



Submission to Labour Portfolio Committee with regards to National Minimum Wage Bill and related amendments to BCEA and LRA

16 March 2018

Summary

1. This submission is made by the National Minimum Wage Research Initiative (NMW-RI) at the University of the Witwatersrand with relation to the National Minimum Wage Bill 2017 (NMW Bill), Basic Conditions of Employment Amendment Bill 2017 (BCEA Bill) and Labour Relations Amendment Bill 2017 (LRA Bill), with specific attention to issues relating directly to the institution of the national minimum wage (NMW).
2. The National Minimum Wage Research Initiative (NMW-RI) is an independent research initiative overseen by a panel of experts based. For the last three years it has provided detailed research regarding: the relationship between minimum wages and poverty, inequality and employment; statistical modelling on the likely impact of a national minimum wage (NMW) in South Africa; and policy options for the implementation of a NMW. The NMW-RI has produced eight Working Papers, seven Policy Briefs and two Summary Reports, as well as hosting six public seminars and a National Symposium, all on matters related to the introduction of a NMW. The work of the NMW-RI has been presented to the NEDLAC Wage Inequality Technical Task Team (WITTT) as part of the negotiations over the implementation of a NMW and was drawn upon by the Expert Panel appointed by the Deputy President (Expert Panel).
3. The Deputy President, Minister of Labour, Department of Labour (DoL) officials, and all those involved in the WITTT should be congratulated on the publishing of this momentous piece of labour legislation.
4. The legislation has a number of significant strengths, amongst others, these include:
 - o Recognising the role the NMW can play in reducing poverty and inequality and spurring domestic demand and productivity increases in the economy;¹

¹ see Asghar Adelzadeh and Cynthia Alvililar, *The Impact of a National Minimum Wage on the South Africa Economy*, National Minimum Wage Research Initiative (University of the Witwatersrand, 2016); Gilad Isaacs, *A National Minimum Wage for South Africa*, National Minimum Wage Research Initiative (University of the Witwatersrand, 2016); Jana Mudronova, *The International Experience of the Relationship between Inequality, Poverty and Minimum Wages*, National Minimum Wage Research Initiative (University of the Witwatersrand, 2016).

- Setting the NMW at an acceptable starting point (R20 per hour) that can be increased over time (subject to qualifications below);²
 - Ensuring universality with appropriate tiers and exemption procedures;
 - Excluding non-basic wage payments from the calculation of the NMW;
 - Establishing a dedicated body comprised of the social partners to oversee the implementation, monitoring and revision of the NMW;
 - Amendments to the BCEA that recognise the need for better enforcement.
5. The Bills also have a number of serious weaknesses noted in this submission. These include:
- Insufficient attention to the role of the NMW in reducing poverty;
 - The definition of ‘worker’ which stands to exclude independent contractors;
 - Inadequate protection of vulnerable workers against casualisation;
 - The undermining of sectoral determinations and the deletion of the powers of the Employment Conditions Commission (ECC);
 - The exclusion of Expanded Public Works Programme workers from the NMW;
 - The exclusion of those in learnerships from the NMW;
 - The failure of the annual review process to protect the real value of the NMW;
 - Vagueness surrounding the annual review and medium-term target;
 - Insufficient independent technical support for the NMW Commission;
 - The role of employer organisations in exemption applications;
 - Weaknesses in the enforcement procedures and resources associated.
6. The NMW-RI has consistently supported the implementation of a well-crafted NMW and has produced abundant local and international evidence highlighting how this policy intervention can contribute towards reducing poverty and inequality while positively benefiting the economy as a whole. However, with regret, the NMW-RI does not support the passing of the Bills in their current form. The NMW-RI is also concerned about the short time frames available to Parliament through which to deal with the serious shortcomings of the proposed Bills.

² This level falls within the range recommended by the NMW-RI, see Isaacs, *A National Minimum Wage for South Africa*; and has been publically supported by the NMW-RI, see Gilad Isaacs, ‘Minimum Wage for All a Big Achievement in Improving Lot of Poor’, *Business Day*, 29 November 2016.

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1. Poverty as a motivation for the NMW

- 1.1. **The NMW Bill pays insufficient attention to poverty as a motivating factor behind the implementation of a NMW.**
- 1.2. The most common motivation for the introduction of minimum wages is to ensure wages meet “the needs of workers and their families”³ (as noted by the International Labour Organization Convention No. 131) and thus alleviate poverty. The Expert Panel’s report begins with a lengthy discussion of poverty in South Africa, and notes (p. 8): “The minimum wage is therefore seen as one of the tools to close the wage gap, including between the genders, and thereby to overcome poverty.”
- 1.3. It is laudable that the implementation of the NMW in South Africa has been linked to the reduction of inequality, which poses a grave challenge. However, given the high levels of poverty amongst workers identified in the research and the fact that minimum wages are aimed at alleviating working poverty, there is surprisingly little mention of poverty and working poverty in the Bills. In addition, the ILO also makes a specific point of noting that wages should cover the needs of workers *and their families*.
- 1.4. **It is recommended that:**
 - 1.4.1. Under “recognising” in the Preamble of the NMW Bill, “high levels of poverty and working poverty” are noted;
 - 1.4.2. Clause 2 of the NMW Bill include: “ensure, over time, wages meet the basic needs of workers and their families”;
 - 1.4.3. Clause 2 of the NMW Bill include “to reduce wage inequality”;
 - 1.4.4. Clause 11(b) of the NMW Bill include “and the alleviation of poverty and working poverty”;

