinary convictions and/or civil claims.

Table 2: Demographic details of study participants

<table>
<thead>
<tr>
<th>Participant no.</th>
<th>Gender</th>
<th>Age (in years)</th>
<th>Race</th>
<th>Qualification &amp; level of education</th>
<th>Employment status</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Male</td>
<td>46</td>
<td>Black</td>
<td>Psychology (honours)</td>
<td>Self-employed (street vendor)</td>
<td>1 life sentence + 20 years</td>
</tr>
<tr>
<td>2</td>
<td>Male</td>
<td>43</td>
<td>Black</td>
<td>Psychology (honours)</td>
<td>Self-employed (street vendor)</td>
<td>1 life sentence</td>
</tr>
<tr>
<td>3</td>
<td>Male</td>
<td>42</td>
<td>Black</td>
<td>Social Work (Bachelor’s degree)</td>
<td>Unemployed</td>
<td>4 life sentences + 39 years</td>
</tr>
<tr>
<td>4</td>
<td>Male</td>
<td>44</td>
<td>Black</td>
<td>Law (Master’s candidate)</td>
<td>Employed (fixed-term contract)</td>
<td>1 life sentence + 3 years</td>
</tr>
<tr>
<td>5</td>
<td>Male</td>
<td>48</td>
<td>Black</td>
<td>Bachelor of Laws (LLB)</td>
<td>Unemployed</td>
<td>1 life sentence</td>
</tr>
<tr>
<td>6</td>
<td>Male</td>
<td>47</td>
<td>Black</td>
<td>Education (PhD candidate)</td>
<td>Employed (permanent)</td>
<td>1 life sentence</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Participant no.</th>
<th>Gender</th>
<th>Race</th>
<th>Previous employment</th>
<th>Employment status</th>
<th>Length of employment (in years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>Male</td>
<td>N/A</td>
<td>Black</td>
<td>Manager: Legal and Discipline</td>
<td>Employed (SACE representative)</td>
</tr>
<tr>
<td>8</td>
<td>Female</td>
<td>N/A</td>
<td>Coloured</td>
<td>High School Educator</td>
<td>Employed (DCS representative)</td>
</tr>
<tr>
<td>9</td>
<td>Female</td>
<td>N/A</td>
<td>Coloured</td>
<td>Human Resource (HR) consultant and advisor</td>
<td>Employed (Unisa HR representative)</td>
</tr>
<tr>
<td>10</td>
<td>Male</td>
<td>N/A</td>
<td>Black</td>
<td>Advocate of the High Court</td>
<td>Employed (LSSA representative)</td>
</tr>
<tr>
<td>11</td>
<td>Male</td>
<td>N/A</td>
<td>Black</td>
<td>Social Worker</td>
<td>Employed (SACSSP representative)</td>
</tr>
<tr>
<td>12</td>
<td>Female</td>
<td>N/A</td>
<td>Black</td>
<td>Social Worker</td>
<td>Employed (SACSSP representative)</td>
</tr>
</tbody>
</table>

A notable distinction between the two forms is that while the latter does not require information regarding the details of the offence when answered in the affirmative, the former states, “a senior member of the Law Society will conduct a personal interview with a prospective candidate attorney…to determine whether a person can be regarded as a fit and proper person for entering the profession” (A complete guide to prepare for career opportunities, 2018, p. 33). Determining whether an applicant is fit and proper to become a legal practitioner involves, among others, the applicant appearing before the relevant law society and High Court and stating under oath that he/she has a Law degree and, despite having previous criminal convictions, wishes to practise law. Personal fitness, in this context, refers to integrity and honesty. For instance, according to the LSSA, an applicant on parole is still fulfilling his/her sentence and is thereby automatically regarded as not fit and proper for either the registration of articles or admission to practice law. This precondition is also stated implicitly under the Legal Practice Act, Section 8(1)(b) and 8(2)(c) that membership to the Council is reserved for fit and proper persons and any individual previously sentenced to an offence exceeding 12 months are disqualified from becoming members of the Council. In his capacity as an official of the Law Society of South Africa (LSSA), Participant 10 explained that:

“Before somebody comes and wants to be admitted to practice law, this person must be adjudged by the court. Duly authorised...to say yes, we have allowed Mr so and so as one of the considerations, for it to satisfy itself that it is unleashing this person unto the unsuspecting public.”

