South African Institute of Race Relations NPC
Submission to the
Department of Justice and Constitutional Development,
regarding the
Promotion of Equality and
Prevention of Unfair Discrimination Amendment Bill of 2021,
Johannesburg, 30th June 2021

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Introduction

The Department of Justice and Constitutional Development (the Department) has invited interested parties to submit written comments on the Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill of 2021 (the Bill) by 12th May 2021. The Department has, however, given the South African Institute of Race Relations NPC (IRR) permission to lodge its submission by 30th June 2021.

This submission is made by the IRR, a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

No satisfactory SEIAS assessment

Since September 2015, all new legislation in South Africa has had to be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this new system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced.[1]

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new legislation has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.[2]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome'. When a bill is published 'for public comment and consultation with stakeholders', this final assessment must be attached to it. A particularly important need, moreover, is to 'identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration'.[3]

The Bill is likely to trigger precisely such 'excessive costs', in the form of both disinvestment and emigration. It will also deter investment, limit growth, reduce employment, add to inequality, and make recovery from the Covid-19 lockdown, which has caused unprecedented damage to an already ailing economy, even harder to achieve. Yet no proper SEIAS assessment of the Bill has been carried out, while no final SEIAS report has been appended to the Bill to help the public understand the ramifications of the Bill so that they can comment on it with greater knowledge of the issues that it raises.

Proper public participation

Public participation in the legislative process is a vital aspect of South Africa's democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning a decade or more. These include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*, *Doctors for Life International* v *Speaker of the National Assembly and others*, and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others.*[4]

The key constitutional provisions in this regard are Sections 59, 72, and 118. According to Section 59(1) of the Constitution, the National Assembly 'must facilitate public involvement in the legislative…processes of the Assembly and its committees'. In the *New Clicks* case in the Constitutional Court, Mr Justice Albie Sachs noted that there were many ways in which public participation could be facilitated. He added: 'What matters is that…a reasonable opportunity is offered to members of the public and all interested parties *to know about the issues* and to have an adequate say'. This passage was quoted with approval in both *Doctors for Life* and in the *Land Access* case.[5]

However, the public cannot 'know about the issues' nor have an adequate say when the provisions of a proposed measure are so vague and uncertain that it remains entirely unclear what conduct is to be allowed and what is to be penalised. This risk is particularly great in relation to this Bill.

This is partly because the Bill introduces many far-reaching concepts and does so in language which is generally unclear. In addition, the Bill provides little more than a bare framework for a host of statutes, policies, regulations, codes of conduct and practices that are still to be developed by various ministers – and the content of which remains uncertain. Worse still, no clear parameters have been laid down to guide those ministers as to what that content should be. The absence of these parameters is inconsistent with the rule of law, the supremacy of which is guaranteed by Section 1 of the Constitution. The uncertainty generated by all these factors also makes it impossible for the public to 'know about the issues' raised by the Bill and to make informed comments on it as part of the public participation process.

In addition, too little time has been allowed to most people and stakeholders for informed public consultation. The six-week period advertised by the Department included two long weekends (over Easter and Freedom Day/Labour Day) when people were likely to be away from their homes and unable to attend to the measure. In addition, the six-week period permitted was intrinsically too short to allow people to get properly to grips with a measure which is extraordinarily complex and wide-ranging.

The content of the Bill

Prohibiting unfair discrimination

Under the Act, 'neither the state nor any person may unfairly discriminate against anyone'. Discrimination is broadly defined as any act, omission, policy, law, practice, or 'situation' which, on a prohibited ground, 'directly or indirectly' either imposes 'burdens, obligations, or

disadvantages' or 'withholds benefits, opportunities, and advantages' from any person on 'one or more of the prohibited grounds'.[6]

The Bill has a different definition, the underlined portions of which are new:
'discrimination' means any act or omission, including a policy, law, rule, practice, condition or situation which, whether intentionally or not, directly or indirectly—
(a) imposes burdens, obligations or disadvantage on;**[or]**
(b) withholds benefits, opportunities or advantages from**[,]**;
(c) causes prejudice to; or
(d) otherwise undermines the dignity of,
any person **[on]** related to one or more of the prohibited grounds[i]**[;]**, irrespective of whether or not the discrimination on a particular ground was the sole or dominant reason for the discriminatory act or omission;

According to the South African Human Rights Commission (HRC), the addition of the words 'whether intentionally or not' is insignificant, as '"intent" is already not a requirement for discrimination'. The HRC further claims that this wording 'merely reflects the current legal and constitutional position in SA'.[7]

However, this claim overlooks a key part of the majority judgment of Mr Justice Pius Langa, then deputy president of the Constitutional Court, in *City Council of Pretoria* v *Walker*.[8] In dealing with the issue 'whether intention has any relevance in the determination of fairness',[9] Judge Langa began by considering how 'the question of intention' had been dealt with by courts in other jurisdictions'.

The United States Supreme Court, he found, had made it clear that 'proof of intention to discriminate is a requirement of claims for indirect discrimination based on the equal protection clause'.[10] It had also said that both consequences and 'motivation' must be taken into account in dealing with discrimination of this kind.[11] It had further ruled that 'where indirect discrimination is in issue, it is necessary to prove that the conduct complained of "had a discriminatory effect and that it was motivated by a discriminatory purpose"'. [12]

The Supreme Court of Canada, by contrast, has held that 'proof of intention to discriminate is not necessary in order to establish a breach of the Ontario Human Rights Code', which bars discrimination against any employee. However, the Canadian court also took pains to stress

[i] The prohibited grounds in S1 of the Act are:
(a)race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or
(b) any other ground where discrimination based on that other ground—
(i) causes or perpetuates systemic disadvantage;
(ii) undermines human dignity; or
(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);

that the Code's 'main approach is not to punish the discriminator, but rather to provide relief for the victims of discrimination'.[13] This indicates that intention to discriminate remains relevant and would need to be established where punishing the discriminator is indeed the aim of legislation – as it clearly is under the 2000 Act.