2. Universality and protecting vulnerable workers

Defining a ‘worker’

- 2.1. **The current definition of ‘worker’ excludes independent contractors from the NMW.**
- 2.2. The NMW Bill (clause 1) defines a worker as “an employee as defined in section 1 of the Basic Conditions of Employment Act”. The BCEA specifically excludes “independent contractors” from its definition of “employee” both in section 1 and section 82(2), as does the LRA in section 213. Clause 83A of the

³ ILO, ‘Convention C131 - Minimum Wage Fixing Convention, 1970 (No. 131)’ (International Labour Organization, 1970), sec. 3
<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C131> [accessed 28 November 2017].

BCEA seems to define “employee” more broadly. The Code of Good Practice issued by NEDLAC⁴ gives further guidance.

- 2.3. By excluding “independent contractors” those performing “task-based work, piecework, home work, sub-contracting and contract work”⁵ – which can range from Uber drivers to shoe makers – may be excluded from coverage of the NMW.
- 2.4. We note that on 31 January 2018 the DoL issued a statement saying that it stands by the definition of worker in the Nedlac agreement that: “Worker means any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind.” This has not, however, been reflected in the Bills submitted to the Portfolio Committee.
- 2.5. A recent ruling from the CCMA (in *Uber SA vs. NUPSAW and SATAWU and others*)⁶ offers important context:

33) The world of work has changed considerably over the last few decades and it continues to change with formal full-time employment on the decrease. Part-time employment, outsourcing and casualization have been features of our labour market even at the time that the Labour Relations Act 66 of 1995 was passed, while the gig economy has provided new opportunities for otherwise unemployed people to earn an income. The line between who is employed and who is not is increasingly blurred as relationships have become largely anonymized, internationally and intranationally.

- 2.6. Applying the existing definition of “employee” (as in the BCEA) poses a significant risk to these workers, who are in danger of working long hours with the equivalent of low hourly wages. It also flies in the face of international trends, existing local agreements and the recommendation of local experts.
 - In this context, the ILO notes (emphasis added): “Minimum wages should also apply to workers in non-standard forms of employment, including workers on fixed-term contracts and other forms of temporary work, temporary agency work and other contractual arrangements involving multiple parties, or part-time work.” And “Exclusions should be kept to a minimum, particularly in relation to vulnerable categories of workers.”⁷

⁴ GenN 1774 in GG 29445 of 1 December 2005.

⁵ Shane Godfrey, *An Examination of How the National Minimum Wage Can Be Optimally Accommodated by the Existing Labour Legislative Framework* (Labour and Enterprise Policy Research Group, University of Cape Town, 16 August 2017), p. 18.

⁶ Winnie Everett, *Uber SA vs. NUPSAW and SATAWU and others*, 2017.

⁷ ILO, *Minimum Wage Policy Guide* (International Labour Organization, 2016), p. 32 <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/genericdocument/wcms_508566.pdf> [accessed 28 November 2017].

- The Expert Panel report notes (p. 96)⁸: “the Panel proposes that the provisions in this regard be drafted to expand the definition of an employee to include forms of work such as piecework and homeworkers, part-time workers, casual workers and self-employed contractors to ensure that their services are remunerated at a rate that does not fall below the NMW.”
- Ruth Castel-Branco, senior policy researcher at the NMW-RI and labour market and social security expert, notes: “For this reason, piecework is being phased out internationally. Some countries have incorporated safeguards to ensure that pieceworkers’ wages cannot be lower than the applicable minimum wage. In Cambodia, pieceworkers’ wages must be fixed at a level that enables a wage earner with below-average skills and normal output to receive, for the same duration of work, a salary at least equal to the guaranteed national minimum wage (ILO 2014b).”⁹
- Dr Shane Godfrey of the University of Cape Town’s Labour and Enterprise Policy Research Group (LEP), an expert in collective bargaining, minimum wages and labour law, notes in a report¹⁰ (p. 30) examining the best legal frameworks for the NMW (Godfrey Report): “We believe that the NMW should follow and consolidate these precedents by applying to ‘workers’ rather than the narrower ‘employee’ category, i.e. the definition used in the NMW statute should not exclude independent contractors.”
- The Civil Engineering SD requires that the wages of pieceworkers must be equivalent to the minimum wage rate at the end of the reference period. This is also the case in a number of collective bargaining agreements, for example, in the motor industry.¹¹
- Internationally, a number of ground-breaking legal battles have challenged the exclusion of contract workers from the NMW. This is the case for Uber drivers in the United Kingdom who have won the right to the hourly NMW.¹²

⁸ Expert Panel, *A National Minimum Wage for South Africa*, 2016.

⁹ Ruth Castel-Branco, *Policy Considerations for the Design and Implementation of a National Minimum Wage for South Africa*, National Minimum Wage Research Initiative (University of the Witwatersrand, 2016), pp. 20–21.