This assertion was also confirmed by the formerly incarcerated participants, as stated below:
“I did an application to be admitted as an advocate and the Law Council objected that I have a criminal record. Until today...there is no one who can tell me exactly why, what does that have to do with my ability to conduct litigation in the courtroom? The Law Council always objects; they find such small technicalities that will make it impossible for you to get to court so your application can be heard.” [P4]

“To do articles requires a lot of effort and money, yet it doesn't have any certainties that after completing my articles I will be admitted to be an attorney due to the fact that I have a criminal record...It is a struggle and I have heard from others who also studied law that it is going to be difficult for me to be granted the certificate to practice as an advocate and that difficulty will arise from the general council of advocates, which is the Bar Council.” [P5]

Lephale (2016) alongside Slabbert and Bomme (2014) confirm this assertion, stating that in South Africa, admission to the legal profession is attainable, provided the applicant shows successful evidence of having undergone a complete and permanent reformation - that is, acknowledging that he/she committed a wrongful act but is now fit and proper to join the legal profession. The implication, thereof, is that FIS are accountable for declaring all previous criminal convictions, as well as for providing a detailed explanation of the offences and also for illustrating that despite their criminal record, they are fit and proper to become legal practitioners as far as integrity, honesty and trustworthiness are concerned.

Based on the above, it seems hard to stipulate any hard and fast rules with respect to admission to the legal profession, since across South Africa, each law society adjudicates on each application to practice law and admission to the Bar Council based on both the facts and merits of the application. Put differently, as guardians of the law, each law society exercises its own discretion in managing applicants with previous criminal convictions and prescribes the process to be followed with respect to admission. Therefore, regardless of the verdict arrived at by a law society, a disgruntled applicant may still approach the High Court because ultimately, the onus is on the court to reach the final decision.

In regard to the 2020 Unisa College of Law advertisement, the analysis revealed that 3 out of 11 posts explicitly indicated as part of the recommendations that applicants must be registered with a professional body but did not specify any details. Interestingly, neither of the advertised posts mentioned nor considered the criminal history of the applicants. Yet, scrutiny of Unisa’s vacancy application process revealed that to apply for a permanent academic post, job applicants are required to use Unisa’s internal application form. Contained within this form is the following question: “Have you ever been found guilty of a criminal offence?” “If yes, specify the details on a separate memo.” In a subsequent section, the following question is asked: “Have you ever had a sentence imposed?”, followed by several alternatives to choose from. As before, an affirmative response to the question automatically requires a detailed explanation of the offence, including the time served or the fine paid in rands in the event of admission of guilt. The application form is problematic in two ways: first, as part of the application process, the form dictates what information is included and excluded, thereby regulating how much personal information employers and/or professional registration bodies have access to, and this gravely violates the Protection of Personal Information Act (POPI Act), 2013 because there is no option for neutrality; second to extent that Unisa’s vacancy application forms “are [also] silent on whether or not having a criminal record will adversely affect a person’s application for a job...[and] are also silent on whether the criminal record in question should be related to the job...” (Mujuzi 2014, p. 282); therefore, by extension, Mujuzi and Tsweledi (2014, p. 247) argue that “[a] person may not even get shortlisted for an interview if he has a criminal record.” For instance, other similar and comparable studies assert that application forms for vacant posts have an inherent discriminatory clause that directly prevents former offenders from applying for a post, particularly when there has not been a lapse of ten years. Comprehensively considered, this line of research serves to illustrate that “chances of securing a decent and well-paying job are slim” for Law students with a criminal record (Lephale, 2016, p. 190). In the next section, the collateral consequences of the criminal record in the Social Work discipline were explored.

