

Institute for Economic Justice

*SUBMISSION TO PARLIAMENT'S
PORTFOLIO COMMITTEE ON LABOUR ON THE
NATIONAL MINIMUM WAGE BILL AND
BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL*

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1. Introduction

This submission is made on behalf of the Institute for Economic Justice (IEJ) by Mr Neil Coleman.

The IEJ is a new progressive economic policy think-tank located in South Africa. IEJ's core objective is to provide policy makers and progressive social forces in South Africa with access to rigorous economic analysis, and well thought through policy options, as a basis for concrete interventions. Interventions proposed by the IEJ seek to advance social justice, promote equitable economic development that realises socio-economic rights, and ensure a thriving, democratic, environmentally sustainable, and inclusive economy that places the needs of the majority at the centre.

Neil Coleman was the lead negotiator for Labour in the NEDLAC Wage Inequality Task Team that considered the implementation of a national minimum wage (NMW). The submission is therefore made with detailed knowledge and experience of the manner in which the negotiations unfolded, and the issues at stake in the Bills. This said, despite this historical role, the submission is in no way a submission on behalf of Labour. The submission is made on behalf of the IEJ, of which Neil Coleman is co-director.

Our focus in this submission is not confined to the technical details of the Bills. Rather we attempt to take a broader view, by looking at the key strategic objectives of introducing the NMW, and measure the Bills against these yardsticks. In doing this, it is necessary to grapple with the details of the Bills, and suggest additional clauses, or alternative wording, to achieve the objectives which have been set out. To this end, we attach some proposed amendments for the members of this Committee to consider.

In addition to this written submission, the IEJ requests the opportunity to make an oral presentation to the Committee on these Bills.

2. The objectives of introducing a National Minimum Wage

The introduction of a National Minimum Wage (NMW) was not an isolated intervention. It was always seen as part of a strategy to ensure structural change in the apartheid labour market. The [Ekurhuleni Declaration](#) what initiated the process did so with reference to the importance of wage income, the legacy of low wages, and the persistence of poverty and inequality. This was reflected in the mandate given to the negotiations which made it clear that the intervention was intended to go beyond the introduction of a minimum wage floor for the most vulnerable and exploited workers.

An indication of this is the naming of the Nedlac structure which negotiated the NMW the *Wage Inequality Task Team* (WITT) rather than the NMW task team. The WITT was charged with the responsibility of looking at ways to transform South Africa's inequitable wage structure, both through the use of a NMW, and through other mechanisms. It is also significant that the negotiators were tasked to look at the introduction of comprehensive social security to address income poverty, the role of employment equity measures in combating wage inequality, the role of public works programmes etc.

The Bills before the Portfolio Committee consider important aspects of the NMW architecture which relate to these broader strategic objectives, such as: the relationship between the NMW and other measures to protect vulnerable workers (for instance, through sectoral determinations); the role of the NMW in promoting collective bargaining; and an approach to reducing wage inequality. Therefore the way in which Parliament resolves these questions, many of which are highly contested in these Bills, will determine whether the Bills achieve their intended objectives.

So what are the broader considerations in light of which the Bills should be assessed?

Fundamentally, the NMW is intended to be part of a new national wage policy, which aims to reconfigure the wage structure, and overcome the apartheid cheap labour legacy, which still characterises the reality facing the vast majority of SA workers.

This new wage policy should be seen as part of a broader socio-economic transformation agenda: by enabling working people to achieve a decent standard of living, it both unleashes economic productivity, and helps to drive domestic demand in the economy, which can be harnessed to support the mass production of locally produced goods.

At the same time, this transformation, by eliminating ultra-exploitative employment practices, can promote greater investment in people, including their training and skilling, and help to promote a higher productivity economy, and eliminate old *baaskap* employment practices in the workplace.

A new wage policy must aim to radically reduce unacceptably high levels of wage and income inequality, combined with other interventions needed to achieve this. The highest earning 10%, on average, earn 82 times the lowest earning 10%, while the wealthiest 10% own 90-95% of the countries' assets.

The wage policy must aim to eliminate working poverty, in which workers work full time (and often long hours of overtime) yet they and their families live in poverty, unable to afford basic necessities, such as adequate food, shelter, health care, clothing, education. This is particularly true of black and women workers, 59% and 58% of whom, respectively, earn wages below the working poverty line. The

NMW is one, important element of a package to raise the incomes of working people. Because of the reality of high unemployment, and the fact that the unemployed rely on low-paid workers, the NMW has to be supplemented by social protection measures, in particular to introduce income support for the unemployed.