¹⁰ Godfrey.

¹¹ Ruth Castel-Branco, *The Building Blocks of a National Minimum Wage for South Africa*, National Minimum Wage Research Initiative (University of the Witwatersrand, September 2015).

¹² Hilary Osborne, ‘Uber Loses Right to Classify UK Drivers as Self-Employed’, *The Guardian*, 28 October 2016, section Technology <<http://www.theguardian.com/technology/2016/oct/28/uber-uk-tribunal-self-employed-status>> [accessed 27 November 2017].

- It is possible that such an exclusion violates section 9(1) of the Constitution of the Republic of South Africa that notes: “Everyone ... has the right to equal protection and benefit of the law.”¹³
 - The CCMA ruling, mentioned in paragraph 2.5, found, in the case of a dismissal of Uber drivers, that Uber SA is an employer, and the drivers, employees, and not “partners” or “independent contractors”.
- 2.7. South Africa should be a global leader in the protection of workers’ rights not reinforcing an out-dated notion of “employee” that does not take cognisance of the changing nature of work globally.
- 2.8. Further, we should not leave the matter to the courts to include such workers as “employees” and should rather take proactive measures to expand the definition of workers, where logical as is the case for the NMW.
- 2.9. More technically, if the NMW is to only apply to “employees” then why not simply say this and use “employee” throughout? Strangely, the BCEA Bill inserts the following as 62A. “For the purpose of Chapter 10, an employee includes a worker as defined in section 1 of the National Minimum Wage Act, 2017.” This is a strange circulatory in that the BCEA amendment references the NMW Bill which is in turn defined in terms of the BCEA. It is also strange as the definition of ‘employer’ and Sections 4(2) and 4(3) suggest the NMW Bill is defining workers differently to ‘employees’ (until the definition of ‘workers’ contradicts this). This will create confusion and disputes.
- 2.10. **It is recommended that:**
- 2.10.1. The definition be altered to ensure that ‘worker’ means any person who works for another and who receives any payment for that work (in money or in kind).

Protecting against casualisation

- 2.11. **The Bills offer insufficient protection against casualisation.**
- 2.12. The instructing parties are to be commended for including a minimum number of hours of work for which the worker must be paid as noted in clause 3 of the BCEA Bill which adds 9A.(1) “An employee who works for less than four hours on any day must be paid for four hours work on that day.” This provision for a minimum level of daily payment is congruous with recommendations from NMW-RI¹⁴ and the Expert Panel¹⁵.

¹³ RSA, *The Constitution of the Republic of South Africa, 1996* (Government of the Republic of South Africa, 1996), sec. 9(1) <<http://www.info.gov.za/documents/constitution/1996/index.htm>> [accessed 12 August 2013].

¹⁴ Castel-Branco, *Policy Considerations for the Design and Implementation of a National Minimum Wage for South Africa*; Ruth Castel-Branco, *Defining the Reference Period and Premium Payments for*

2.13. **It is recommended** that this stipulation of a minimum number of hours of work be included not only in the BCEA amendments but also referenced in the NMW Bill for two reasons:

2.13.1. Section 5(2) in the NMW Bill on the face of it contradicts the 4 hour minimum in the BCEA Bill, reading: “The worker is entitled to receive the national minimum wage for the number of hours that the worker works on any day”.

2.13.2. Even if this was resolved the NMW Act should be a comprehensive guide to workers and employers and so all important components of the NMW should appear in the Act and this is surely one.

(It seems that this may have been intended as the SEIAS attached to the NMW Bill notes in Section 1, under “summary of proposal” paragraph iii. that “The Bill makes provision for a guaranteed minimum number of hours, namely four hours which must be paid even if an employee should work less than four hours.”)

2.14. The NMW Bill does not, however, adopt other protections for part-time workers, specifically a premium for part-time work as found within certain SDs, e.g. “In the retail and wholesale sector, employees who work less than 27 hours a week are paid 25% above the hourly wage for a full-time worker.... Domestic workers who work less than 27 hours a week are also entitled to a premium rate (Department of Labour 2015).”¹⁶

2.15. Such premiums: 1. ensure that part-time workers earn closer to the amount needed to meet their basic needs; and 2. discourage employers from *unreasonably* reducing the number of hours worked by each worker (i.e. casualisation) (some level of reduction in working hours is accepted as an adjustment to the NMW).

2.16. **It is recommended that**, given trends towards increased casualisation as noted above, workers working less than 27 hours should receive one third more than the NMW hourly rate.

Sectoral determinations

2.17. **The amendments to the BCEA irrationally remove a tool available to government to project the most vulnerable workers and reduce poverty and wage inequality – the ability to amend and create new sectoral determinations.** Doing away with the ability to ‘manually’ update existing SDs

a National Minimum Wage, National Minimum Wage Research Initiative (University of the Witwatersrand, January 2016).

¹⁵ Expert Panel.

¹⁶ Castel-Branco, *Policy Considerations for the Design and Implementation of a National Minimum Wage for South Africa*, p. 22.

and institute new ones will, in the long term, disadvantage the most vulnerable workers.

