



FW de Klerk  
FOUNDATION

**THE FW DE KLERK FOUNDATION**  
*Upholding South Africa's National Accord*

Department of Sport and Recreation  
Cape Town

Attention: **Adv. Nkosana Mehloakulu**  
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**CONCISE SUBMISSION ON THE NATIONAL SPORT AND RECREATION AMENDMENT BILL, 2020**

**1. INTRODUCTION**

- 1.1. The FW de Klerk Foundation (the Foundation) was established in 1999 to protect and promote the Constitution of the Republic of South Africa, as the most important legacy of its founder, former President FW de Klerk.
- 1.2. The Foundation recognises the need for the transformation of sport and recreation, to make sport and recreation facilities, participation and training available to all South Africans. It believes that the Department of Sport and Recreation; the Department of National Education and sporting federations and bodies have a duty to make sport and recreation accessible to all South Africans and particularly to the youth.
- 1.3. The Foundation welcomes this opportunity to comment on the *National Sport and Recreation Amendment Bill*. However, the Foundation has serious concerns regarding the Amendment Bill, in its present form, because in our view it:
  - 1.3.1. is irrational - in as far as its authors have not taken into consideration the key requirements of international sporting organisations - including the International Olympic Committee, the International Cricket Council and FIFA - that clearly prohibit racial discrimination of any kind and undue state interference in the management of sport;
  - 1.3.2. would grant the Minister vague and unbounded powers to dictate policy to private sports and recreation bodies;
  - 1.3.3. would seriously limit the freedom of individuals and sport and recreation bodies to participate and manage their sport and recreation activities as they see fit; and
  - 1.3.4. cost the state much more than the R7 million per annum indicated in the accompanying memorandum.

**2. IRRATIONALITY**

- 2.1. The Rule of Law requires *inter alia* that there must be a rational connection between legislation and its stated and underlying objectives.
  - 2.1.1. According to the Constitutional Court in *Prinsloo v Van der Linde 1997 (3) SA 1012 (CC)* at paras 25-26, "...the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate purpose."

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- 2.1.2. In *New National Party v Government of the RSA 1999 (3)* the Constitutional Court stated that “The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.”
- 2.1.3. The Constitutional Court stated further in *Pharmaceutical Manufactures: In re Ex parte Application of the President of the Republic of South Africa 2000 (2) SA 674 (CC)* that “It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not it falls short of the standards demanded by our Constitution for such action.”
- 2.2. It is trite that the underlying purpose of legislation affecting sport should have as its objective the promotion of South African sport nationally and internationally and that such legislation should not jeopardise South Africa’s participation in international sport. The Amendment Bill jeopardises South Africa’s participation in international sport on two grounds, firstly because the legislation requires teams to impose racial quotas, and secondly because it mandates unacceptable State control of sport.
- 2.3. Much the Amendment Bill is profoundly at odds with the values and prescripts of international sporting bodies:
- 2.3.1. In terms of the Olympic Charter, “Members of the IOC will not accept from governments, organisations, or other parties, any mandate or instructions liable to interfere with the freedom of their action and vote”.
- 2.3.2. The IOC’s Code of Ethics requires “rejection of discrimination of any kind on whatever grounds” including race and colour;
- 2.3.3. The constitution of International Cricket Council requires that every member must “manage its affairs autonomously and ensure that there is no government interference” in its activities. In August, 2019, it suspended Zimbabwe from participation in ICC events because of Zimbabwean government interference in the running of the sport.
- 2.3.4. According to Article 3 of FIFA’s statutes dealing with non-discrimination and stance against racism - “Discrimination of any kind against a Country, private person or group of people on account of race, skin colour, ethnic, national or social origin, gender, language, religion, political opinion or any other opinion, wealth, birth or any other status, sexual orientation or any other reason is strictly prohibited and punishable by suspension or expulsion.”

