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

Executive Summary

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Introduction

This submission on the Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill of 2021 (the Bill) 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.

Procedural issues

Contrary to government policy, no proper SEIAS assessment of the Bill has been carried out. In addition, no final SEIA report has been appended to the Bill to help the public understand the ramifications of the Bill. This is necessary, however, so that they can comment on it with a greater knowledge of the issues that it raises.

Proper 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. The court has stressed that the public must be given 'a reasonable opportunity…to know about the issues and to have an adequate say'.

In this instance, however, the public cannot 'know about the issues', or 'have an adequate say' because the Bill is so vague and poorly worded, leaving it unclear as to what conduct is to be allowed and what is to be penalised. The Bill is also little more than a bare framework for a host of other statutes, policies, regulations, codes of conduct, and practices still to be adopted – the content of which is entirely unknown.

These factors prevent proper public consultation. They also make the Bill unconstitutional for contradicting the doctrine against vagueness of laws and undermining the supremacy of the rule of law.

The content of the Bill

The Bill amends the definition of 'discrimination' by eliminating intention and extending the list of prohibited acts, omissions, policies or situations. In making these changes, the Bill ignores much of what Judge Pius Langa, then deputy president of the Constitutional Court, stated on the issue of intention in *City Council of Pretoria* v *Walker*. 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.

The Bill also amends the definition of equality to include, among things, 'equal right and access to resources, opportunities, benefits and advantages'. But Section 9 of the Constitution 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'. The legal rights in issue thus 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 and generalised provisions of the Bill.

The Bill also changes the 'general obligation to promote equality' by requiring that the state, public bodies, and many other entities 'eliminate discrimination', provide 'equal access' to 'resources' and 'opportunities' and achieve 'equality in terms of impact and outcomes'.

The Bill's insertion of an obligation to 'eliminate discrimination' – rather than 'unfair' discrimination – conflicts with S9 of the Constitution, which makes it clear that it is only 'unfair' discrimination that is prohibited. The insertion is thus unconstitutional, both in S25 of the Bill and in the various other sections in which it is repeated.

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 a range of policy questions going far beyond the limited issues that may be included in a money Bill. This too makes the Bill unconstitutional.

In dealing with the state's obligation to promote equality, the Bill includes several provisions that are extraordinarily broad and vague. This is particularly so for 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 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.

There is also great potential for overlap and potential conflict between the provisions of the Bill dealing with the state, public bodies, persons contracting with the state, and 'all persons'. Many organs of state, companies, and non-governmental organisations are likely to find themselves subject to several sections in the Bill, some of which seem to contradict each other. This will make for even more uncertainty as to how these entities are to interpret the Bill and fulfil their obligations.

Ramifications of the Bill

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

The Bill will have enormous 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.

The expanded definition of discrimination in the Bill may encourage many individuals and organisations to bring businesses before the equality courts on charges of having unintentionally 'withheld benefits from' or 'caused prejudice to' people on a basis that is 'related to' the 18 prohibited grounds of discrimination listed in the Act, along with any 'comparable' grounds, including poverty.

Where unfair discrimination is in issue, businesses will be able to defend themselves by disproving unfairness under Section 14 of the Act. However, putting the private sector under this additional pressure at a time of great economic crisis will make it even more difficult to attract investment, increase growth, or overcome the massive burden of unemployment 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 confront an unemployment rate now standing (on the expanded definition) at a staggering 75%.

When it comes to the promotion of equality, however, the Department of Justice may perhaps have made a drafting error in demanding the 'elimination' of all discrimination, rather than that which is 'unfair'. 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, the state, and civil society must not only '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, including poverty, that may in time be added. These changes to the equality provisions will have enormous and highly damaging ramifications.

In the private sector, for example, the amended equality clauses in Bill are likely to undermine established principles of risk assessment in the banking industry 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.

Where the promotion of equality is in issue and all discrimination must be eliminated, the whole of Section 14 of the Act – dealing with the determination of fairness – will become irrelevant. 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'.

Race-based black economic empowerment (BEE), employment equity, and preferential policies will thus no longer be treated as examples of 'fair' discrimination. All these policies will instead have to terminated in keeping with the general obligation to promote equality by 'eliminating discrimination'. This will have major ramifications not only for business, but also for the state and civil society.

Non-governmental organisations, ranging from policy think tanks to welfare organisations, musical societies, and craft guilds will have to comply with whatever measures, regulations or codes of practice may be 'adopted and implemented' by relevant ministers. 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 conflict with the rule of law. In practice, moreover, they will allow the state to penalise and undermine the independence of civil

society watchdogs and lobby groups – particularly those which do not share the socialist ideology of the ruling party and its allies. These provisions contradict the Constitution's commitment to 'an open and democratic society based on human dignity, equality, and freedom'. 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.

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 bringing 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 to promote 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.