

SUMMARY OF POINTS

OPPOSITION TO EMPLOYMENT EQUITY AMENDMENT BILL (EEB)

STOP NEW NATIONWIDE RACE QUOTAS

This petition to the President of the Republic of South Africa is made by the South African Institute of Race Relations (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. The IRR opposes the EEB.

The EEB is sitting on President Cyril Ramaphosa's desk awaiting his signature. However, he has an obligation not to sign it into law as it is unconstitutional in many significant ways. Instead, he should send it back to Parliament for revision.

The EEB will impose public service type-race quotas on businesses across the private sector. It will also force private employers to test employees' race identification and disqualify many businesses from tendering for government contracts. The EEB will chase away money and jobs and is therefore an anti-poor policy. The EEB is also unconstitutional for the following reasons:

Section 1 of the 1996 Constitution expressly identifies 'non-racialism' as a core value on which the democratic state 'is founded'. The EEB, with its emphasis on race classification and racial preferences, runs counter to non-racialism.

Section 1 of the Constitution expressly identifies 'the supremacy of the rule of law' as a core value on which the democratic state 'is founded'. The EEB, in many instances, will compel employers to apply vague criteria and an opaque process in overturning the supposedly 'voluntary' racial self-classifications of their employees. This is contrary to the certainty required by the rule of law.

Section 9 of the Constitution governs the right to equality. It requires equality before the law and bars unfair race (and other) discrimination. Affirmative action measures may nevertheless be valid, but only if they satisfy three tests laid down by the Constitutional Court. The EEB fails all three of these *Van Heerden* tests. The EEB fails to 'target' the great majority of poor black people, who will not get management or other senior jobs under it. It will not 'advance' the poor, but will rather hurt them by choking off investment, growth, and jobs. It will not 'promote equality' but rather increase the already very large gap between a relatively small black elite and the 11.3 million black people now mired in unemployment and destitution.

Section 195 of the Constitution calls for 'broad representivity' in the 'public administration', but not in the private sector. As reflected in the Latin maxim, *expressio unius est exclusio alterius*, this means that Section 195 never intended business to be made subject to representivity requirements – but the EEB ignores this.

Section 217 governs public procurement. It allows some racial preferences in state procurement, but only if contracts are still efficient and cost-effective. In addition, the preferences must help advance the poor – not a self-serving political elite. Any preferences granted must also comply with the Preferential Procurement Policy Framework Act (PPPFA), which sets limits on what is allowed.

The EEB contradicts the PPPFA's framework by barring companies that fail to comply with the minister's unrealistic racial quotas from doing business with the government at all. Yet, under the 'subsidiarity' principle, the PPPFA – backed by the Constitution – must take precedence over the EEB and rules out the EEB's attempt to impose 'pre-qualification' criteria in state tendering.