It is also clear that the new wage policy needs to be supplemented by an effective employment strategy. The debate on the impact of a NMW on employment has been comprehensively canvassed in the negotiations, and in the international literature. The [conclusion](#) is that the NMW, if correctly implemented, is, in the long run, most likely to have a neutral impact on employment. The NMW Expert Panel, and the ILO, concurred with this view.

However, if it is true that brutal repression of wages will not create employment, rising wages will also not inevitably generate employment, unless other appropriate policies are put in place. It is possible that increasing demand in the economy generated by rising wage levels could stimulate increased employment, but this will only happen if the correct policy interventions are made in areas such as macroeconomic policy (e.g. through fiscal stimulus measures, and falling interest rates), well-resourced and well-targeted industrial policy interventions, measures to promote and channel public and private sector investment etc.

Finally, when the labour movement proposed the introduction of a NMW for South Africa, it asserted that the NMW must be part of a comprehensive package which:

- Promotes decent work and a living wage, using the NMW floor as a springboard;
- Promotes comprehensive collective bargaining in all sectors of the economy, and that this bargaining should improve on the NMW floor, and reconfigure the entire wage structure;
- Establish comprehensive social protection which, combined with the NMW, and the reduction in the cost of key public services, would significantly raise the income of poor households.

While the NMW and BCEA Bills cannot achieve all these objectives by themselves, they should where appropriate and possible promote these objectives, and at the very least should not intervene in ways which retard progress in achieving them. There are some real concerns in this regard which are set out below.

3. Do the Bills achieve these objectives?

3.1 The NMW as contested terrain

It needs to be recognised that the introduction of a National Minimum Wage in important respects strikes at a core element of apartheid's political economy – the system of cheap labour. It is therefore not surprising that such an intervention was regarded as threatening huge interests in the economy, and that these interests have done everything in their power to block the introduction of the NMW, delay progress in the negotiations, and water down the NMW (after business lost the battle to block the NMW).

This explains why the introduction of a NMW has taken longer to negotiate and finalise, than the negotiations in the Constitutional Assembly! It also explains why the Bills under consideration are incoherent in important respects, and undermine significant agreements reached in the negotiations under the leadership of the then Deputy President.

As in all negotiations, the outcome contained in the Nedlac February 2017 [Agreement](#) on the NMW reflected a compromise, and the balance of power between the parties, and this agreement is the key reference point, with all its weaknesses. But the Parliamentary Committee should consider the fact that the Bills were not themselves a product of engagement in Nedlac.

The submissions of the Community Consistency and Labour to Nedlac, the submission of Organised Labour to the DOL and Parliament, and the wording of the Nedlac Report to Parliament reflect the reality that the draft Bills were introduced without engagement on their content. Social partners were not involved either in the drafting of the Bills (contrary to previous practice where constituencies had representatives on the drafting committee), nor consultation around new elements contained in the Bill (e.g. on the phasing out of Sectoral Determinations). Nor were important elements of the February 2017 agreement (such as annual increases, and the medium-term target) taken forward adequately.

Therefore it must not be assumed that what is contained in the Bills before Parliament represent a Nedlac agreement.

We look below at the main clauses of the NMW and BCEA Bills, and whether they advance the objectives set out above.

3.2 The NMW level

The level of the national minimum wage will be R20/hour, or R3464 a month for 40 hours per week, and R3897 a month for 45 hours a week.¹

The adequacy of the proposed level of R20 per hour has to be considered against two broad benchmarks:

- The extent to which it will improve the existing wages of low paid workers; and

¹ Some commentators have used an incorrect method to calculate the NMW, by assuming that you multiply the hourly wage x 40 (or 45), to get the weekly wage, and then x 4, forgetting that there are more than 4 weeks in a month. The official formula is to multiply the weekly wage x 4.33

- How far it goes in meeting the demands of workers, and the objective requirements needed to get low paid workers and their families out of poverty.

Statements based on estimates of the NMW Panel of experts, that over 6 million workers will benefit from the NMW, are probably significantly overstated for the following reasons: implementation of the NMW in May 2018 rather than July 2017, as initially proposed by the Panel, will erode the NMW's value; there is probably a significant underestimation in the statistics of the level of wages; and a number of informal sector workers are unlikely to immediately benefit.