## **2.4. Racial Discrimination and Racial Quotas**

In terms of clause 7(1)(g) of the Amendment Bill:

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- 2.4.1. "The Sports Confederation contemplated in subsection (1) must, amongst others, perform the following functions: (g) comply with the guidelines or policies to promote equity, representivity and redress in sport and recreation as contemplated in section 13A";
- 2.4.2. Section 13A provides that a report to the Minister by the Ministerial Committee of Enquiry may include information relating to "(ii) any failure to comply with the provisions of section 13A of this Act and the Transformation Charter as endorsed and approved by the Minister";
- 2.4.3. According to paragraph 3.5.3 of the Transformation Charter the objective of the Charter is to "Ensure the establishment of a sustainable pipeline of sport participants and supporters **by changing sport's demographic profile on and off the field of play so that it reflects regional and local population demographics.**"
- 2.4.4. Paragraph 4.2 of the Transformation Charter requires a commitment from the South African sport sector to "retaining the principles of the **quota system** that will be based on a holistic approach across the sport development continuum."

## 2.5. Government Interference in the Administration of Sport

The Amendment Bill dramatically increases the government's power to interfere in - and control - the activities of the sport confederation and sport administrative bodies in South Africa - in clear contravention of the prohibition of such activities by the IOC and many international sport federations. The following provisions of the Amendment Bill, *inter alia*, give the government the power to interfere in - and control - the activities of sport administration bodies:

- 2.5.1. In terms of the definition of a "national federation" "the relevant international controlling body" is no longer regarded as "the only authority for the administration and control of the relative code of sport or recreational activity in the Republic."
- 2.5.2. Section 2 of the Amendment Bill provides that the "Sports Confederation may, from time to time, develop guidelines for the promotion and development of high performance sport" - but that it must in future do so "in consultation with the Minister";
- 2.5.3. Subsection (7) lists the functions that the Sports Confederation "must" perform.
- 2.5.4. Subsection (8) gives the Minister effective control over of the Sports Confederation by stating that if it fails to carry out the functions listed in subsection (7) "...the Minister may by written notice to the Sports Confederation insist on compliance within 30 days". Failure to comply with the written notice might lead to suspension of the recognition of the Sports Confederation, withdrawal of national colours and withdrawal of funding.
- 2.5.5. Section (4) of the Bill gives the Minister virtually untrammelled power to dictate policy to all sport and recreations bodies and clubs in the country: "The Minister may from time to time determine and publish policy objectives to be achieved by Sports and Recreation South Africa, the Sports Confederation and sports or recreation bodies".
- 2.5.6. Subsection (6)(2) states that sport or recreation bodies must actively participate in and support programmes and services of Sport and Recreation South Africa and the Sports



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Confederation relating to high-performance sport and the promotion and development of sport;

- 2.5.7. In terms of Section (11)(1) of the Bill the Minister - and no longer the Sports Confederation - will establish a National Colours Board to consider all applications for the awarding of national colours;
- 2.5.8. Section 13 takes the power to investigate allegations of wrong-doing in sport from the Sports Confederation and bestows it on the Minister, who may appoint a Ministerial Committee of Inquiry to investigate any matter that may bring a sport or recreational activity or body into disrepute.
- 2.5.9. Subsection 6(2)(b) of the Bill now requires sport and recreation bodies must notify the Minister of their intention to - (i) lobby for candidates at an international body; (ii) lobby for bidding and hosting of international events; or (iii) seek election to an international body; (iv) vote in any elections of an international body; (v) vote in any matter dealt with by an international body. They may act in any of the abovementioned capacities only after consultation with the Minister and "in a manner that does not bring the Republic into disrepute".
- 2.5.10. Sport and recreation bodies are required by subsection 6(2)(B)(f) to "comply with and support the following key government priorities as communicated by Sport and Recreation South Africa: (i) Combating HIV and AIDS; (ii) anti-xenophobia; (iii) anti-crime; (iv) promotion of nation building and social cohesion; (v) promotion of national symbols and heritage; (vi) disaster management and environmental protection; (vii) educational promotion on issues of sports; and (viii) health related messages".
- 2.5.11. Section 11 (C)(1) gives the Minister effective control of "combat sports" through the establishment of a "Combat Sport Regulatory Authority ... which must oversee, administer and govern all forms of combat sport."
- 2.5.12. Similarly, Section (11)(D)(1) would give the Minister control of the "fitness industry" through the establishment of a Fitness Industry Regulatory Authority "...which must oversee, administer and govern a safe environment for the fitness industry ..."