Subtheme 2: Re-exclusion of the ‘societal outcasts’

The analysis commenced with contrasting the 2018 Social Work brochure with the 2021 Social Work brochure, during which significant alterations regarding the criminal history or conduct of students were observed. The 2021 Social Work brochure, in complete contrast with the 2018 Social Work brochure, is unique in that it explicitly highlights the prerequisites for gaining access to the Social Work profession. Whereas there is neither mention nor consideration of students’ past criminal conduct in the 2018 Social Work brochure, the revised 2021 Social Work brochure explicitly mentions a formal background policy check by the Social Work council.

The prerequisites are highlighted, starting with the Higher Certificate in Social Auxiliary Work, and then the Bachelor’s, Master’s and doctoral degrees in Social Work. For example, the admission requirements for the Higher Certificate in Social Auxiliary Work in the 2021 Social Work brochure are explicitly stipulated as follows:

Applicants should note that this is a selection qualification, in which they will be assessed to ascertain suitability to the profession. In addition to the above requirements, applicants will be subjected to the following:

A police clearance for criminal convictions checks aligned with the definition of a ‘fit and proper person’ by the South African Council for Social Service Professions (SACSSP)...[furthermore]...applicants must include, together with their documentation, a receipt from SAPS indicating that they have applied for a police clearance certificate. Successful applicants must submit this clearance certificate at the time of registration.

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The rules clearly state that students must be registered with the SACSSP at the beginning of their studies. The brochure then states that “[t]he Department of Social Work at Unisa will facilitate registration with the council at the time of registration or as soon as possible after registration.” The brochure, in bold print, emphasises and explicitly reiterates that “students will be required to submit the police clearance before they register”. Similarly, it is also unambiguously stated in the admission rules for the bachelor’s degree in Social Work that students are subject to a police clearance for criminal convictions checks in line with the council’s definition of a “fit and proper person”. Also reiterated in bold print under the qualification rules in the 2021 brochure is the warning that “students will not be able to register without the police clearance” (p. 34). In explicating the rationale for the police clearance, the SACSSP official said:

“As much as we don’t want to discriminate anybody from studying the profession of their choice, [however], we realised that this is disadvantageous to a lot of students. So as council [SACSSP], we developed norms and standards for universities to include the requirement that every time they admit a student, we get the police clearance to check whether the person has previous criminal offences.” [P12]

Based on the above extract, a police clearance certificate or compulsory evidence purporting that students truly applied for a police clearance must be submitted to the university at the time of registration. Unlike the previous versions of the brochure, the 2021 Social Work brochure is explicit about the admission requirements for the programme in such a clear manner that “if [students] cannot be licensed to practice professionally after completing the course or stopped in the middle of the course, for example, due to their criminal history, the institution does not take the blame (Mugume, 2017, p. 35).

The admission requirements for both a master’s and a doctoral degree in Social Work were reviewed and compared, where it was consistently found that, as was the case with all the levels of qualifications, it was stipulated that both master’s and doctoral students must be registered with the council, and that evidence of such registration and updated membership must accompany their application. The brochure further recommended that since Social Work is practice-oriented, candidates for a masters’ degree must have practised as a social worker for a minimum of two years. This assertion was corroborated by one of the previously incarcerated participants in stating that:

“A criminal record is a continual punishment... currently, I am trying to apply [but] I cannot proceed to master’s level, especially at Unisa because they want that it [police clearance] and it’s compulsory that you have to register with the professional board and have two years’ experience working as a social worker before one can register for master’s.” [P3]

Based on this inference, it is evident that individuals with a criminal history encounter restricted opportunities to pursue postgraduate studies in Social Work and obtain certification from the social work council for practicing in both public and private sector settings.

**Registration with, and the provisions of, the SACSSP Act, 1974**

According to the SACSSP Act, 1974, the council and its professional boards have explicit responsibilities and powers regulating the education, training and qualifications of social workers. Consequently, the council is mandated to “…approve institutions, schools and departments that provide education and training with respect to professions falling within the ambit of the professional board”. Moreover, the Act stipulates that only candidates with the prescribed qualifications may register with the council, and that this is done in collaboration with all HE and training institutions.