2.18. Clause 4 of the BCEA Bill repeals Chapter 8 and 9 of the BCEA Act 75 of 1997 (BCEA Act). These chapters deal with the promulgation of Sectoral Determinations (SDs) and the powers and functions of the Employment Conditions Commission (ECC).

2.19. In the context of this repeal, the BCEA Bill (p. 208, clause 20) notes that:

- “any sectoral determination in effect at the commencement of the National Minimum Wage Act, 2017, remains in force except to the extent that it prescribes a wage that is less than the national minimum wage”; and
- “If any sectoral determination already prescribes wages that are higher than the national minimum wage, the wages in that sectoral determination and the remuneration and associated benefits based on those wages must be increased proportionally to any adjustment of the national wage... for a period of three years from the commencement of the National Minimum Wage Act, 2017.”

2.20. The purpose of SDs should first be noted:

- The Expert Panel’s report (p. 53) notes: “Sectoral determinations are set by the Minister of Labour, based on recommendations by the ECC, and target areas where workers are considered to be vulnerable, as well as sectors that are not represented by workers’ organisations.”
- The Godfrey Report (p. 30) notes: “The main purposes of SDs are to introduce wages for employees in certain sectors and to customise the BCEA’s provisions to better regulate the ‘peculiarities’ of sectors.... Most of these sectors covered by SDs are characterised by low trade union density, limited or no collective bargaining and have a preponderance of what are termed vulnerable workers.”
- In sum, these Reports highlight the rationale behind the introduction of SDs, that they: cover sectors characterised by low levels of collective bargaining and high levels of vulnerable workers; and implement sector-specific regulation.

2.21. Importantly, like collective bargaining agreements, the SDs¹⁷ include a wage schedule stipulating minimum wage levels for different categories of workers. For example:

- Sectoral Determination 9 in the wholesale and retail sector has 15 job categories ranging from “general assistant/trolley collector” to “manager”

¹⁷ DoL, *Sectoral Determinations (Multiple Agreements)* (Department of Labour, Government of the Republic of South Africa, 2015) <<http://www.labour.gov.za/DOL/legislation/sectoral-determinations>> [accessed 7 May 2016].

and including jobs like “fork lift operator”, “cashier” and so on. In the current schedule (01/02/2017 to 31/01/2018) ten of the job categories earn above R20 per hour. A driver of a large truck (16001kg and greater), for example, earns a minimum of R26.19 per hour in Area A.

- Sectoral Determination 6 for private security sector has 3 pay grades for security guards (as well as numerous other job categories), all of which (for Area 1 and 2) have monthly minima above R4000 (and thus above the R20 per hour NMW).
- Such job categories and wage schedules also exist in Sectoral Determination 2 for the civil engineering sector and Sectoral Determination 11 for the taxi sector.

2.22. The SDs also include sector specific regulations, for example the inclusion of commissions in Sectoral Determination 9 in the wholesale and retail sector.

2.23. It is commendable and appropriate that the NMW creates a single wage floor irrespective of levels previously stipulated in the SDs as recommended by the ILO,¹⁸ Expert Panel¹⁹ and NMW-RI.²⁰ However there is no reason to believe, even through concerted effort by the DoL and social partners, that any of the conditions outlined in paragraph 2.20 will change with the introduction of the NMW or be eradicated within the three-year phase out period. The original motivation for the institution of the SDs therefore remains.

2.24. Further, by removing the the ability of a statutory body to create and update wage schedules (with various job categories and wage levels), as the BCEA Bill does, a tool to protect workers earning above the NMW level and reduce inequality is removed. Why should the ability to regulate, for example that a driver of a large truck in the retail sector earn a minimum of R26.19 be lost? In addition, the ability to institute sector-specific arrangements is lost.

2.25. As noted, SDs are supposed to replace collective bargaining in sectors with low levels of union density; nowhere is it adequately justified why the NMW necessitates doing away with this.

2.26. Finally, the institution of the NMW should be seen within the context of a new wage policy for South Africa – a wage policy that redresses apartheid inequities. *Complementary* mechanisms to achieve this should be actively supported.

2.27. **It is recommended** that the powers associated with the ECC with respect of SDs be given to the new National Minimum Wage Commission (the Commission) as established in the NMW Bill.

¹⁸ ILO, *Minimum Wage Policy Guide*.

¹⁹ Expert Panel.

²⁰ Castel-Branco, *Policy Considerations for the Design and Implementation of a National Minimum Wage for South Africa*.

Schedule 1 tiers

2.28. **The NMW Bill does not provide for the phasing out of the lower rates (or 'tiers') for domestic and agricultural workers.**

2.29. It is our understanding of the Expert Panel report and the February 2017 NEDLAC NMW Agreement that the lower tiers of the NMW for agricultural and domestic work would be phased out over time.

- The Expert Panel (p. 63) report notes: "The Panel strongly believes that any transitional arrangements should have effect until 2019 at the latest. After this period, the objective of universal coverage of the NMW system should be achieved."
- The Nedlac agreement (Section 10) reads: "The social partners have agreed that when the NMW is introduced domestic workers will be paid 75% of the NMW and agricultural workers will be paid 90% of the NMW. It is proposed that these sectors will be brought up to 100% of the NMW level within 2 years pending research by the NMW Commission on this timeframe."²¹

2.30. **It is recommended** that the phasing out of these tiers be expressing included in Schedule 1, including the necessary mechanism and timeframes.