Against the background of these cases, Judge Langa turned to Section 8 of the interim Constitution (the equivalent of Section 9 in the final 1996 Constitution) and the question of how it should be interpreted. He began by picking up on the point made by the Supreme Court of Canada, saying: 'The purpose of the anti-discrimination clause, section 8(2) is to protect persons against treatment which amounts to unfair discrimination; it is not to punish those responsible for such treatment'.[14] This suggests that, where the purpose is indeed to punish those responsible for unfair discrimination, then intention to discriminate would have to be established at the outset.

Judge Langa went on to say:[15]

> In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken. There is nothing in the language of section 8(2) which necessarily calls for the section to be interpreted as requiring proof of intention to discriminate as a threshold requirement for either direct or indirect discrimination…
>
> I would hold that proof of such intention is not required in order to establish that the conduct complained of infringes section 8(2). Both elements, discrimination and unfairness, must be determined objectively in the light of the facts of each particular case… This does not mean that absence of an intention to discriminate is irrelevant to the enquiry. The section prohibits *"unfair"* discrimination. The requirement of unfairness limits the application of the section and permits consideration to be given to the purpose of the conduct or action at the level of the enquiry into unfairness.

Judge Langa's statements by no means rule out the requirement of intent. On the contrary, they start by suggesting that intent would indeed have to be established at the outset where the aim is to punish those responsible for unfair discrimination, as it is under the 2000 Act. They go on to point out that the wording of section 8(2) the Constitution does not 'necessarily' call for proof of intention – which means that it does not 'necessarily' exclude it either. Most importantly, moreover, Judge Langa concludes by emphasising that 'the absence of an intention to discriminate' remains 'relevant to the enquiry' and should be taken into account when the 'unfairness' of the discrimination is being considered.[16]

In amending the definition of discrimination to exclude intention, the Bill ignores much of what Judge Langa said. In addition, as Advocate Mark Oppenheimer has pointed out, the Bill's wording will give rise to situations in which state and private entities may be deemed guilty of

discrimination whether they carry out a particular action or refrain from doing so. A rule so inherently absurd is inconsistent not only with Judge Langa's careful reasoning but also with the requirements of the rule of law.

Advocate Oppenheimer provides an example of the absurdity that could arise. The Food and Drug Administration (FDA) in the United States (US) is considering banning menthol cigarettes, which are particularly popular with African-Americans, as this would help save lives and reduce health disparities within a vulnerable group. But black leaders such as Al Sharpton have responded that banning a product that is most popular among African Americans is discriminatory and could prompt illegal trading, which would 'give rise to many more upsetting interactions between law enforcement and young black men'.[17]

Under the Bill, as Advocate Oppenheimer adds, a failure to ban menthol cigarettes would be discriminatory because the cigarettes 'cause prejudice' to people 'on grounds related to their race'. However, imposing the ban would also be discriminatory because the ban could generate increased confrontation between black youth and the police and thereby 'cause prejudice' to people 'on grounds related to their race'. Under the Bill, in short, the FDA would be deemed guilty of discrimination whether it imposes the ban or refrains from doing so.

That the FDA would still have the opportunity to disprove the unfairness of its discrimination – and the absence of any attempt to discriminate – does not cure this defect. In addition, the problem is still more serious under the 'promotion of equality' provisions in the Bill, which demand the 'elimination of discrimination', irrespective of whether this is fair or not. In the equality context, intention can never be considered – contrary to what Judge Langa ruled – and liability for discrimination is strict, even where that discrimination is fair. Yet the notion that strict liability can be imposed on this flawed basis is anathema to the rule of law and clearly unconstitutional.

Incitement and vicarious liability

S6(2) is a new provision, which states: 'Any person who causes, encourages, or requests another person to discriminate against any other person is deemed to have discriminated against such other person.'

Under the Bill, the person who has done the 'encouraging' or 'requesting' is deemed to have discriminated against the alleged victim – even though the 'requesting' person has carried out no relevant act or omission and may not have had any intention to discriminate.

S6(3) of the Bill creates vicarious liability for individuals, companies, and groups of people by stating: 'If a worker, employee or agent of a person contravenes the Act in the course of his or her work or while acting as agent, both the person and the worker, employee or agent, as the case may be, are jointly and severally liable for a contravention and proceedings under the Act may be instituted against either or both of them unless the person took reasonable steps to prevent the worker, employee or agent from contravening the Act.'

The absurdity of this provision is best illustrated by the menthol cigarette example earlier discussed. Under the definition of discrimination in the Bill, the FDA could be held liable for discrimination whether it bans these cigarettes or refrains from doing so. Under S6(3), the FDA could also be held liable for the actions or omissions of all employees involved either in imposing the ban or deciding not to do so. Yet the FDA would be unable to 'take reasonable steps' to prevent its employees from 'contravening the Act' as either of their possible actions – imposing the ban or refraining from doing so – would be equally impermissible under the new rules.

Provisions which put individuals and organisations in breach of the law irrespective of what they do – and regardless of their intentions – undermine 'the supremacy of the rule of law' and are unconstitutional.

Prohibition of retaliation

The Bill adds a new S9A, which states: 'No person may retaliate or threaten to retaliate against a person who (a) objects to a discriminatory act or omission; or (b) instituted or wishes to institute proceedings in terms of or under the Act.'