The process of registration with the SACSSP was explored, and it was found that the SACSSP, just like the NBCSA requires Social Work students to declare their criminal records during the application process. The question on the admission form reads as follows:

“Have you ever been found guilty of an offence by a court of law?” Again, an affirmative response to the question leads to the applicant being probed to supply further details of the offence, namely: “…specify the nature of the offence of which you were convicted, and the year in which the offence took place and the sentence passed”. Furthermore, the form contains the following directive “Training institutions to inform the Council of the outcomes of any criminal offence that led to a disciplinary hearing”. While these documents appear to uphold the “fit and proper person” requirement, in a subtle manner, they disaggregate applicants with a criminal record from those without. According to Mugume (2017), this is problematic because although students may graduate after the completion of the programme, however, they may not qualify for specific jobs. This claim was supported by the DCS official 8 who said:

“The moment you were found guilty…[certain] career choices closed...guys in need of education who are incarcerated must be able and willing to accept that there are certain limitations in the open labour market.” [P8]

This deduction suggests that certain professions in the job market adhere strictly to the “fit and proper person” criterion, dissuading individuals with a criminal history from pursuing those careers.

**Applying for a permanent academic post**

The examination of the 2019 Unisa Social Work advertisement, aimed at recruiting a senior lecturer and lecturer revealed that “current registration with the SACSSP including evidence of current registration” was listed as a post-specific requirement, and not as a recommendation. This is problematic, in the following three ways.
First, access to HE is perceived to rehabilitate and prepare offenders for the labour market; yet, close examination of these policy documents showed noticeable silence regarding the growing cohort of student-applicants with a criminal record attempting to access these professional bodies, suggesting that these students remain largely ignored, marginalised and unaccounted for. Secondly, the construction of this advertisement displays the extent to which registration councils regulate and approve the compulsory registration of lecturers in Social Work, and by extension, vacant posts in Social Work. Moreover, as already pointed out, Unisa’s internal application form for vacant posts does make enquiries into the criminal conduct of applicants, but, similar to the Law recruitment advertisement discussed above, this advertisement also did not mention or consider the criminal history of the applicants. Thirdly, all of this together points to a lack of synergy in as far as the management of student-applicants with a criminal record is concerned. In conclusion, it can be argued that power dynamics in the form of policy documents are what constitute the labour market, especially the private sector, which consolidates the idea that in the labour market power resides in the hands of the employers, and that they, as such, reserve the right to decide which applicant to accept and/or reject - implicitly deciding the destiny of applicants with a criminal record (Dlamini, 2016).

Subtheme 3: To declare or to self-exclude: why invest on education for rehabilitation, professional registration and employment?

The hurdles of gaining access to higher education (a reference to some Unisa learning programmes)

Inquiry into the brochures indicated that the College of Education comprises five different levels of qualification, namely higher certificates in Education, diplomas, advanced diplomas, master’s and doctoral degrees. None of the qualifications under the umbrella of the College of Education either mentioned or considered the criminal history of the students. The brochures only signalled the Bachelor of Education degree (BEd) as the initial teaching degree for all students to be registered as fully qualified educators.