Expanded Public Works Programme

2.31. The Expanded Public Works Programme (EPWP) is included in Schedule 1 of the NMW Bill. Workers enrolled in this programme are "entitled to a minimum of R11 per hour from 1 May 2018".

2.32. The NMW-RI is not opposed to the inclusion of EPWP in the NMW at a lower tier, indeed we recommended this.²² However, the EPWP rate is not fixed at a percentage of the NMW meaning it could languish at R11 per hour, nor is there a procedure stipulated whereby the level is gradually raised to reach the general NMW over time.

2.33. The Godfrey Report (p. 52), in line with government's own approach, notes the importance of the EPWP: "The EPWP has been identified as flagship job creation and poverty alleviation initiatives that should seek to balance work opportunities with wages that make an impact on poverty." The report goes on to note that: "The obvious argument against inclusion is that raising the wages of EPWP workers would place too much strain on the national fiscus."

²¹ NEDLAC, 'Agreement on the Introduction of the National Minimum Wage' (National Economic Development and Labour Council, 2017), p. 3 <<http://new.nedlac.org.za/wp-content/uploads/2014/10/Agreement-on-the-Introduction-of-the-national-minimum-wage.pdf>> [accessed 28 November 2017].

²² Elena Konopelko, *Exclusions and Exemptions from a National Minimum Wage System*, National Minimum Wage Research Initiative (University of the Witwatersrand, April 2016).

2.34. However, the Godfrey Report, referencing long-serving Treasury bureaucrat Andrew Donaldson, notes that this proposition: “was rebutted by the previous Deputy Director-General of Treasury, who stated that the cost of phasing in the NMW to the EPWP by 2019 would be “modest”.” This is born out by a budget analysis: the 2017/18 estimated EPWP expenditure is R2,407,583,000 not all of which goes towards EPWP stipends,²³ so even a doubling of the wage level would have modest fiscal implications. Furthermore, the Godfrey report notes that “if the wage levels for EPWP workers do not keep in touch with the NMW there is potential for abuse of the scheme to circumvent the NMW”.

2.35. In addition to these considerations the R11 is very low and does not represent a meaningful increase to EPWP workers.

2.36. We take the same position as the Godfrey report (p. 52) that: “It is not clear why the EPWP and CWP should not be included within the ambit of the NMW. An arrangement similar to domestic workers and farm workers could be made for the EPWP and CWP, perhaps with a longer phase-in period or even an indefinite phase-in period. In such a case the wage for the EPWP would be set at 75% of the NMW for five years or for the foreseeable future.”

2.37. We are also concerned about how NGOs, and particularly those NGOs performing state functions, will be included within the NMW. The early childhood development (ECD) sector is an example. ECD centres, for example, receive a grant from the Department of Social Development (DSD) (based, in part, on how many children the centre caters for). According to some estimates, the average salary, in 2013, for ECD centre staff was R1 373 (most of these staff are black African women).²⁴ Without proper coordination across government, in this instance an increase of the DSD grants, these NGOs will be unable to pay their staff the NMW. Similar problems may arise for NGO healthcare workers. Interim measures, such a lower tier for these institutions, needs to be considered.

2.38. It is recommended that:

2.38.1. The EPWP rate be set as a percentage of the NMW;

2.38.2. Mechanisms and timeframes be established for ensuring the EPWP rate reaches the NMW level over a defined period of time;

2.38.3. Where government subsidises programmes that employ workers, such as the ECD sector, that government ensures that the relevant grants are increased to allow for the payment of the new NMW.

²³ Daniel McLaren, *Realising Right to Decent Work in South Africa* (Studies in Poverty and Inequality Institute, 2017).

²⁴ Akhona Stafane and others, *Understanding the Potential Impact of a National Minimum Waeg on the Early Childhood Development Sector in South Africa - A Need for More Financial and a Measured Approach* (Ilifa Labantwana, October 2016).

Learnerships

2.39. Learnership allowances are included in Schedule 2 of the NMW Bill. The amounts stipulated are considerably lower than the planned NMW, with minimum monthly wages as low as R1 295. Even for learners with higher NQF levels and more advanced in the learnership programmes, wages fall below the monthly equivalent of R20 per hour. Castel-Branco argues:

The exclusion of workers enrolled in learning programmes [from the full NMW] is based on the assumption that they are not workers but learners who, by virtue of being enrolled in training programmes are less productive or less deserving of remuneration. Therefore, in order to incentivise employers to set up learning programmes, they are excluded from the national minimum wage. This is the case for instance in Chile (ILO 2014b). However, the outright exclusion of workers in learning programmes means that they are not assured a wage sufficient to meet their needs and those of their families. Furthermore, while this approach assumes that learners and apprentices are not workers, they often perform similar work to full-time employees, thereby undermining the principle of 'equal pay for equal work', as well as potentially undercutting the positions of experienced workers. ...

