**Presentation to the Portfolio Committee on Labour, on behalf of Sakeliga, 13 April 2021 – Martin van Staden LL.M.**

Thank you chair and honourable members for this opportunity.

My remarks will be limited to technical issues in the bill itself from a legislative drafting and constitutional standards point of view. My colleague Mr Le Roux has already discussed Sakeliga’s perspective on some of the substantive issues emanating from the bill.

I must note at the start, honourable members, that the concerns we have about these technical drafting issues are not limited to this bill in particular, but of a trend among government’s legislative drafters in general. So, you may want to respond to us that this bill is written just as any other South African bill is written, and you would be correct. That is, however, precisely the problem I wish to address.

The first example of this is clause 4 of the bill. It provides for the determination of numerical targets by the Minister of Employment and Labour. The Minister “may” by notice “identify” the sectors where these targets will be applicable.

During any other verbal presentation to Parliament, I would pause here and explain that this provision is problematic because it contains no guiding or restraining criteria with which the Minister must comply in their numerical targets determinations and sectoral identifications.

However, the clause also provides that the Minister themselves may prescribe criteria that guides this identification.

Honourable members, this makes no sense.

The idea that criteria must be prescribed in legislation to guide the exercise of discretionary or delegated law-making powers is closely associated with the Rule of Law, which is a foundational principle of South Africa’s constitutional order. The reason for this Rule of Law requirement is simple: Only Parliament in plenary session is clothed with the authority to make law, not ministers or officials. While ministers and officials can determine the technical implementation of parliamentary laws, only Parliament can determine the substance of law.

It is such that Parliament, when it assigns discretionary or delegated law-making powers in legislation to the executive, must prescribe criteria and guidelines in the legislation itself for how those powers must be exercised. In the absence of such criteria, the minister or official with the power is enabled to make decisions arbitrarily, capriciously, and self-interestedly.

Clause 4 is perplexing and nonsensical because it gives the Minister themselves the power to prescribe criteria for their own exercise of power. In other words, the Minister has to make the rules with which they themselves must comply. This is circular.

It is Parliament, not the Minister, who must prescribe the criteria for the identification of economic sectors for numerical targets. This is a substantive legal issue – deciding to whom certain rules will apply – not a technical issue.

We therefore recommend that if Parliament wishes to proceed with this bill and its very objectionable substantive content, clause 4 must be revised to remove the Minister’s power to prescribe criteria, and that a sub-clause must be inserted wherein Parliament itself defines the criteria for the identification of economic sectors.

Clause 4 is however problematic for another reason.

It provides that the Minister “may” by notice “set numerical targets” for identified economic sectors, “for the purpose of ensuring the equitable representation of suitably qualified people from designated groups”. This notice may contemplate “different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor”.

This provision contains no guiding or restraining criteria that circumscribes the Minister’s power, and as such amounts to an unqualified discretion. This is particularly problematic given that this aspect of clause 4 clearly contemplates differentiation, and racial differentiation at that. Differentiation can very easily become unconstitutional unfair discrimination. This is why it is of the utmost importance that Parliament set down detailed criteria for how the Minister must exercise their power. Indeed, the power to differentiate between sectors and subsectors is a power that Parliament, not the Minister, has.

As you might have concluded from the presentation of my colleague, our preference is for clause 4, and by implication any other clause that owes its functioning to clause 4, to be removed from the bill, primarily for substantive reasons. But without taking into account the drafting issues I have outlined, even if the clause remains, they will be tainted by incongruence with the Rule of Law as a foundational principle of our Constitution.

Clause 12 of the bill, furthermore, provides that Minister may only issue a certificate of compliance, thereby allowing enterprises to tender for State contracts, if the Minister “is satisfied” that that business has complied with the numerical targets set by the Minister.

We fear that the Minister’s satisfaction is an insufficient legal control on a discretionary power. Clause 12 must be revised to provide that the Minister must issue a certificate of compliance if the business has complied with the requirements set out in the Act. It must not be discretionary, but automatic.