The new section does not define what is meant by 'retaliation', which is likely to cause uncertainty and thereby contradicts the rule of law. The provision could also be abused by allegedly corrupt procurement officers, as the recent Eskom example shows (in which CEO Andre de Ruyter was repeatedly and falsely accused of racism by chief procurement officer Solly Tshitangano, who was under investigation for his role in several allegedly irregular Eskom contracts).[18] Those facing merited disciplinary charges might, in short, use this provision in the Bill to derail necessary investigations by complaining that they are being discriminated against by those responsible for such probes. With corruption in the public service and state-owned enterprises (SOEs) particularly rife – as the Zondo commission into state capture has revealed – this section should be omitted, lest it be used to deter investigations into abuses causing great harm to the country and all its people.

Definition of equality

The Bill expands the definition of equality, so that it reads as follows (new wording is underlined):

'**equality**' includes—

(a) the full and equal enjoyment of rights and freedoms as contemplated in the Constitution;

(b) equal right and access to resources, opportunities, benefits and advantages;

(c) **[and includes]** *de jure* and *de facto* equality;

(d) **[and also]** equality in terms of impact and outcomes; and

(e) substantive equality;"

This definition is inconsistent with the equality provision in the 1996 Constitution and its various sub-sections. S9(1) guarantees equality before the law and gives everyone the right 'to equal protection and benefit of the law'. S9(2) states that 'equality includes the full and equal enjoyment of all rights and freedoms' and that, 'to promote the achievement of

equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.

S9(3) provides that 'the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds', including the 17 listed in the subsection. S9(4) adds that 'no person may unfairly discriminate directly or indirectly against any person on one or more grounds' listed in S9(3). It also says that 'national legislation must be enacted to prevent or prohibit unfair discrimination'. S9(5) states that 'discrimination on one or more of the grounds listed in S9(3) is unfair unless it is established that the discrimination is fair'.[19]

S23(1) of Schedule 6 of the Constitution, dealing with transitional arrangements, adds that the 'national legislation envisaged in S9(4)…must be enacted within three years of the date on which the new Constitution takes effect'. The 2000 Act is the national legislation that was adopted by Parliament in terms of this section.

S9(4) of the Constitution clearly states that this 'national legislation must be enacted to prevent or prohibit unfair discrimination'. It says nothing about the promotion of equality, which means that provisions in both the 2000 Act and the Bill that deal with the promotion of equality exceed the mandate provided to the legislature by S9(4).

The additions to the definition of 'equality' in the Bill are also problematic. According to the Bill, equality is now to include 'equal right and access to resources, opportunities, benefits and advantages'. But S9 deals with legal rights rather than the provision of resources. It guarantees equality 'before the law', gives everyone 'the right to equal protection and benefit of the law', and adds that 'equality includes the full and equal enjoyment of all rights and freedoms'. Hence, the legal rights in issue here do not extend to 'resources, opportunities, benefits and advantages', as the Bill seeks to assert. Moreover, where the Constitution makes provision for socio-economic rights, the content of those rights is set out in the appropriate sections of the Bill of Rights and cannot be trumped by the contrary provisions of the Bill.

General responsibility to promote equality

The new S24 introduced by the Bill reads as follows (new wording is underlined):

(1) The State <u>and public bodies have</u> a duty and responsibility to <u>eliminate discrimination</u> and to promote and achieve equality.

(2) All persons have a duty and responsibility to <u>eliminate discrimination</u> and to promote equality.

(3) <u>The State, public bodies, and all persons have a duty and responsibility in particular to:</u>

(a) <u>eliminate discrimination on the grounds of race, gender and disability, and</u>

(b) <u>promote equality in respect of race, gender and disability.</u>

(4) <u>The State, public bodies, and the organisations and institutions referred to in section 28(1) must take reasonable measures, within available resources, to make provision in their budgets for funds to implement measures aimed at eliminating discrimination and promoting equality referred to in this Chapter</u>.

The 'persons' referred to in S24(2) are defined in the 2000 Act as 'including a juristic person, a non-juristic entity, a group or a category of persons'. Whether this definition would extend to individuals is unclear, but the use of the word 'includes' suggests that it might.[20]

The organisations and institutions referred to in S28(1) are 'persons [presumably here limited to juristic and non-juristic entities], non-governmental organisations, community-based organisations or traditional institutions', all of whom are expected, as further described below, to 'promote equality in their relationships with other bodies and in their public activities'.[21]

The Bill's insertion of an obligation to 'eliminate discrimination' – rather than 'unfair' discrimination – conflicts with S9 of the Bill of Rights, which makes it clear that it is only 'unfair' discrimination which is prohibited. This insertion is thus unconstitutional, both in this section and in the various other sections in which this wording is repeated.

S24(4) of the Bill also demands that juristic and non-juristic entities in the private sector, along with non-governmental organisations and traditional institutions, 'make provision in their budgets for funds to implement measures aimed at eliminating discrimination and promoting equality'. This makes the Bill a money bill, under S77 of the Constitution, as it is seeks to impose 'levies' or 'surcharges' on business and other organisations for the purpose of promoting equality. The Bill nevertheless deals with many policy questions that go far beyond the limited range of issues that may be included in a money Bill. This too makes the Bill unconstitutional.

The state's duty to promote equality

The most important of the changes made by the Bill in its new S25 are as follows, with new wording underlined:

(1) The State must…

(c) adopt and implement, within available resources, measures to eliminate discrimination and to promote and achieve equality in line with the objectives of this Act.

According to S25(2), the 'measures' referred to above must be included in the the strategic plans of national and provincial departments and in the integrated development plans of municipalities.