Nevertheless, the Wits National Minimum Wage Research Initiative (NMW RI) estimates that when calculated in **2018 prices** nearly **4,3 million** low-wage workers – or one third of the formal sector workforce – will have their wages raised when the NMW comes into effect. Ultra low wage levels will increase to R20 p/h for formal sector workers; R18p/h for farm workers at 90% of the NMW; and R15p/h for domestic workers at 75% of the NMW (this number of 4,3 million would be a bit higher if all informal workers were included in the calculation)². These are the numbers who will benefit:

Table 1

- Formal sector workers under R20 p/h in 2018:	3 048 780
- Farm workers* under R18 p/h:	509 482
- Domestic workers* under R15p/h:	728 680
TOTAL	4 286 942

**For farm and domestic workers, these figures include informal sector*

So it is clear that the NMW (with qualifications outlined in the submission below) will be an improvement for many low-paid workers. There are few countries where the NMW has benefited such a high proportion of workers, and South Africa will be a leader in that regard. But we are also an outlier in terms of our excessive levels of wage inequality, and therefore it is appropriate that the NMW affects a large proportion of the working poor.

However, many in mass organisations, social media, and commentators in general, have argued that this amount is far too low. They have correctly pointed out that a worker earning R3 500 p/m (or even R3 900 p/m) cannot afford to provide the most basic necessities for their family³. This is borne out by [studies by Saldrú at UCT](#) which show that the Minimum Living Level would have been R5544 for a household of four in February 2016 prices, and therefore substantially more in 2018.

It also falls short of Labour's demand in 2016 for a NMW of R4500p/m or R26p/h (which would be higher in 2018 prices). At the same time, until December 2016, business negotiators were proposing a NMW of around R2000 p/m or about R11.50 per hour. Therefore on the face of it, while inadequate, the agreement constitutes a significant advance for Labour.

The agreed NMW level is therefore a compromise which will allow low-wage sectors to adjust, without an excessive shock. However, this compromise is only acceptable if it is based on the understanding that while the level is low, it is an improvement on existing wage levels, and constitutes a bulkhead which

² See attached Appendix 1, which shows the number of workers earning less than R20 per hour at the end of 2016.

³ See Pacsa statement http://www.pacsa.org.za/images/SUBMISSIONS/Media_Release_NMW_PACSA_Response_13_Feb_2017.pdf

lays the basis for further advances, if the appropriate provisions are in place. It therefore requires there be significant progressive improvements in the real value of the NMW over time.

This is where consideration of the *whole package in the Bills* becomes so important, and where consideration of the R20 p/h level in isolation may not be helpful. Any elements in the Bills which enhance the value of the NMW going forward, or alternatively which undermine it, become very important to consider.

Recommendations:

The Portfolio Committee should ensure that aspects which relate to the value of the NMW, which are dealt with in the sections below, need to be strengthened in the Bills particularly with regard to:

- payment for minimum working hours;
- deductions;
- annual increases;
- the medium-term target;
- the protection and improvement of sectoral determination wages and conditions higher than the NMW;
- and the protection of collectively bargained wages and other wages which are higher than the NMW.

3.3 The NMW and Collective Bargaining

A concern has been expressed that employers will use the NMW to undermine higher wages in collective bargaining agreements. Clause 4 (6) in the NMW Bill attempts to deal with this by making it an unfair labour practice. This clause is problematic because it only applies to individual employers (as opposed to bargaining councils) and prevents unions from taking strike action in such an instance. This ploy was attempted in the engineering sector by employers attempting to vary entry wages downward for new workers.

There needs to be an effective clause in the Bill which prevents such abuse. In addition unions will have to use their collective strength to build on the wage floor created by the NMW, particularly in the more vulnerable sectors, recruit vulnerable workers, establish bargaining councils in those sectors, and act to counter abuse by employers. In general the international experience of the NMW is that it advances and promotes collective bargaining, rather than undermines it. However there must be deliberate policies and legislative provisions, combined with effective organising by unions, to ensure that this is the case.

Recommendation

The Committee should consider inserting this provision in the NMW Bill:

4(7) No wages or conditions of work prescribed by Sectoral Determinations or Bargaining Council Agreements, or private contracts, which are more favourable than the NMW, may be decreased after, or in anticipation of, the introduction of the NMW.