When contrasted with the registration of Social Work students, the analysis revealed that the process of registration of educators with SACE is the responsibility of the students, and not the College of Education, as is the case with Unisa’s Department of Social Work. This was deemed problematic insofar as the criminal history and criminal conduct of the students are entirely ignored under the admission and qualification rules in the College of Education brochures. Instead, all the brochures under the BEd qualification rules for the Foundation, Intermediate and Senior phases only state that students must register with SACE from the first year of BEd registration. It is precisely because of the above-mentioned reason that the SACE admission form was reviewed, and much like the NBCSA and the SACSSP admission forms, the SACE form requires applicants to declare their criminal history during the application process. Therefore, due to lack of synergy between SACE and Unisa’s College of Education, one is inclined to conclude that there is institutional inconsistency in regard to the admission criteria for FIS. For instance, the SACE form poses the following question: “Have you been convicted of a criminal offence?” Similar to previous instances, an affirmative response to the question predisposes the applicants to divulge further details of the offence. In the declaration section of the form, the following is stated: “I also hereby give SACE permission to check if there are no previous convictions against me by any tribunal.” The declaration is then followed by the enquiry: “Do you have a valid police clearance certificate?” Whereas the College of Education brochures disregard information relating to students’ previous criminal convictions, the analysis showed that SACE actively pursued this information. In this regard, criminal record concealment is a problem. According to the Public Service Commission (2009) report, an employee appointed in a post on the grounds of misrepresentation (e.g. failing to disclose a criminal record) may be discharged in terms of the Employment of Educators Act, 1998, on the grounds of misconduct. The concealment of a criminal record was mentioned by the SACE official as follows:

“Non-disclosure will have a [negative] effect if you are found out, which happens, teachers are constantly being checked by their employers, so if you are found out, you are guaranteed deregistration in terms of Section 15 Subsection 3 of the Employment of Educators Act. You are deemed to have resigned; your registration was based on fraud; you did not declare, you withheld information and you will be deregistered on those basis [so] your employer must remove you.” [P7]

A recent phenomenological study incorporating the labelling theory sought out to explore the experiences of Kenya’s offender population. The results show that the concealment of a criminal record is a popular choice employed as a coping mechanism among former offenders (Muthee, 2020). Similar results came from Spain and the Netherlands (Zand-Kurtovic, 2017; Zand-Kurtovic & Rovira, 2017). Generally, “if an applicant attempts to withhold information or falsify information pertaining to previous convictions, the employee will be disqualified from further employment consideration in any position with the company due to falsification of an application” (Boachie & Asare, 2015, p. 115). Similarly, in Cameroon, research indicates that labels associated with collateral consequences engenders Cameroonian former offenders to either conceal their criminal records or to self-exclude (Besin-Mengla, 2020). The term self-exclusion refers to a scenario where applicants with a criminal record actively avoid applying for employment as a result of being fearful that their criminal history will be used to discriminate against them (Fitzroy Legal Service Inc. & Job Watch, 2005). For instance, in the Netherlands, applicants are rejected for tertiary education in even for minor offences that do not pose a serious risk (Kurtovic & Rovira, 2017; Zand-Kurtovic, 2017). Perceived this way, criminal records become an obstacle that constitutes a risk of not completing education, thus leading to exclusion.
The hurdles of applying for a job as a criminal record holder (A snapshot of a Unisa permanent academic post)

A 2018 College of Education advertisement aimed at recruiting seven senior lecturers, twelve lecturers and two junior lecturers were examined. The analysis revealed that almost all the advertised posts (20 out of 21) indicated as part of either the post-specific requirement or recommendation that the incumbent must be “affiliated to at least one professional or academic association”. In light of this development, further attention was given to the SACE Act, 2000, and the Employment of Educators Act, 1998.

In terms of SACE’s regulatory powers, it was found that the SACE Act, 2000, regulates all educators, lecturers and management staff of colleges. Yet, for the prescript to be binding, one is first required to become a professionally registered educator and secondly, the Employment of Educators Act, 1998, consolidates the argument that the Act applies to the employment of educators at (1) public schools (2) Further Education and Training (FET) colleges (3) departmental offices and (4) adult basic education centres. Thus, in terms of its application, university lecturers are exempted from this Act as supported by one of the previously incarcerated participants:

“It is compulsory for a teacher to be a registered SACE member; but with tertiary education [university lecturers], it is not compulsory. However, what I noticed was that when I applied at SACE, there was a section that required me to disclose my criminal record...and they had an interest in knowing what I was arrested for…” [P7]

Furthermore, the analysis revealed that neither of the Acts either mentioned or considered the criminal record, leading to the conclusion that the council does not have a guiding policy for applicants with previous criminal convictions. Moreover, the Act implicitly excludes applicants whose offences were committed before registration with SACE. Highlighting this difference is crucial, because exceptional circumstances do exist such as in the case of applicants convicted of an offence before and after embarking on the application process.