Under S25(3), these 'measures' must include 'the amendment or enactment' of [existing or new] legislation, policies, codes, [and] practices, or the adoption of any other measure giving effect to the objectives of the Act'.

Under S25(4), the state must determine what measures need to be adopted by, among other things, 'preparing a list of the laws, policies, codes, practices, structures or other measures which have a bearing on equality', scrutinising them 'with a view to identifying discriminatory elements thereof', considering 'possible remedial measures to remove the

discriminatory aspects', and considering possible measures to 'promote social and economic equality'.

Under S25(5), the measures referred to in S25(1)(d) – ie, measures to 'eliminate discrimination' and promote equality, 'within available resources' – may be adopted only after 'proper investigation and analysis', 'in-depth research', and 'consultation with civil society'.

Under S25(6), the measures to be adopted by the State to achieve equality must 'proactively address systemic and multidimensional patterns of inequality and discrimination found in social structures, rules, attitudes, acts, or omissions, which prevent the full and equal enjoyment of rights as contemplated in the Constitution, including equal access to resources, opportunities, benefits and advantages and social goods'. They must also 'provide for reasonable accommodation of the needs of persons on the basis of any of the prohibited grounds'.

Under S25(7), organs of state subject to the Public Finance Management Act or its municipal counterpart must report 'on the funds provided in [each] year for the implementation of these measures' or 'on the reasons why no funds have been provided'.

Under various other sub-sections of S25, the Legal Aid board must seek to ensure that legal aid is granted to people wanting to institute proceedings under the Act; the Department of Justice must 'keep a register of all the codes of practice referred to in this Act'; and 'all functionaries' and 'ministers' who have already issued codes of practice must send them to the Department for inclusion in a register, so that ministers wanting to issue new codes can 'have regard to the codes already issued by other ministers in order to prevent overlapping…or contradictions between the codes'.[22]

Most of these provisions are extraordinarily broad and vague: and particularly those set out in S25(6). These clauses conflict with the doctrine against vagueness of laws as their uncertain wording is sure to be interpreted in different ways by different officials at different times. This undermines the supremacy of the rule of law and is contrary to Section 1 of the Constitution.

In addition, the Bill fails to set out clear parameters to guide ministers and other state officials as to the content of the legislation, policies, codes, practices and other measures they are to introduce or amend in order to help achieve the vaguely phrased objectives of the Bill. That so many relevant obligations are still to be added via further laws, policies, and codes further undermines the certainty required by the rule of law.

Specific duty of constitutional institutions

The duties of the HRC and other constitutional institutions, as set out in the Bill, are similar to those contained in the Act.

Duty of public bodies to promote equality

Under S26A(1), 'public bodies must adopt and implement measures to eliminate discrimination and to promote and achieve equality in line with the objectives of this Act'.

Other subsections require public bodies to 'prepare strategic, corporate or business plans'; report on the funds provided each year for the implementation of equality 'measures' (or explain why no funds have been provided for this purpose); implement measures 'determined by regulation or otherwise' and 'abide by the code of practice issued by the minister responsible for the public body'. To help reduce duplication and inconsistencies, the minister in question must 'have regard to existing measures' before issuing a code.[23] (Some of the cross referencing in this section is wrong and makes no sense.)

The Bill defines 'public body' as including 'any institution or functionary exercising a power or performing a function' under the Constitution, a provincial constitution, legislation, or customary law. Since such institutions and functionaries form part of the state, it is unclear why the Bill includes them in a separate section with differing provisions and obligations from those contained in S25.

Duty of persons contracting with State

Under S27(1), 'any person exercising a power or performing a function on behalf of the State in terms of a contract, which constitutes a public power or public function, must
(a) adopt and implement measures to eliminate discrimination and to promote equality, determined by regulation or otherwise; or
(b) abide by the code of practice issued by the minister on whose behalf the person is exercising the power or performing the function'.

Again, in an attempt to reduce duplication and inconsistencies, the minister must have regard to existing measures before determining the measures or issuing a code.

Duty of all persons to promote equality

Under S28(1), as earlier noted, 'all persons, non-governmental organisations, community-based organisations or traditional institutions must promote equality in their relationships with other bodies and in their public activities'.

Under S28(2), the ministers responsible for the portfolios in which these persons and entities operate must 'determine, by regulation or otherwise, the measures to be adopted or implemented or issue a code of good practice dealing with the elimination of discrimination and the promotion of equality in respect of' those persons and entities.

Under S28(3), 'different measures may be determined and different codes may be issued' for different persons or entities 'depending on their size, resources, and influence'.

Under other subsections, a minister who has already issued measures or a code is exempt from having to implement new ones. One who still needs to do so must 'have regard to any existing measures' already in place 'in any law, directive, policy, or charter which relates to the elimination of discrimination and the promotion of equality'.

Since 'persons' is defined in the 2000 Act as including both juristic persons and non-juristic entities, the scope for duplication and possible conflict is enormous. Many organs of state, companies, and non-governmental organisations are likely to find themselves subject to the requirements of several sections in the Bill. This will make for even more uncertainty as to how these entities are to interpret the Bill and fulfil their obligations.

The power given to the minister to determine 'different measures…and different codes' for different persons, organisations and institutions, 'depending on their size, resource, or influence', is unconstitutional too. It clearly breaches the rule of law, which requires not only certainty, but also equality before the law.

Ramifications of the Bill

The Bill is so broad in its reach and vague in its wording that it is extremely difficult to assess what its ramifications might be. What amended or additional legislation, policies, regulations, codes, or other practices might yet be introduced is also impossible to tell. However, the poorly drafted provisions already contained in the Bill provide some pointers as to what may lie ahead.