3.4 Hourly denomination

The introduction of a NMW denominated as an hourly minimum wage was the outcome of a proposal by the NMW Expert Panel, after the negotiations had deadlocked for over a year. Parties had previously considered a monthly NMW, but Labour and Community had supported the NMW being denominated in hourly, weekly and monthly formats – where the weekly and monthly amounts are not necessarily simply multiples of the hourly rate and where even part-time workers are guaranteed a certain weekly or monthly minimum. The focus in the public domain on the figure of a R3500 p/m NMW (or R3900 p/m for workers working a 45 hour week) to some extent distracted attention from the limitations of the hourly approach. Nevertheless constituencies in Nedlac raised strong concerns about the impact of this approach, and the danger of abuse, particularly in relation to the reduction of working hours, and the need for payment for minimum working hours, and premium payments (dealt with below).

Recommendations

1. The NMW commission should review after the first year whether the hourly provision is being abused (in conjunction with the issue of payment for minimum hours), and whether a weekly and/or monthly NMW should be introduced in addition to the hourly NMW, as is practiced in some countries.
2. In the meantime a table should be included in schedule 1 of the NMW Bill, which sets out the weekly and monthly equivalents of the NMW, in order to assist workers and employers to calculate the NMW. This has previously been done by the DOL, e.g. with sectoral determinations.

3.5 Working hours

The Bills provide that workers must be paid for a minimum of four hours a day. This by itself, while a step in the right direction, is inadequate protection against casualisation, and doesn't go far enough. A number of sectoral determinations either require payment for a higher minimum number of hours (i.e. above four), or require a premium on the hourly rate for workers working less than 27 hours a week; in retail for example, those working less than 27 hours earn an hourly rate 25-30% higher than those working more than 27 hours.

The value of introducing an hourly NMW, particularly for the most vulnerable, low-paid workers, could be seriously eroded if there are not mechanisms to ensure payment for a higher number of hours, as well as premiums for part-time work to deter excessive casualisation. While the agreement provides that workers should not be worse off after the NMW introduction, and the NMW Bill provides that hours should not be unilaterally reduced (but limits this to an unfair labour practice), this does not prevent the systematic extension of part-time work to counter the NMW impact, including to new workers.

Labour had therefore proposed mechanisms to combat abuses related to working hours, to combat a situation where workers merely work for transport and lunch. In addition to penalties to combat downward variation of conditions, this could include: the provision of a daily payment for a minimum number of five hours; a premium for working hours below eight hours a day; and/or the requirement of weekly or monthly payment for work over a certain number of hours. These proposals draw on existing agreements in sectoral determinations and collective bargaining agreements to combat such abuses.

The agreement in Nedlac was that the NMW Commission would investigate the feasibility of extending minimum payment from four to five hours, but this is not given expression in the Bills.

Recommendations:

1. The Bills need to contain a transitional provision mandating the Commission to investigate the matter of minimum payment for working hours.
2. The Commission should also investigate other mechanisms to counter abuse of part-time work, including a sliding scale of premium payments, and a requirement for weekly or monthly payment over a certain number of hours.
3. As recommended above, the Commission should review whether the NMW denomination should be changed.

3.6 Annual increases

The February 2017 NMW Agreement provides that while annual increases in the NMW should 'not lead to the erosion of the value of the NMW', the actual increase will be subject to a host of factors. Labour and Communities understanding of this agreement was that there will, at minimum, be inflation-linked increases (so as not to erode the value), and that any increase above this will be considered by the NMW Commission in the context of the factors listed in the agreement. This is in line with current practice in all sectoral determinations of providing for inflation plus further increases.

If the NMW is to be part of a wage policy which deliberately raises the wages of low-paid workers faster than that of the higher paid, it then follows logically that the NMW will have to increase at a level higher than inflation, and that it should increase faster than average wages in the economy. Otherwise the gap will continue to grow.

The NMW Bill therefore needs to contain provisions which clearly and unambiguously capture this intention. Unfortunately, the draft NMW Bill muddies the water in this regard.