Subtheme 4: Decolonising the discipline of Psychology through adopting an inclusive perception of former offenders

In 2020, only the Bachelor of Arts Honours degree in Psychology and the Master’s degree in Clinical Psychology were open for enrolment during the phase of data gathering and analysis. Consequently, the review process excluded programmes such as the Bachelor of Psychology, Bachelor of Arts in Psychology and Master’s in Research Psychology, because they were unavailable due to recurruculation. Common to all the Psychology brochures was the conspicuous silence regarding the criminal history and conduct of students in the admission requirements and qualification rules. Furthermore, there was neither a request for a police clearance, nor an indication of how the students’ registration process would be facilitated between Unisa’s Department of Psychology and the HPCSA.

Implicitly, and by virtue of this silence, it is assumed that all students, including students with a criminal record, are aware of the programme's future requirement - that is, the precondition to register with the HPCSA in order to practise Psychology as a profession. This statement, however, contradicts the study’s findings, suggesting that incarcerated students embark on the Psychology profession without proper career guidance and counselling (Mabowa, 2022). A similar assertion was also made by one of the formerly incarcerated students, confirming that:

“Before I started studying psychology, I was not informed that eventually I would have to register with the council [HPCSA] which regulates the psychology profession. I chose it because I liked it.” [P1]

Thus, based on this faulty premise, together with Mugume’s (2017, p. 35) assertion, this has a negative impact on students’ career prospects, as they may complete their training and yet be unable to qualify for certain jobs post-graduation, and “…this is…more of a requirement set by the Health Professions Council of South Africa (HPCSA), which is implemented by institutions” of HE. It is also in accordance with this premise that the admission forms and accompanying legal prescripts governing the healthcare professions were investigated, which will now be discussed.

Registration with the HPCSA

Two HPCSA application forms were reviewed and contrasted, namely Form 23 (2013) was compared and contrasted with Form 24 (2020). The analysis revealed that the construction of these two forms were designed to protect, among other things, the council in case of future court litigations by disgruntled applicants, both nationally and internationally, since it obligates the signing of a declaration expressing applicants’ understanding of the professional requirements and liability for any future consequences should it be discovered that applicants fall short of the requirements (Mugume, 2017). For example, Form 23 (2013) states the following: “I also declare that I have never been convicted of any criminal offence… and that, to the best of my knowledge and belief, no proceedings involving or likely to involve a charge of offence…is pending against me at present”; while Form 24 (2020) repeats the exact information, except emphasising the following at the end of the sentence “…is pending against me in any country at present”. The implication, thereof, is that upon registration with the HPCSA as healthcare practitioners, all student-applicants are required to declare any criminal record that they may have, locally and internationally.

Moreover, the forms indicate that “…[t]he Council, in the normal course of its duties, reserves the right to divulge information in your personal file to other parties”. However, collecting applicants’ personal information about a possible criminal record requires...
clear reasons to be provided for requesting such information, including when the information will be removed from the HPCSA’s system, and destroyed (Mugumu, 2017). Yet, regardless of this clause and despite the country’s Protection of Personal Information Act, 2013, the forms made no mention of how applicants’ personal information would be stored and shared with other third parties, nor did they explain the rationale for requesting such information or mention the Act anywhere. All these factors underscored the context in which the council exercises its discretion as to whether or not, notwithstanding the conviction, the applicant is still fit and proper to be admitted to practice psychology as a profession.