The Bill will have particular impact on business in many different spheres, on all organs of state in all three tiers of government, including SOEs, and also on a number of charities and other non-governmental organisations, as set out below.

Ramifications for the private sector

Obligation to prevent unfair discrimination

As earlier noted, the Bill widens the definition of unfair discrimination in various ways, while overlooking Judge Langa's nuanced ruling on the salience of an intention to discriminate. Absurd consequences could follow from these changes, as illustrated by the menthol cigarette example once again.

Assume this time that it is the manufacturing company that must decide whether to continue selling these cigarettes – so 'causing prejudice' to black youth through their negative health effects – or to withdraw them from the market, thereby 'causing prejudice' to black youth through the likelihood of increased confrontations with the police over illegal sales. Irrespective of what the company decides, it will be deemed to have discriminated on a ground related to race. It will also be vicariously liable for the actions of all employees involved in the decision either to withdraw the cigarettes or to continue selling them.

Under these provisions, companies will often, as the saying goes, 'be damned if they do and damned if they don't'. However, no legislation should confront corporate citizens with such a

Hobson's choice. Nor can legislation that does this pass constitutional muster or comply with the rule of law.

The breach of the rule of law cannot be cured by allowing companies deemed guilty of discrimination in this way to defend themselves by disproving unfairness under Section 14 of the Act. Moreover, when it comes to the 'promotion of equality' provisions, the Bill dispenses with any reference to 'unfair' discrimination. Under these equality provisions, companies are to be held strictly liable – and severely punished – for deemed discrimination they may not be able to avoid.

A recent real-life example further illustrates the risks. Take, for instance, the interim findings of race discrimination made in January 2021 against Discovery Health, the Government Employees' Medical Scheme (GEMS), and Medscheme. These findings were made by an independent panel established by the Council for Medical Schemes and chaired by Advocate Tembeka Ngcukaitobi.[24]

The saga began in May 2019, when several black doctors and other health professionals accused medical schemes of discriminating against them on the basis of their race by withholding payment for the medical services they had rendered. Though this was being done under Section 59 of the Medical Schemes Act – which empowers medical schemes to investigate fraud, waste and abuse (FWA) costing some R28bn a year – black practitioners alleged that they were being singled out for investigation for racist reasons. By contrast, few white practitioners were being subjected to the same 'degrading, humiliating, and distressing treatment' (as the panel was later to describe it).[25]

The medical schemes countered that the doctors selected for investigation were identified by codes and not by names, excluding any basis for racism. In addition, there was no evidence of 'explicit racial bias in the algorithms' being used to identify FWA, as the panel itself had confirmed.[26]

The panel nevertheless found that 'black practitioners were 1.4 times more likely to be classified as having committed FWA than those identified as not black'. Since this imbalance could not be attributed to chance, the panel concluded that 'black providers had been unfairly discriminated against on the basis of race. There was also 'unfair discrimination in outcomes'.[27]

Had the Bill been in force at the time, the panel might also have found that the medical schemes, despite having no intention to discriminate, had acted in a way that 'caused prejudice to' or 'undermined the dignity of' the health providers on a basis 'related to' their race.

The panel is to finalise its report after the responses of the medical schemes have been obtained. In the meantime, many of the black practitioners concerned are planning to bring a class action for damages against Discovery, GEMS, and Medscheme.[28] If they were to sue

under Pepuda, the Act would allow them to seek substantial damages for financial loss, pain and suffering, and emotional distress. If the Bill and its supplementary regulations and codes were also to be in force by then, they would probably be entitled to substantial additional damages for the failure of the medical schemes to 'eliminate discrimination' and promote equality of outcomes.

The medical schemes had no intention to discriminate on racial grounds and were seeking to protect their members against costly wastage and fraud. They nevertheless now confront significant reputational damage and potentially large financial (and perhaps other) penalties. The damages awarded may bring short-term benefits to the class-action litigants, but medical schemes – along with companies in many other spheres – may become more wary of the hidden costs of operating in South Africa. They may then be less inclined to expand and employ more people. Some may also have more impetus to shift to other countries.

Putting the private sector under this kind of pressure will make it even more difficult to attract investment, increase growth, or overcome the massive unemployment crisis in the country. Per capita income will continue to decline, as it has for the last seven years. The people who will suffer the most will be the unemployed and marginalised – and particularly the predominantly black youngsters between the ages of 15 and 24 who now confront an unemployment rate standing (on the expanded definition) at a staggering 75%.

Obligation to promote equality

The Department of Justice may perhaps have made a drafting error in demanding the 'elimination' of all discrimination – rather than that which is 'unfair' – as part of the general obligation to 'promote equality'. The omission seems intentional, however, for it strips away the defence of 'fair' discrimination that applies under the first 'leg' of the Act (dealing with the 'prevention of unfair discrimination') and excludes its application under the second 'leg' of the Act, which deals with the promotion of equality.

To avoid liability under this second 'leg', companies must not only to 'eliminate discrimination' but also provide 'equal access' to 'resources and benefits' and achieve 'equality in terms of impact and outcomes'. They must do so, moreover, on 18 'prohibited' grounds as well as any other 'comparable' grounds that may in time be added.

The Act lists 18 prohibited grounds, these being race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, and HIV/AIDS status.

The 'comparable' grounds that qualify for inclusion in the prohibited list are any other grounds that 'perpetuate systemic disadvantage', undermine human dignity, or adversely affect rights and freedoms in a serious manner comparable to discrimination on a ground already listed. A potential new prohibited ground need satisfy only one of these criteria.