Recommendations:

Proposed amendments are attached which seek to capture this intention requiring, *inter alia*, that

1. The Commission must progressively improve the real value of the NMW;
2. The level of the increase above inflation will be determined by the other factors listed;
3. Inflation must be calculated based on the level of inflation faced by low-paid workers; and
4. Minimum levels for a family must be considered as one of the key factors in determining the increase.

3.7 Medium-term target

Labour's approach in the negotiations was that if the NMW starts from a relatively low level, when compared to the basic subsistence needs of workers, then the NMW package must be designed in such a way as to ensure a transformation of the wage structure through: progressively increasing the value of the NMW over the medium term and deliberately reducing the excessive levels of wage inequality.

The provision in the February 2017 agreement that the NMW Commission, which will oversee implementation of the NMW, must establish a medium-term target for the NMW, based on agreed

benchmarks, was an important step in this direction. While Labour's preference had been for this medium-term target to be set upfront through the negotiations, this commitment seemed to make it clear that there must be a progressive improvement in the NMW to meet a target over the medium term.

However the NMW Bill fails to take forward this commitment in any meaningful way, and does not require the medium-term target to be reached in specified timeframes, nor does it guide the Commission as to what benchmarks should be used in establishing the target. This negates the intention of the target, and the Committee needs to correct this.

Recommendations

1. The Commission must within its first year of operation stipulate the level which the national minimum wage must achieve within 3-5 years of the Commission's establishment.
2. The medium-term target should take into account appropriate benchmarks and relevant International Labour Organization instruments, including the minimum living level; the internationally used ratios between the NMW and average wage; and the average minimum in collective agreements.

3.8 Sectoral Determinations and the ECC

The proposal to phase out sectoral determinations (SDs) in three years, abolish the ECC, and withhold powers from the NMW Commission to oversee the SDs, was not part of the February 2017 agreement, and was unilaterally introduced by the Department of Labour in the draft Bills. This raises a host of problems, which the Committee of Principles (COP) attempted to address in the negotiations, but which remain unresolved in the published Bills:

1. The CoP agreed that all vulnerable workers must be protected, and that if the proposed **transition period of three years** is to be implemented there needs to be a provision that ensures vulnerable workers continue to be protected if Bargaining Councils (BCs) have not been established within these timeframes in particular sectors. There is no provision in the Bills which require the setting up of the BCS within three years, nor a provision protecting vulnerable workers from May 2021. Section 22 of the BCEA Bill (under Transitional Provisions) only provides that SD wages and benefits are increased proportionally to adjustment of the NMW. It doesn't say what happens after that, but the implications are that the SDs fall away. Thus vulnerable workers in those sectors earning above the NMW would lose their protections.
2. There is no role given to the **NMW Commission** in reviewing or adjusting SDs, and Chapters 8 and 9 of the BCEA currently dealing with SDs and the Employment Conditions Commission (ECC) are repealed. This is important for a range of reasons, including that the SDs need to be dynamically adjusted and that the Commission should be able to holistically tackle conditions of vulnerable workers using both the NMW and SDs. Further, the notion that the highest wages and the lowest wages in SDs, and associated conditions, will automatically increase by the same percentage as the NMW deprives the Commission of a tool to reduce wage inequality.
3. The understanding that **non-wage conditions in the SDs would continue after the three years** is not captured in the BCEA or NMW Bills. This is also a matter that the Commission should be given the

mandate to oversee. Section 21 of the BCEA Bill only states that a *minimum wage* in an SD remains in force.

4. The Minister no longer needs to consult with Nedlac before withdrawing or amending a SD. Previously, as noted in the explanatory memo to the BCEA: “the Minister must seek the advice of NEDLAC on any amendment or withdrawal of a sectoral determination, and publish proposals for public comment.” This has now been withdrawn.

Recommendations

This is a critical issue which must be addressed, otherwise government will be ‘giving vulnerable workers the NMW with one hand’ and ‘taking the SD benefits away from them with the other’. A number of issues need to be resolved in the Bills including:

1. A mechanism to ensure BCs are introduced within three years in all sectors currently covered by SDs and all currently uncovered sectors (approximately 46% and 20% of lower-wage workers respectively) must be inserted, or the three-year transitional provision must be dropped.
2. The NMW Commission must be given the necessary mandate to adjust SDs appropriately, and to recommend their extension if BCs are not set up in the three-year period.
3. All non-wage conditions must be explicitly protected, and the Commission given the mandate to adjust these, as appropriate.
4. The provision requiring the Minister to seek the advice of NEDLAC on any amendment or withdrawal of a sectoral determination must be reinstated

3.9 Deductions

The Bills allow for certain deductions from the NMW, and prohibit others, but:

- They do not regulate deductions for food and accommodation, but instead prohibit them. This will have unintended consequences, and the regulation of such deductions contained in the farm and domestic SDs should be incorporated.
- The Bill doesn’t specifically prohibit deductions for employer contributions to medical aid, UIF etc being taken off the NMW.
- There is no cap on the amount employers can deduct.