Some countries have opted to cover learners and apprentices at a lower minimum wage tier, generally calculated as a percentage of the national minimum wage, and increased progressively as workers gain qualifications and experience. This is the case for instance in Portugal, where apprenticeships are limited to between six months and a year. However, the ILO recommends that in order to uphold the principle of equal pay for work of equal value, differentiated wages should only be considered for learners who receive structured training during working hours (ILO 2014b). However, many countries, including Uruguay and Malaysia, provide the same wage for apprentices and learners as other qualified workers (ILO 2014b; NWCC 2012). There are numerous advantages to this approach: it ensures that workers who are undergoing training are not trapped in a cycle of working poverty and are able to meet their basic needs and those of their families; it removes the incentive to replace positions for qualified workers with learnerships, thus ensuring career progression for qualified workers; it reinforces the function of apprenticeships as an entry point into a long, productive career; and it reduces downward pressure on the wages of qualified workers.

Given that South Africa already offers an array of incentives to employers to defray the potential costs related to lower productivity output and training, such as grants administered by SETAs and tax incentives by SARS, there is no rationale for the exclusion of learners or their inclusion in the national minimum wage system at lower wage tiers (Castel-Branco 2016b).

2.40. **It is recommended** that learnerships are not excluded from the NMW.

Other defined categories

2.41. The Bill does not currently resolve tensions with workers employed under the Employment Tax Incentive Act. As research by SALDRU at the University of Cape Town²⁵ shows this policy measure has had no impact in expanding employment and there is no justification for the exclusion of these workers from the NMW.

3. The Commission and annual reviews

Protecting and increasing the real value of the NMW through the annual review

3.1. **There is significant danger that the real value of the NMW will be eroded over time.**

3.2. The decision to impose an annual review of the NMW is welcome. However, while the NMW Commission *may* recommend an adjustment, an adjustment is not mandatory, nor is a minimum increase stipulated.

3.3. Given that in no circumstance would it be desirable for the NMW to lose real value it is insufficient that the Commission must, amongst other factors, *consider* (as noted in clause 7(b)(i)) “inflation, the cost of living and the need to retain the value of the minimum wage”.

3.4. **It is recommended that:**

3.4.1. A minimum increase – of CPI as faced by the lowest quintile (or lowest two) – be mandatory.

3.4.2. Between 7(a) and 7(b) an additional clause is added so that
7(a) promote – [remain as is subject to additions noted in paragraph 3.13 below]

7(b) ensure –

(i) that the real value of the national minimum wage is not reduced through a minimum mandatory inflation-based increase (inflation as faced by the lowest two quintiles)

7(c) further consider –

(i) inflation as faced by the lowest two quintiles, the cost of living and the need to retain the real value of the national minimum wage

²⁵ Vimal Ranchhod and Arden Finn, *Estimating the Short Run Effects of South Africa’s Employment Tax Incentive on Youth Employment Probabilities Using a Difference-in-Differences Approach* (Southern Africa Labour and Development Research Unit, University of Cape Town, 2014) <<https://ideas.repec.org/p/ldr/wpaper/134.html>> [accessed 20 October 2015]; Vimal Ranchhod and Arden Finn, *Estimating the Effects of South Africa’s Youth Employment Tax Incentive – An Update* (Southern Africa Labour and Development Research Unit, University of Cape Town, 2015) <<https://ideas.repec.org/p/ldr/wpaper/152.html>> [accessed 20 October 2015].

[(ii) – (viii) remain as is subject to amendments noted in paragraph 3.14 below]

- 3.5. **The Bill does not reflect the desire to progressively increase the real value of the NMW over time.**
- 3.6. Ensuring a minimum inflation-linked increase (as faced by the poor) would serve as a safeguard against the NMW losing value. But the Bill should also reflect the desire to progressively increase the real value of the NMW; this is essential if the NMW is going to reduce inequality. Towards this end **it is recommend that** under clause 7(a) it be added that the Commission must promote “the progressive increase in the real value of the national minimum wage subject to considerations noted in section 7(c)”.
- 3.7. To be technically correct “value” should be “real value” throughout.

Medium-term target

- 3.8. **The Bill is currently unclear what the purpose of the medium-term target is,** and what it means (in clause 6(a)(i)) to promote “the medium targets referred to in section 11(d)”.
- 3.9. **It is recommended** that:
- 3.9.1. The Bill make clear that the medium-term target, as expressed in the February 2017 agreement,²⁶ is intended to provide a goal to progressively increase the value of the NMW, based on internationally accepted benchmarks, such as minimum living levels and the proportion of the NMW to the average wage.
- 3.9.2. Clause 11(d), which mandates the Commission to “set medium-term targets for the national minimum wage within three years” be clearer. What is meant here is unclear both grammatically and conceptually. It could read: “set medium-term targets for the level [and/or other dimensions of the target] of the national minimum wage to be reached within three years of the establishment of the Commission”.