The Act identifies socio-economic status as a possible comparable ground, and defines it as 'a social or economic condition' of a person 'disadvantaged by poverty, low employment status or low-level educational qualifications'. The Act also empowers an equality court to decide that socio-economic status should indeed be recognised as a prohibited ground.

The Western Cape high court, sitting as an equality court, has already ruled that the unequal distribution of police personnel in Cape Town, with more police officers allocated to affluent areas, discriminates against Khayelitsha residents on the grounds of both race and poverty. However, this decision – handed down in December 2018 in *Social Justice Coalition and others* v *Minister of Police and others* [Case EC03/2016, 14 December 2018] – applies to a government department rather than the private sector, where other factors need to be considered.

Business is in a different situation, for it has no tax revenues on which to rely and must maintain its competitiveness if it is to keep employing people and contributing to taxes, municipal rates, export earnings and GDP. Hence, if another equality court were nevertheless to make poverty a prohibited ground for the private sector as well as the state, the ramifications would be enormous – and especially so if the Bill is also enacted.

Once the Bill is in force, companies will be obliged to 'eliminate discrimination', ensure 'equal access' to resources and opportunities, and achieve 'equality of outcomes' on grounds 'related to' the 18 listed ones and probably poverty too. These shifts are so far-reaching that their practical impact is hard to foresee. Some insights may, however, be gained from the following examples. (All these deal with sectors of the economy which the Act already singles out for criticism via an illustrative 'schedule' of practices which 'are or may be unfair' and so 'need to be addressed'.) [29]

Banking sector

In the 'housing', 'land' and 'property' spheres, the Act identifies 'red-lining on the grounds of race and social status' as an unfair or potentially unfair practice. It applies the same critique to any 'unfair discrimination in the provision of housing bonds, loans, or financial assistance'.

Where unfair discrimination is alleged under the Act – say because banks charge higher interest rates to people who pose a higher risk of default, some of whom happen to be black – those banks are generally able to avoid liability by showing that they have 'differentiated reasonably and justifiably between persons according to objectively determinable criteria, intrinsic to the activity concerned'.[30]

However, when the Bill takes effect, banks will be expected to 'eliminate discrimination', irrespective of whether this is fair or unfair – and the 'objective criteria' defence will be irrelevant in assessing whether they have failed to promote equality. The Bill is thus likely to put significant pressure on the country's major banks to change long-established methods of

risk evaluation – and to engage in lending practices that may not be sustainable and could contribute to a banking crisis.

Perhaps not coincidentally, the sector already confronts a #Racistbanksmustfall campaign, involving the EFF, Cosas, Sanco, the MKMVA, Transform RSA, and various others. The campaign alleges, in the words of Transform RSA president Adil Nchabeleng, that banks charge blacks higher interest rates, are 'quick to repossess' cars or houses belong to black people, and 'target black people by closing their bank accounts'. Mr Nchabeleng also echoes recent criticisms by President Cyril Ramaphosa that banks have been 'racially selective in providing R200bn in Covid-19 relief funds'.[31]

Under the Bill, as noted, the banks are obliged to 'eliminate discrimination', irrespective of whether this is unfair or not. Hence, if Mr Nchabeleng is correct that banks sometimes charge different interest rates to white and black clients – even if this differentiation is based on their risk profiles rather than their race – then those banks have failed to 'eliminate discrimination' and hence to promote equality.

In addition, if Mr Nchabeleng can cite prima facie evidence that the cars of some people who happen to be black have been more swiftly repossessed than those of people who happen to be white (perhaps because of differing crime levels in their respective residential areas), then the banks will again have failed to 'eliminate discrimination'.

If socio-economic status becomes recognised as a prohibited ground in the private sector, banks will also have to ensure that the poor and the better off have 'equal access' to the 'opportunities and benefits' of home and other loans. Simply providing 'access' on an equal basis will not be enough, moreover, as banks must also help the poor obtain equality of outcomes with the better off and the rich.

Failure to promote equality could expose the banks to penalties which remain as yet uncertain, as these will generally depend on the legislation and codes yet to be introduced by relevant ministers.

The Bill is likely to undermine established principles of risk assessment and require the granting of loans on equally easy terms to all individuals, companies, and other entities so as 'eliminate discrimination' and promote equality of outcomes as between all comparator groups. In this situation – in which interest rates must perforce remain very low and loan repayments may become difficult to enforce – a banking crisis could easily arise. This would further cripple the economy, reduce investment, add to already sky-high unemployment rates, and jeopardise the savings of all South Africans, including the poorest.

<u>Insurance industry</u>

As regards the insurance sector, the Act already identifies as 'unfair' (or potentially so) any 'unfair refusal to provide an insurance policy to any person' on any prohibited ground, including HIV/AIDS status.

Once the Bill takes effect, the insurance industry may also find it difficult to base underwriting decisions on established risk criteria. Equal outcomes in the payment of claims would also have to be provided. This would make it harder for insurers to resist claims that are poorly substantiated, or which brush over contributory negligence or other wrongdoing (material non-disclosure, for example) on the part of the insured.

To maintain their profitability, insurance companies might then want to increase premiums for everyone – but this too could attract penalties for denying black, female, disabled, and poor people equal access to 'resources' and failing to promote equality of outcomes as between all relevant comparator groups. In such a situation, insurance companies might increasingly battle to survive, adding to job losses, reducing tax revenues, and curtailing growth. People would also find it more difficult to insure valuable assets against theft, loss, or damage.

Pension funds

In the pensions sphere, the Act already describes it as 'unfair' (or potentially so) to 'unfairly exclude any person from membership of a retirement fund' or to 'unfairly discriminate' against existing members or beneficiaries.