Recommendations

1. Deductions for food and accommodation for farm and domestic workers as regulated in the SDs should be allowed.
2. The Bill must prohibit deductions for employer contributions from the NMW.
3. Labour’s proposal for a 25% cap on the amount employers can deduct, as a proportion of the NMW, should be incorporated.

3.10 Exclusions and tiers

With the DOL having announced that all workers are covered by the NMW, and that the definition of ‘worker’ is not limited to ‘employee’ as defined in the BCEA etc., there is now clarity that the only categories of workers currently not covered by the full NMW are farm, domestic and EPWP workers, as well as learners. The decision to include farm and domestic workers at tiers in the NMW, however, could

have major benefits for these categories of workers, if they are brought up to 100% of the NMW over two years, as agreed.

Despite being tiered at 75% and 90% respectively, domestic and farm workers will nevertheless be better off when the NMW kicks in than they would have been had they continued to be covered by SDs. The NMW RI calculates that at current rates of increase of SD wages in these sectors, they would not have reached these tiered levels by June 2019 – domestics (non metro) workers would reach R13.79 in 2019 vs. the R15 tier agreed to for May 2018; and farm workers would reach R17.54 in 2019 vs the tiered level of R18 which will cover farm workers in May 2018. Their inclusion as a tier of the NMW with a commitment to increasing their wages to 100% will be a significant advance for these most exploited workers.

However, the Bills are currently unclear on the transitional arrangements to ensure incorporation of farm and domestic workers into the full NMW.

The proposal on EPWP workers, pegging them at R11p/h is extremely problematic. The former DDG of Treasury, Andrew Donaldson has stated publicly that the fiscus can support the incorporation of EPWP workers into the NMW.

The R11p/h level is not even an inflation-based increase on the current minimum SD for EPWPs which is *R85 per day* (a fraction under R88 per day or R11 per hour). Assuming inflation at a low level of just over 5%, an inflation level increase for the EPWP would be at least R90 per day. A R12 per hour minimum would be R96 p/d or around a 12% increase on the current level.

Based on the figures given by the DPW in its submission to Nedlac, a 66% tier or R105 p/d would at most cost the fiscus R3 billion.⁴ A R12 p/h or R96 p/d tier would therefore cost the fiscus an increase of R2.7 billion at the most. Given the large numbers of beneficiaries of the EPWP, and the fact that EPWP wages are way below SD wages for the most vulnerable workers, this suggests that a moderate increase from R85 p/d to R96 p/d is very reasonable.

Recommendations

1. Clear provisions need to be contained in the transitional arrangements to ensure that farm and domestic workers are progressively incorporated into the full NMW – see attached amendments.
2. The tier for EPWP workers needs to be improved and an investigation undertaken on a process to progressively incorporate them into the NMW over a period of time.
3. A clear definition is required for learnerships – see attached.

3.11 Wage inequality

As outlined at the outset, a new wage policy requires the NMW to be connected to a coherent strategy to address wage inequality.

Section 8 c) of the NMW Bill transfers the functions of the ECC to implement section 27 of the Employment Equity Act to the NMW Commission namely to “(c) *investigate income differentials and recommend benchmarks for proportionate income differentials*”. Recall that this, irrationally, is done at the same time as the power to amend and create SDs is abolished!

⁴ Although their other calculation in the same presentation was much lower: R1,3 billion.

The problem with this is that Section 27 is a weak section, which was never implemented, needs clarification particularly on its **vertical application**, and has no **sanctions** for non-compliance. Sanctions could be introduced in the form of an amendment to Section 27. The EEA has to be amended in any event with the introduction of the NMW Bill, and *certain amendments were tabled for discussion in a Nedlac committee*. This matter should be dealt with when the EEA is amended.