**Regulations governing the healthcare professions**

The Health professions Act, 1974 was also reviewed to explore the provisions and regulations governing contraventions by registered and unregistered persons. Examples of infringements and penalties for contravening the Act include a fine, incarceration, and one’s name being removed from the register. The Act further prescribes that aggrieved applicants can approach the High Court of South Africa to appeal against the penalty decision. Subject to the outcome of the hearing, restrictions may, for instance, be lifted, resulting in one’s name being restored in the register. However, extended consideration was given to section 45(1), which refers to previous criminal convictions. Section 45(1) reads as follows:

*Every registered person who, either before or after registration, has been convicted of any offence by a court of law may be dealt with by the professional board in terms of the provisions of this Chapter if the professional board is of the opinion that such offence constitutes unprofessional conduct, and shall be liable on proof of the conviction to one or other of the penalties referred to in section 42: Provided that, before imposition of any penalty, such person shall be afforded an opportunity of tendering an explanation to the professional board in extenuation of the conduct in question. [Subs. (1) substituted by s. 44 of Act 89/97]*

In terms of this regulation, an offence refers to non-compliance with the requirements of the HPCSA’s Act, as well as to criminal and unprofessional conduct by registered and/or unregistered persons. Articulated in this manner, inevitably suggests that applicants can be differentiated as follows: first-time applicants with a criminal record prior to registration with the HPCSA, and registered healthcare professionals convicted of an offence after registration with the HPCSA. To the extent that the latter is distinguishable from the former, it became fundamentally significant to illustrate and highlight the distinction between first-time applicants and applicants for re-admission after having been struck off the roll due to unprofessional conduct. Slabbert and Bomme (2014) opine that in the case of the former, an applicant who broke the law and subsequently harboured a criminal record prior to registration with the HPCSA could have misunderstood the gravity of his/her errant ways when the offence/s were committed, which also includes not knowing the future impact of the criminal record on one’s chosen career. Conceived this way, first-time applicants could be viewed as entirely distinct from the former who, despite full knowledge of their wrongful doing proceeded to contravene the regulations of the healthcare profession. Furthermore, while a criminal conviction against a registered practitioner is perceived as bringing the HPCSA into disrepute, and thus as a direct contravention of the ethical code, the same can be contested as inapplicable to first-time applicants (Slabbert & Bomme, 2014).

Given the above, as well as an interpretation of the HPCSA Act, 1974, one can reasonably assume that, at best, the criterion used to select applicants who are adjudged legally fit and proper points to practicing exclusionary and discriminatory policies in the light of a lack of statute and framework that equally provide for the clear management of applicants with a criminal record.

In fact, the admission of applicants with a criminal record into the healthcare professions remains unaccounted for, since the Act is silent on issues pertaining to the nexus (i.e. the connection between the offence committed and the specific category of accreditation applied for) and nature of the offence (i.e. violent versus non-violent), as well as the period when the offence was committed. This unwarranted subjugation of applicants with a criminal record by the HPCSA creates a domino effect that reduces the opportunities of securing quality employment, as discussed in the section below.

**The recruitment of lecturers in Psychology**

A 2018 Department of Psychology advertisement aimed at recruiting three senior lecturers and eight lecturers was reviewed and examined to establish whether non-affiliation with the HPCSA was a disadvantage in regulating job applicants’ prospects when applying for lecturing posts. The analysis revealed that in addition to satisfying the minimum requirements (such as possessing the relevant qualification), applicants must also be registered with the HPCSA under one of the following categories: Clinical, Counselling or Research Psychology.

The fact that registration with the HPCSA was a priority and constituted part of the post-specific requirements instead of a recommendation signified the HPCSA’s powerful role in regulating the applicants’ prospects of being employed as a lecturer. A post-specific requirement, as opposed to a recommendation implies that registration with the HPCSA is compulsory for job applicants to even make it through the shortlisting phase. Consequently, the role of the HPCSA as gatekeepers of the healthcare professions, together with the influence it has over training institutions, infiltrates the labour market, where people with a criminal record miss out on practicing their chosen career due to non-affiliation with the HPCSA. The lack of opportunities in the Psychology discipline was also corroborated by one of the formerly incarcerated students as follows:

“I have a psychology degree but at the same time I find myself a cleaner and sweeping streets…it’s the same as having just wasted my time.” [P1]
Through this excerpt, the study extends the notion that the architecture of the recruitment processes in many local higher education institutions, public and private sector organisations is likely to undermine former offenders’ reintegration, sustainable development and human agency. A similar finding is also shared by Beatriz and Bartolome (2022) in Spain, contending that marginalised populations invariably experience workplace discrimination and consequently conceal their true identity “to avoid being excluded, which means that they do not find in their workplaces the ideal environment to feel integrated (p. 287).”