Once the Bill takes effect, pension funds will also have to ensure that black, female, disabled, and poor people have equal access to the 'resources' and 'benefits' they offer. They may also have to ensure 'equality of outcomes' as regards both the investment returns and the pension payouts they provide.

Failure to fulfil these impossible demands will expose pension funds to major penalties under Pepuda. At the least, this will inhibit expansion and the generation of more jobs. At worst, it will encourage pension funds to shift their operations to other countries where the regulatory regime is more reasonable.

Private hospitals and medical practices

In the healthcare sector, the Act already describes as 'unfair or potentially unfair' any 'failure to make healthcare facilities accessible to any person'. Equally suspect is 'unfairly refusing any person access to healthcare facilities'.

Once the Bill takes effect, private hospitals and many private medical practices, including specialist ones, will come under increasing pressure to avoid any discrimination, even if this is not unfair. They will also have to provide 'equal access' to 'resources and benefits' and ensure 'equality in terms of impact and outcomes' as between all comparator groups.

This will put great pressure on private hospitals and health professionals to provide surgery or other costly medical treatments to black, female, disabled, or poor people at much reduced prices that all can equally afford. But this could also make it difficult for these hospitals and

practices to survive. It could also encourage an exodus of health professionals and other scarce resources that the country cannot afford.

Retail companies, large and small

Under the Act, it is already 'unfair or potentially unfair' for any for any supplier of goods and services 'unfairly to refuse to provide goods and services' on any prohibited ground.

Once the Bill takes effect, all private companies selling goods and services will have to lower the prices so as to provide 'equal access' to the 'resources', 'opportunities' and 'benefits' they offer, and ensure equality of outcomes as between the better off and the poor and within all other comparator groups.

As earlier noted, it will not be enough for companies to show that their current pricing strategies differentiate 'reasonably and justifiably between persons according to objectively determinable criteria, intrinsic to the activity concerned'. This provision in the Act generally provides a defence where the prohibition of unfair discrimination is in issue, but it does not apply where the promotion of equality is at stake.

Again, many companies will, at best, find it far harder to expand and employ more people. At worst, many companies could be pushed into bankruptcy, generating a slew of retrenchments, adding to the massive unemployment crisis, reducing consumer spending, and further limiting growth.

Ramifications for the state, including SOEs

Obligation to prevent unfair discrimination

Under the Bill, all organs of state – including SOEs such as Eskom, Transnet, and Prasa – must prevent any unintended discrimination that 'causes prejudice' to people on a basis 'related to' any the 18 listed grounds, poverty, or other comparable grounds.

The practical ramifications are again difficult to foresee but are likely to be extensive. Where this first 'leg' of the Act is in issue, organs of state will be able to avoid heavy penalties by disproving unfairness under Section 14. But government departments at national and provincial levels, along with municipalities and SOEs, may constantly find themselves hauled before equality courts for having unintentionally 'withheld benefits, opportunities, or advantages' or 'caused prejudice', on grounds related to race and poverty, by:

- failing to provide as many teachers in township schools as are employed in some suburban ones;
- omitting to provide township train commuters with the same speed and quality of service as the Gautrain offers;
- implementing a national minimum wage policy even though, as the National Development Plan had pointed out in 2012, entry level wages were already so high that they were pricing inexperienced black youth out of jobs;

- introducing localisation policies likely to raise prices on domestically produced goods by 20%, to the detriment of poor black people in particular;
- failing to prevent price inflation in Eskom's coal contracts, even though this pushes up tariffs and makes electricity unaffordable for the black poor; and
- failing to transfer individual ownership to land reform beneficiaries, which bars them from borrowing working capital from the banks and causes many of their farming operations to collapse, as the High Level Panel of Parliament reported in 2017.

Tens of thousands of unintentionally discriminatory acts, omissions, policies, and situations that 'withhold benefits from', 'cause prejudice to' black, female, disabled, and poor people or 'undermine their dignity' on grounds related to the 18 listed ones and any other 'comparable' ones, including poverty, are sure to come to light each year. So much so that the government may in time find itself having to defend virtually every aspect of its policies and their implementation before the equality courts.

Obligation to promote equality

Under the obligation to promote equality, strict liability will apply and all organs of state will have to 'eliminate discrimination' on the 18 listed grounds – and many 'comparable' ones too – irrespective of whether this discrimination is fair or not. They will also have to provide 'equal access' to resources, opportunities, benefits and advantages and bring about 'equality in terms of impact and outcomes' as between all relevant comparator groups.

S14 of the Act, dealing with the 'determination of fairness or unfairness', will be irrelevant in this context. This will exclude any consideration of S14(1), which states that 'it is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination'.[32]

Race-based black economic empowerment (BEE), employment equity, and preferential policies will no longer be treated as examples of 'fair' discrimination. Instead, all these policies will have to terminated in keeping with the general obligation to promote equality by 'eliminating discrimination'.

All these BEE policies will satisfy the new definition of 'discrimination' in the Bill because, whether intentionally or otherwise, they 'withhold benefits from', 'cause prejudice to' and 'undermine the dignity of' people outside the preferred groups. More seriously still, these policies also 'cause prejudice' to the great majority of black South Africans, who have little prospect of ever benefiting from BEE but have been badly hurt by the decline in public service and SOE efficiency, the increase in corruption in public procurement, the low levels of investment and growth over the past decade, and the escalating unemployment crisis.

That all BEE policies will be in conflict with the Bill – which, in essence, is to trump all laws other than the Constitution – means that the private sector and civil society organisations will also be barred from implementing policies of this kind.