Section 8 e) mandates the commission to “advise the Minister on measures to reduce income differentials”. We support Labour’s proposal to introduce a **ratio between the top 5% and bottom 5% of earners**, and a broader package of measures to combat wage inequality. This could be incorporated and require that the Commission finalise this matter by May 2019.

The third element is a **comprehensive policy package** of measures on wage inequality. The NMW February 2017 agreement agreed that a Nedlac Committee would discuss a package of measures to combat wage inequality. This has not been done and the Portfolio Committee could request Nedlac and the COP to expedite this matter, or alternatively instruct the NMW Commission to table its proposals within an agreed timeframe.

Recommendations

1. An amendment to Section 27 to clarify it and give it teeth – this can be done after the NMW Bill is agreed;
2. An amendment to 8 e) to include provision for a wage ratio – see attached;
3. Discussions of a policy package by Nedlac for presentation to the Commission in mid-2018, or to require the Commission to discuss this directly.

3.12 Enforcement penalties and incentives

There are various aspects relating to the issue of enforcement which are dealt with in the BCEA Bill – **the bulk of the Bill Sections 6 -19** deals with issues of monitoring, compliance, disputes, penalties, the role of labour inspectors, the CCMA, Labour Court etc.

There is a lot of detail on the above, but they fall short in a number of principle ways:

1. **Penalties:** that there must be serious and progressively increased penalties for repeat offenders, with criminalisation of serial offenders.
2. That **access to government tenders and incentives** must be dependent on compliance with the NMW, and other labour legislation, and eligibility for these should require a *certificate of compliance*. While government had committed to make this a requirement for tenders this is not captured in the Bills.
3. If the fast-tracked **role for the CCMA** is to be supported, the Labour Court must not duplicate the role of the CCMA, and the CCMA must be given the necessary powers and resources.
4. The need for **scaling up and proper resourcing** of the DOL inspectorate.

Recommendations

1. Adequate penalties need to be contained in the Bill – see proposed amendments attached;
2. A compliance certificate required for eligibility for tenders – see proposed amendments attached;

3. The CCMA must be given the necessary powers and resources;
4. Scaling up and proper resourcing of the DOL inspectorate.

3.13 Exemptions

There are two major concerns in the NMW Bill provisions on exemptions.

First, the Bill S 14 (1) provides that: “An employer **or an employers’ organization** ... on behalf of its members may apply for an exemption”. It has always been clearly understood that the purpose of exemptions is for individual employers to show that there are exceptional circumstances requiring a temporary exemption. The notion of employers applying collectively for their members defeats this intention. Even if its done by the organisations separately for each employer, it is likely that this will produce a machine designed to undermine the NMW, just as Cofesa became a facility for labour brokers to frustrate the labour legislation.

Second, the notion of collective exemptions actually constitute disguised **exclusions**. If such a phase in arrangement is to be agreed for a group of employers, sector or subsector, it should be through upfront, negotiated arrangement through the BCs, and agreed before the law comes into effect.

The NMW Bill S15 provides that the Minister ‘may’ (previously it was ‘must’) make regulations on exemptions containing various details. Problematically, certain aspects are missing, e.g. the requirement to submit financial statements (a current requirement with SDs). And there is no requirement for the Minister to table the regulations at Nedlac, only to first consult before drafting the Regulations.

Recommendations

1. The reference to employers organisations should be removed.
2. If the details are to be contained in regulations, the law needs to specify the key elements which must be contained in the regulations, including the requirement to submit financial statements.
3. The Minister must table draft regulations at Nedlac.

3.14 Role of the NMW Commission

A number of issues are raised above relating to the important role of the NMW Commission, in terms of progressively improving the NMW, establishing and achieving the medium-term target, overseeing sectoral determinations, and implementing a strategy to address wage inequality.

In order to do all these things effectively, the Commission needs to have:

- The necessary mandate in the Bills;
- Proper resources and capacity to implement its mandate, do the research and so on;
- Sufficient authority and weight to ensure that it is not reduced to a mere advisory body.

Recommendations

1. There are a range of issues which impact on the role of the Commission, which have been dealt with in this submission, which suggest that a number of concerns exist about the lack of the necessary powers, and mandate which need to be dealt with in the legislation – proposals are attached.

2. In its report to Parliament, it would be important for the Committee to identify areas where the Commission needs to be capacitated and given adequate resources, similarly with the CCMA and DOL inspectorate.