Powers of Minister relating to annual review

- 3.10. **The powers of the minister in rejecting the annual review are unclear and the Bill does not require the Commission’s report be made public.**
- 3.11. In clause 6(4) which reads “... the Minister, may in the prescribed manner, refer the report and recommendations back to the Commission to clarify or alter their recommendation”. It is not clear what “or alter” refers to here and

²⁶ NEDLAC.

whether they must alter the report based on an instruction from the Minister; the powers of the Minister in this respect are not clear and appear too broad.²⁷

3.12. It is recommended that:

- 3.12.1. The powers of the Minister be made clearer in this regard.
- 3.12.2. In the interest of transparent governance, it be stipulated that the annual review report be made public. It could further be stipulated that it be tabled in Parliament along with amendments to schedules 1 and 2.

Considerations during the annual review

3.13. We note with concern the wording of clause 7(b)(vii), for the Commission to consider “the likely impact of the recommended adjustment on employment or the creation of employment”, for three reasons:

- While it is possible (despite methodological dispute) to measure the previous impact of a wage increase (using econometric techniques) it is far more complicated to measure the *future impact* of an adjustment to the NMW, which requires complex statistical modelling;
- The idea that the likely impact on the “*creation of employment*” (emphasis added) should be measured is even more complex.
- To the extent to which these can be measured, competing economic models will produce competing estimates of the future impact. There is some consensus on methods to measure, *post hoc*,²⁸ the impact of a previous increase in wage levels, but there is none when it comes to future impacts. All parties to the NEDLAC process will remember the contestation around the use of competing economic models.²⁹ Such conflict was part of the deadlock in the negotiations and part of what necessitated the creation of the Expert Panel. The inclusion of this clause *inter alia* instructs the Commission to use such models and risks a yearly debate over what economic model to use and the potential for on-going deadlock on this issue – not only between social partner representatives but also between the Commissions ‘experts’.

²⁷ It is recommended the underlined is added to Clause 6(1) of the NMW Bill: “The Commission must review the national minimum wage annually and make recommendations to the Minister in the form of a review report on any adjustments of the national minimum wage”. This is because “review report” is used in the clauses that follow. In addition the end of this clause doesn’t make grammatical sense “... on any adjustments of the national minimum wage, which minimum wage must commence on 1 May of the next year.” It should read something like: “... on any adjustments of the national minimum wage, which would come into effect on 1 May of the next year”. Given that the date for submitting the report has not, by this point in the Bill, been stipulated, the drafters may consider moving the latter phrase towards the end of clause 6.

²⁸ Ilan Strauss and Gilad Isaacs, *Labour Compensation Growth in the South African Economy: Assessing Its Impact through the Labour Share Using the Global Policy Model*, National Minimum Wage Research Initiative (University of the Witwatersrand, 2016).

²⁹ Servaas Storm and Gilad Isaacs, *Modelling the Impact of a National Minimum Wage in South Africa: Are General Equilibrium Models Fit for Purpose?*, National Minimum Wage Research Initiative (University of the Witwatersrand, Johannesburg: CSID, 2016).

3.14. **It is recommended** that a more general phrasing for clause 7(b)(vii) be used, something like “the general impact on employment in the economy”, allowing the Commission to decide whether this means assessing the previous impact, modelling future impacts, considering evidence from other countries, and so on.

Composition of the NMW Commission

3.15. It is not clear in clause 10(1)(a) if the chairperson of the Commission is one of the three independent experts, a fourth independent person, or drawn from the existing members nominated by social partners. This confusion is compounded by reference to “four independent experts” in the NMW Bill Explanatory Memorandum paragraphs 3.8.1 and 3.8.2.

Secretariat of NMW Commission

3.16. **The current arrangements regarding the secretariat of the NMW Commission do not provide sufficient capacity or operational independence.**

3.17. The establishment of the Commission is congruent with the recommendations of the both the NMW-RI and Expert Panel. Both stressed the need for the (operational and political) independence of the Commission and for it to be well capacitated.

- In Malaysia, for example, the work of the National Wages Consultative Council (NWCC) is supported by a technical committee, nominated and selected by the NWCC rather than the Ministry of Labour. This ensures that the technical committee is directly accountable to the NWCC.
- In South Africa, Castel-Branco recommends: “The secretariat should be a structurally autonomous, well-resourced body with the capacity to fully support the commissioners and conduct outreach to the public regarding the evidence produced.” The Expert Panel stresses that the Commission should be well capacitated and have the ability to undertake its own research.

3.18. On accountability, it is noted that the Bill and associated documents seem to imply that the Commission Secretariat will be within the DoL. It is unclear what the reporting lines are, and whether the Commission has direct authority of these staff. **It is recommended** that the Commission be given direct authority over the seven planned employees of the Secretariat.

3.19. On capacity, the Commission offers an opportunity to develop, and highlight the importance of, in-house capacity, and for state, and quasi-state, institutions not to rely on outsourcing their research and other tasks. The evidence which the Commissioners must consider is extensive. **It is**

recommended that the Commission should develop the necessary expertise, in house and under their direct authority, to undertake this research and that sufficient resources be provided to do so. This research can interface with other work of the DoL and have a potentially positive departmental impact.