This, of course, must be heeded in light of our substantive concerns with these certificates.

Honourable members, I have some final remarks on the lack of an impact assessment accompanying the bill.

According to a policy document published by the Department of Planning, Monitoring, and Evaluation, from 2015, all new government interventions, whether policies, regulations, or legislation, must be accompanied by a socio-economic impact assessment.

Whether the Department of Employment and Labour regards itself as bound by the DPME policy is not a matter that civil society groups like ourselves have to concern ourselves with. That is an issue the departments must resolve amongst themselves. But for as long as the 2015 DPME policy is on the books, we will regard it as applicable.

It is concerning, therefore, that we have not had sight of a socio-economic impact assessment accompanying the Employment Equity Amendment Bill. The only indication that one might exist is in the memorandum of the bill, where it is claimed that the implementation of the bill would have no effect on the provinces and would cost the Department of Employment and Labour a mere R1.2 million.

If such an impact assessment exists, I would humbly ask the secretary or anyone else who has access to that document to please send it to us and make it publicly available for South Africans to interrogate it.

However, because we have not been able to find a socio-economic impact assessment on this bill, we assume that one was not conducted as required by the DPME’s 2015 policy.

Honourable members, if this is the case, it is highly concerning. Impact assessments serve an incredibly important purpose. They help both government and the public understand what the costs, benefits, and most importantly, the unforeseen or unintended consequences of a given intervention might be. If the intervention will yield mostly positive and beneficial consequences, then it is in the interest of the department that has prepared the legislation to make this known. On the other hand, if the department expects detrimental consequences to result, it makes sense that it would rather not conduct an assessment or, if it did conduct one, not to publish it.

But this cannot be accepted. Even if the results will be damaging, we, as South Africans, must know.

Without an impact assessment having been published, we regard the legislative process as incomplete and out of order. We ask that an impact assessment be conducted and published, and then for public participation to restart anew.

What we cannot accept, however, is Parliament, as our elected representatives, adopting a bill without having familiarised themselves with the likely consequences of that bill. We cannot have legislators shooting in the dark, and potentially undermining the growth and employment prospects of South Africa.

The lack of an impact assessment, furthermore, gives us reason to doubt the confident declarations in the bill’s memorandum that the legislation will cost the provinces nothing and will cost the Department of Employment and Labour only R1.2 million. On what are these declarations based?

Honourable members, as a portfolio committee you have a special duty to provide oversight over what the departments of our government does. You are the best-placed to insist that before the Department of Employment and Labour sends you anything for approval, it must do an impact study on that intervention, so that you will know what you are dealing with. Before this bill can proceed, we humbly ask that you send it back to the department so that they can complete the process and have a credible and independent assessment conducted.

Only then can we engage about the merits of this bill in a substantive sense.

In summary, honourable members, I have pointed out three things that are problematic from a technical perspective as regards the Employment Equity Amendment Bill.

The first is that clause 4 is presently nonsensical. It empowers the Minister to set criteria for themselves. We cannot have people making the rules they themselves must comply with. Parliament must set the criteria in the legislation.

The second is that clause 12 is problematic because it deals with the Minister’s satisfaction. Such a subjective criterion will not do. Instead, if a business has complied with the requisite requirements, it must automatically be granted a certificate of compliance. A box-checking exercise, in other words.

The third and final item is that either no impact assessment was conducted on the bill, which would reckless, or no impact assessment has been published, which would be dishonest. Both of these options are unacceptable. We need a quantification of the consequences, both intended and unintended, both foreseen and unforeseen, that this legislation will bring about in our economy and in our society.

As a last note, honourable members, I wish to emphasise again that our preference would be for this bill not to be adopted in any way, shape, or form, because it is fundamentally incompatible with the non-racial promise of our Constitution. In this regard the principal Act is also exceedingly problematic. Please do not interpret my remarks about the technical aspects of the bill only in any way as an endorsement of its substantive content.

Honourable members, I thank you for the opportunity and would gladly take questions.