

**02 December 2024**

**From:** Anlu Keeve, IRR Researcher

**To:** The Minister of Forestry, Fisheries and the Environment

**By email:** [FRAPpolicycomments@environment.gov.za](mailto:FRAPpolicycomments@environment.gov.za)

To whom it may concern,

**Comments on the draft policy on the allocation and management of rights to operate fish processing establishments and the draft policy for the transfer of commercial fishing rights<sup>1</sup>**

**Recommendations:**

- All clauses that restate the importance of maintaining the transformation profile ought to be removed.

**Introduction**

The Minister of Forestry, Fisheries and the Environment has invited public comment on the draft policy on allocation and management of rights to operate fish processing establishments and the draft policy for the transfer of commercial fishing rights published under the Marine Living Resources Act, 1998 (MLRA; Act No. 18 of 1998) by 30 November 2024.

This submission is made by the Institute of Race Relations (**IRR**), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill.

**General comments**

The draft policy outlines the framework for the transfer of commercial fishing rights under the MLRA. It reinforces criteria that will ensure fairness and impartiality and restates the importance of detailed assessments of applications to prevent monopolistic practices and ensure compliance with legal and environmental standards.

An important provision of the draft policy is the emphasis on maintaining the “transformation profile” of the fishing sector.

**Contradiction**

Firstly, the IRR believes that the draft policy is inherently inconsistent. Clauses 7.1 and 7.2 emphasise fairness, equal treatment, and merit-based evaluation.

It states:

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<sup>1</sup> Portions of this comment were originally presented by Anthea Jeffery in *Blueprint for growth: Breaking the BEE barrier to growth* and can be accessed here: <https://irr.org.za/reports/occasional-reports/files/breaking-the-bee-barrier-to-growth-1-1.pdf>

7.1 No applicant shall be favoured or prejudiced in considering his or her or its application for the transfer of a commercial fishing right.

7.2 All applications will be considered on the basis of their own merit and will be subject to the requirements and procedure set out in this Transfer Policy read with the relevant legislation and application form.

However, clauses 5.5., 10.1.4 and 11.2.9 imposes demographic criteria as a core evaluation factor. It states:

5.5 promote transformation, economic development and poverty alleviation in South Africa.

10.1 When evaluating an application for a transfer between entities, the Department will consider the following:

10.1.4 whether the transfer will maintain or improve the transformation profile (colour, race, gender, disability and age, etc) of the affected fishing sector, and/ or the degree to which the percentage of TAC and/or TAE is held by historically disadvantaged persons.

11.2 In evaluating applications arising from a change in control the following will be considered:

11.2.9 if the transfer of shares or members' interest results in the entity being less transformed as at the date of allocation, in addition to the above stated factors listed in paragraph 11.2.1 to 11.2.9, the Department will consider the degree to which the transformation of the Transferee and the black ownership of the Total Allowable Catch (TAC) and Total Allowable Effort (TAE) will change should the transfer be approved.

This effectively creates a double standard. Applicants are ostensibly treated equally under clauses 7.1 and 7.2, yet are in practical terms subject to preferential treatment based on demographic factors under clause 10.1.4.

This duality undermines the principle of fairness and equal opportunity. The explicit requirement to assess demographic factors, imply that the policy inherently favours some applicants (those who align with transformation objectives) and prejudices others, which means merit and economic rationality are secondary to meeting transformation quotas.

Furthermore, the transformation requirements conflict with many clauses in the Constitution. The racial targets they impose cannot be met without the continued use of apartheid-era race classifications and the overt preferencing of black South Africans over their white, coloured, and Indian counterparts. Yet this is prima facie inconsistent with the Constitution's founding value of "non-racialism", as well as its express prohibition of unfair racial discrimination by both the state and private persons.

Also relevant is Section 195 of the Constitution, which recognises a need for "broad representivity" in "public administration". However, "broad" representivity is different from the strict arithmetical quotas commonly imposed under transformation profile requirements. In addition, by confining the need for such representivity to "public administration", the

Constitution implicitly indicates that a similar level of representivity is not expected in the private sector.

Many commentators have long assumed that Black Economic Empowerment (BEE) is implicitly authorised by Section 9(2) of the Constitution, which allows the taking of “legislative...measures designed to...advance [those] disadvantaged by unfair discrimination’ and ‘promote the achievement of equality”. However, as the Constitutional Court ruled in the Van Heerden case in 2004, race-based remedial measures are valid only if they satisfy three tests: they must (1) target the disadvantaged, (2) help advance them, and (3) promote equality.

The Constitutional Court has never properly applied these tests in adjudicating on BEE. Were it to do so, however, BEE rules would fail on all three grounds. First, BEE does not target the disadvantaged, for it helps only a relative elite (the most advantaged 15% within the black population) and not the great majority of poor black people. Second, BEE has failed to “advance” the black majority, which has instead been greatly harmed. Third, BEE has failed to “achieve equality”, for it enriches the few even as it keeps the great majority of black South Africans unskilled, unemployed, and mired in destitution. This also explains why the Gini coefficient of income inequality is higher now (at 63 in 2022) than it was at the end of the apartheid era, when it stood at 57.

## **Recommendations**

The IRR urge the Minister to clarify whether merit or transformation takes precedence in evaluating applications. If transformation objectives take precedence, the draft policy should explicitly state this. However, if the Minister wish to ensure broader economic growth, ecological sustainability, contribute to job creation and food security, responsible management and development in the sector is a prerequisite. For this, merit must be the primary criterion, and demographic factors should therefore not influence decisions.

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Contributions: see footnote