4. Exemptions and Enforcement

Exemptions and regulations

- 4.1. **The exemption system outlined in the NMW Bill is full of gaps that could undermine the universality of the NMW.**
- 4.2. The NMW Bill requires the Minister to stipulate regulations with respect of exemptions, leaving almost the entire exemption system to regulations. This departs from the BCEA which deals with a number of aspects of exemptions within the Act. There is not reason why the NWM Bill shouldn't do the same.
- 4.3. Clause 15(1) notes that "... an employers' organisation ..., acting on behalf of its members, may... apply for an exemption from paying the national minimum wage." This substantially departs from the existing exemption systems under both Sectoral Determinations and Bargaining Council Agreements in that it seems to give employers' organisations the power to apply for exemptions *en masse*. The principle of universality must strictly prohibit this. Exemptions should be granted on a case-by-case basis if businesses are able to prove that it would be impossible for them to pay the NMW and remain in business. This section of the Bill should not open the door for sector-wide exemptions by employer organisations. It should also not allow for employer organisations to developed sophisticate systems of fudging the numbers that allow them to then apply for exemptions on behalf of their members.
- 4.4. **It is therefore recommended that:**
 - 4.4.1. "employers' organisation" be removed from clause 15(1), and
 - 4.4.2. that if it is deemed necessary to provide for mechanisms through which whole subsectors or groups of employers are to be excluded then this take place through the Commission
- 4.5. In line with the above regarding the work of the Commission, there is need for a clear interface between the delegation of powers to grant exemptions and the work of the Commission. Ideally, those granting exemptions should be within the Commission Secretariat and be accountable to the Commission as the granting of exemptions significantly impacts the successful implementation of the NMW.
- 4.6. Missing from clause 16 is specific mention of the need to collect and make public data on exemptions (applied for and granted). The opacity of this

process has been noted on a number of occasions. Konopelko, for instance, notes that “the criteria for exemption are vague; there is little transparency regarding why some exemptions are granted and not others; and public reporting on exemptions is poor”.³⁰

- 4.7. **It is recommended** that the Minister (under clause 16(1)) be instructed to provide regulations on “(c) the collation and public dissemination of relevant statistics relating to exemptions applied for and granted”. This would be in line with the Constitutional mandate of transparent governance.

Enforcement

- 4.8. **The Bills pay insufficient attention to the need to increase capacity to enforce the NMW and offer inadequate incentives and deterrents.**

4.9. We welcome the emphasis placed on the need to adequately enforce the new NMW, found throughout the Bills and associated memoranda. In particular the emphasis on training the inspectorate and moving the legal proceedings from the labour court to the CCMA are important, the latter representing a potentially significant innovation (if various obstacles to effective implementation are overcome).

4.10. We are, however, concerned that there is a sense that the inspectorate is otherwise well functioning and simply needs education regarding the NMW and minor improvements in its operations. Contrary to this there is a significant literature, including work commissioned by the DoL from the DPRU, which shows serious systemic problems in the functioning of the inspectorate. These include:

- A lack of human and physical resources;
- No national case management system;
- A misallocation of inspectors across provinces;
- Few strategies to targeted sectors without fixed places of employment, e.g. the taxi or security industries;
- The low probability of inspection combined with the modest fines generates incentives to not comply; and
- Institutional interfaces with other statutory bodies such as SARS, the UIF or SAPS.

4.11. It is not clear why the parties did not draw upon a wide range of incentives used elsewhere in the world to encourage voluntary compliance by businesses, these include:

- Making participation in any kind of public procurement and/or government industry specific programmes (such as, for example APDP -

³⁰ Konopelko, *Exclusions and Exemptions from a National Minimum Wage System*, p. 4.

Automotive Production and Development Programme or MCEP - Manufacturing Competitiveness Enhancement Programme) conditional on national minimum wage compliance. Collective bargaining institutions could assist in certifying compliance;

- Providing access to Industrial Development Corporation (IDC), National Empowerment Fund (NEF) and other development finance institution loans and/or creating opportunities for subsidised loans subject to minimum wage compliance; and
- Direct, targeted tax incentives (for example, akin to Brazil's Simples programme).

Information on these can be found in Konopelko, Muhurwa, and Castel-Branco.³¹

4.12. The fines currently imposed and outlined are insufficient to deter non-compliance and numerous comparator countries impose stiffer penalties, including criminal ones.³²

4.13. **It is recommended** that the Bills:

4.13.1. Allow for research to occur in order to set the level of fines sufficiently high to deter non-compliance; and

4.13.2. Put in place mechanisms to allow for the institution of incentives to be offered to businesses.

5. Miscellaneous issues

5.1. Clause 4(6) of the NMW Bill ends with “unless the context indicates otherwise”; it is unclear what this means.

Queries regarding this submission can be referred to:

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³¹ Elena Konopelko, *Incentives to Enhance Compliance with a National Minimum Wage in South Africa*, National Minimum Wage Research Initiative (University of the Witwatersrand, March 2016); Brian Murahwa, *Monitoring and Enforcement: Strategies to Ensure an Effective National Minimum Wage in South Africa*, National Minimum Wage Research Initiative (University of the Witwatersrand, Johannesburg, 2016); Castel-Branco, *Policy Considerations for the Design and Implementation of a National Minimum Wage for South Africa*.

³² Murahwa.