The dearth of literature in South Africa regarding criminal record stigma and access to higher education, professional registration, and employment opportunities has contributed to lack of policy aimed at increasing the employment prospects of formerly incarcerated individuals. The present study adds to scholarship in several important ways. Firstly, it provides data from a purely South African context concerning the intersection of criminal records, higher education accessibility, professional certification, and employment opportunities. Secondly, by focusing on the South African context, the present study confirms the existence of systemic barriers associated with having a criminal record which increases the likelihood that formerly incarcerated individuals will be denied access to higher education, professional registration, and employment. Thirdly, by highlighting the discriminatory practices embedded in current policies and institutional procedures, the present study serves as a critical resource for policymakers, educators, and employers. It calls for a reevaluation of existing norms and practices to foster a more inclusive society that enables the reintegration and rehabilitation of individuals with criminal records.

Conclusion

The primary objective of this paper was to understand the extent to which South Africa’s labour policies had the impetus to sufficiently accommodate persons with a criminal record into the labour market. The study was also set to ascertain how higher education institutions and professional registration councils managed and regulated the admission and/or rejection applications by persons with a criminal record. Therefore, based on the findings, it could be argued that criminal record checks leverage employers, organisations, and institutions to unjustly use the criminal record as a screening tool to not only identify and discriminate between job applicants, but also exclude those with a criminal record from participating in the labour market. This is problematic insofar as it illustrates the criminal record’s ability to travel beyond incarceration, where it disguises itself in exclusionary measures that hinder the successful reintegration of ex-offenders into the labour market (Saliba, 2012).

Given the absence of policy on the management of people with a criminal record in South Africa, and the ad hoc basis in which some of these cases are dealt with, the existing evidence suggests that to a certain degree, institutions and professional registration councils do probe into applicants’ criminal record as a precondition for admission. For example, while differing in context, all the application forms reviewed share one thing in common: all of them require applicants to declare their criminal records as well as the details surrounding the offence and conviction. Comparably, this presents a paradox because nearly all states in the USA have adopted some form of “ban-the-box” legislation to assist individuals with criminal records gain access and admission to higher education, professional registration, and employment (Burton et al 2024). However, in South Africa, such policies are yet to exist. Therefore, this study recommends the implementation of “ban-the-box” legislation such as California’s Fair Chance Act 2018, which makes it illegal to ask about the criminal records of student-applicants. However, exceptions exit where prospective employers have to enquire about the existence of a criminal record if there is a direct nexus between the job applied for and the criminal record. This could, for instance, relate to applicants whose prior offenses were sexual in nature because “employers, [too] can be held liable for the criminal actions of their employees under the theory of negligent hiring. Legally, negligence is premised on the idea that one who breaches duty of care to others in an organization or to the public is legally liable for any damages that result” (Holzer et al., 2002, p. 3).

In conclusion, the disclosure of a criminal record suggests that although gathering applicant’s criminal record information remains essential yet owing to the legislations and decision-making powers vested in these councils, the automatic disqualification of ex-offenders, due to their criminal record seems inevitable, regardless of their academic achievements and background training (Agboola, 2017; Mujuzi, 2014). In this respect, issues of power and the legality with which professional bodies misuse this power, for instance, in the form of criminal record checks, advocates for a research agenda that ensures that such institutions consider applicants with a criminal record and the mis opportunities that they have in South Africa’s labour market when designing and developing policies specific to the South African context. Therefore, this paper calls upon a research agenda specific to the South African context on the development of a policy that improves access for people with a criminal record.

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