The Amendment Bill's requirement for racial quotas and its advocacy of racial discrimination, as well as the powers that it would confer on the Minister to interfere in, and to control - so comprehensively - the management of sport and recreation at every level of participation, lead to the inevitable conclusion that the drafters of the Bill were simply unaware of, or did not take into account, the clear prohibition of such activities by international sporting codes. The egregious breaches of these codes would seriously threaten South Africa's continuing participation in the major international sport codes and in the international Olympic movement. Accordingly, in the Foundation's view, the Bill does not pass the rationality test required by the Rule of Law.

### 3. **CONTRAVENTION OF THE FOUNDATIONAL VALUE OF FREEDOM**

South Africa is a constitutional democracy, based on the values of human dignity, the achievement of equality and the advancements of human rights and freedoms.

Human rights and freedoms devolve on individuals and include all the rights and freedoms in the Bill of Rights - including the freedom and security of the person; the freedoms of conscience,



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religion, thought, belief and opinion; the freedom of expression; the freedom of association; the freedom of movement and residence; and the freedom of trade, occupation and profession. In Section 36 our society is described as an “open and democratic society based on human dignity, equality and freedom” in which the rights of individuals may not be lightly or easily abridged.

Excessive and intrusive government regulation can seriously limit the rights and freedoms of individuals and organisations, particularly when exercised in a capricious and arbitrary manner.

The Amendment Bill poses a serious threat to individuals pursuing their legitimate interests in sport and recreation bodies. In accordance with international practice and requirements, the management of sport and recreation activities should be in the hands of sport and recreation bodies and federations and not in the hands of the government.

Neither does the government have the right in a free society to require essentially non-State organisations to carry out government policy and to implement government programmes.

#### **4. UNBOUNDED POWER TO DETERMINE POLICY**

In terms of Section (4) of the Bill, “The Minister may from time to time determine and publish policy objectives to be achieved by Sports and Recreation South Africa, the Sports Confederation and sports or recreation bodies.”

This section gives the Minister the power to dictate policy to non-State sport and recreation bodies and, by its nature, opens the possibility for capricious and arbitrary behaviour. It gives the Minister quasi-legislative powers and in so-doing offends against the proper separation between the legislative and executive branches of government.

The Minister’s power under section (130)(D) of the Bill to appoint the members of the Sport Arbitration Tribunal - further dilutes the separation of powers by permitting him, through the appointment of members of the Tribunal - influence in the quasi-judicial role of the Tribunal. The Tribunal would “adjudicate on any conduct prohibited in terms of the Act, to determine whether prohibited conduct has occurred and, if so, to impose any remedy provided for in this Act.”

#### **5. LIKELY FINANCIAL IMPLICATIONS OF THE AMENDMENT ACT**

The Bill makes provision for the appointment of the Sport Arbitration Tribunal; a Ministerial Committee of Inquiry; a Fitness Industry Regulatory Authority; a Combat Sport Regulatory Authority; a National Colours Board; and an undetermined number of Sport and Recreational Facilities Inspection Officers.

The Department will also take on extensive responsibilities with regard to the determination of norms and standards for the building of new sport facilities. It will oversee the governance of any new sport and recreational facilities and carry out regular inspections.

All this will considerably expand the Department’s workload and yet the memorandum that accompanies the Bill estimates that this vast expansion of the Department’s responsibilities will cost a mere R7 million per annum - less than 1% of its annual budget of R 1.15 billion.



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Clearly, once again, the authors of the Amendment Bill and its accompanying memorandum have failed to apply their minds to the real financial implications of the legislation.

Yours sincerely,

Dave Steward  
Chairman