Ramifications for non-governmental organisations and traditional institutions

Obligation to prevent unfair discrimination

Non-governmental organisations range from policy think tanks to housing, health, water and other lobby groups; charities and welfare organisations; residents' associations; social and other clubs; choirs and musical societies; craft guilds; and organisations seeking to resolve problems within communities.

Under the Bill, all these organisations have an obligation to prevent unintended discrimination that 'withholds benefits from', 'causes prejudice to' or 'undermines the dignity of' people on a basis related to any of the 18 listed grounds, along with all comparable ones, including poverty.

Since Section 14 of the Act will remain relevant in this context, these entities will have the opportunity to disprove the unfairness of any discrimination in which they have inadvertently engaged. They may nevertheless have to devote considerable time – and a significant portion of the voluntary donations on which most rely – to defending themselves.

A lobby group focused on solving sewage spills into the Vaal Dam could be accused of discrimination for, on grounds related to race and poverty, 'withholding benefits from' or 'causing prejudice to' communities living elsewhere along the river that are poorer and less able to mobilise. A welfare organisation established to assist poor members of the Jewish community could be accused of discrimination, on grounds related to religion and belief, for 'withholding benefits from' and 'causing prejudice to' poor members of Christian and Muslim communities. A society for the furtherance of Khoi San languages could be accused of discrimination, on grounds related to language and culture, for 'withholding benefits from' and 'causing prejudice to' people with other home languages.

Since substantial damages may be awarded against organisations that fail to disprove their guilt, the impetus to bring suit may be considerable – partly perhaps for ideological reasons (as in the case of the Jewish welfare organisation) but mainly as a way of trying to mobilise resources in a society in which unemployment is at extraordinarily high levels.

Allegations of discrimination may also be brought against many traditional institutions – particularly if their allocations of customary land are limited to members of particular ethnic groups and thereby, on grounds related to ethnic origin, 'withhold benefits from' and 'cause prejudice to' people from other ethnic groups.

These provisions in the Bill conflict with many guaranteed rights, including freedom of association (S18 of the Constitution) and freedom of belief and opinion (S15 of the Constitution). They also make a nonsense of the Constitution's commitment to 'the advancement of human rights and freedoms' which is no less important than its commitment, after decades of statutory racial discrimination, to equality before the law and the full and equal enjoyment of all constitutional rights and civil liberties.

Obligation to promote equality
Under the obligation to promote equality, strict liability will again apply and all these organisations and institutions will have to 'eliminate discrimination' on the 18 listed grounds – and many 'comparable' ones too – irrespective of whether this discrimination is fair or not. They will also have to provide 'equal access' to resources, opportunities, benefits and advantages and bring about 'equality in terms of impact and outcomes' as between all relevant comparator groups.

In all the examples outlined above, the relevant organisations and institutions will be strictly liable for the discrimination they have inadvertently caused – and may be penalised under the (still unknown terms) of the many codes and practices still to be introduced by relevant ministers.

Under S28 of the Bill, all non-governmental organisations and traditional institutions, as part of their obligation to promote equality, will also have to comply with whatever measures, regulations or codes of practice may be 'adopted and implemented' by the ministers responsible for the portfolios in which they fall. As the Bill states, 'different' measures and codes may be adopted for 'different' organisations and institutions, 'depending on their size, resources, and influence'.

These provisions contradict the principle against vagueness of laws. By requiring different treatment for different organisations, they also undermine the supremacy of the rule of law. In practice, moreover, they will allow the state to penalise and undermine the independence of civil society watchdogs, think tanks, and lobby groups – particularly those which do not share the socialist ideology of the ruling party and its allies. These provisions undermine the Constitution's commitment to 'an open and democratic society based on human dignity, equality, and freedom'.[33] They are also at odds with the foundational values of 'accountability, responsiveness and openness' underpinning South Africa's system of multi-party and democratic government.[34]

The way forward
Necessary procedural requirements have not been fulfilled, for no proper SEIAS assessment has been carried out. In addition, no SEIA report has been released in conjunction with the Bill to help the public 'know about the issues' raised by the measure. Yet a comprehensive and objective SEAI report is an essential step in empowering people to have 'an adequate say' on the content and ramifications of the Bill, as part of the public consultation process required by the Constitution.

In addition, the Bill is so vague and so unconstitutional in its substantive content that it cannot lawfully be adopted by Parliament and must simply be scrapped.

The 2000 Act should instead be amended to:

- narrow the ambit of its hate speech provisions in S10 and bring them into line with the definition of hate speech in S16 of the Constitution;

- repeal Chapter 5, dealing with the promotion of equality, as it conflicts with Parliament's obligation, under S9(4) of the Constitution, to enact legislation 'to prevent or prohibit unfair discrimination', but not promote to equality;
- remove socio-economic status as a potential prohibited ground of unfair discrimination, as poverty cannot be reduced by legislative fiat – and is best overcome by repealing dirigiste legislation and embracing economic freedom in the true sense of the word.

Hard data and objective assessment over many years have shown that the 'most free' countries – those that do best in avoiding excessive state intervention of the kind envisaged in the Bill and in many other laws introduced since 1994 – have an average annual per capita income of some $44 000, whereas the equivalent figure in the 'least free' countries is a mere $5 700. The poorest 10% of the population do far better in the 'most free' countries too, having average incomes of $12 300 a person, as compared to some $1 600 in the 'least free' states. Absolute poverty is also far more limited in the 'most free' nations, afflicting only 1.7% of the population as opposed to 31.5% of the people in the least free ones.

The formula for inclusive prosperity, in short, is proven and well-known – and is the polar opposite of what the Bill requires.

South African Institute of Race Relations NPC **30th June 2021**

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