3. Conclusion

This submission has highlighted serious deficiencies within the Bills as they currently stand. In particular, we have argued that the various parts of the NMW cannot be viewed in isolation to one another and that the NMW must be viewed as a package; the current package falls short. The deficiencies are not simply technical in nature but go to the heart of the purpose of the NMW and whether the legislation in its current form gives expression to that purpose.

Those intentions are noble in character and reflect the commitment of the government, ruling party and various social partners to give expression to the long-standing objective of a 'better life for all'. In particular, the NMW seeks to contribute towards changing the existing wage structure - inherited from apartheid South Africa - as part of the structural transformation of the economy.

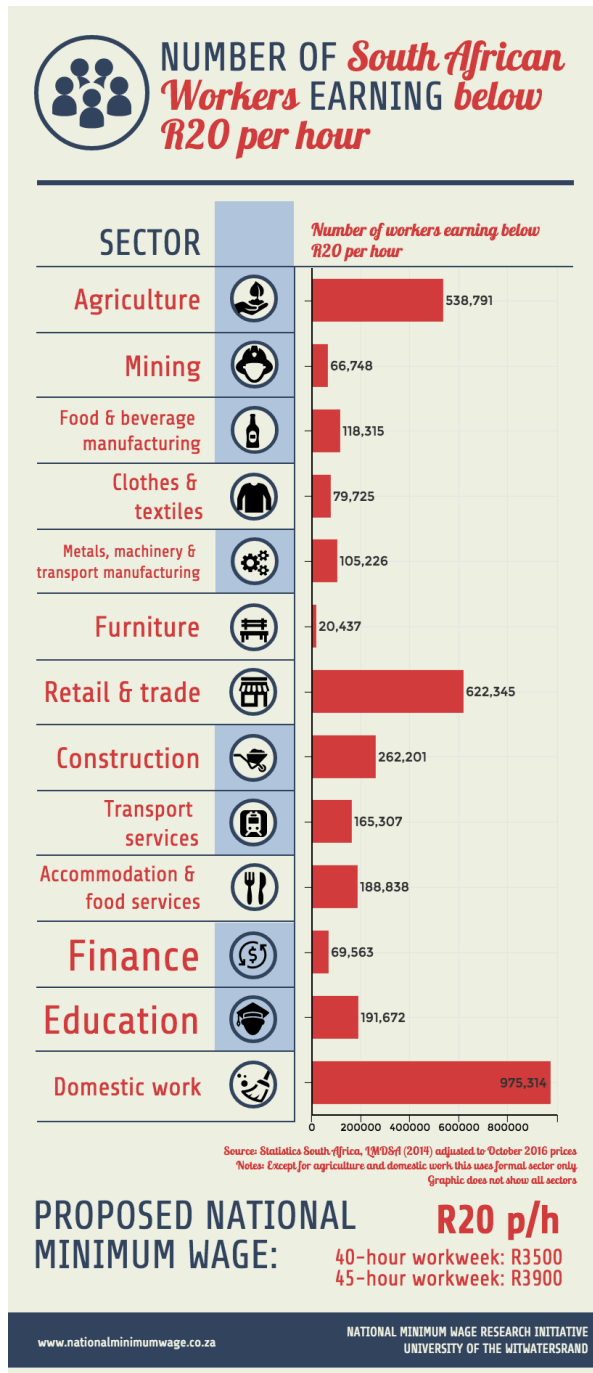
It would be a tragedy for these objectives to not be given full expression in this landmark piece of labour market legislation. The Portfolio Committee must therefore shoulder the weighty burden of correcting where the social partners and DoL have fallen short.

This process cannot be rushed and the Committee should not rush the legislation to meet the 1 May deadline if such haste would undermine the purpose of the legislation.

If implemented correctly, the NMW has the potential to contribute towards reducing poverty and inequality, ensuring social stability and playing a transformative role in South Africa.

4. Appendices

Appendix 1: Formal sector workers in key sectors earning less than R20 p/h in October 2016⁵:



⁵ Graphic supplied by Wits NMW Research Initiative

5. Proposed Amendments National Minimum Wage Bill

PREAMBLE

- (1) **Noting** the high levels of working poverty in the country;
- (2) **Noting** the need to eradicate poverty and inequality;
- (3) **Noting** the need to promote fair and effective competition in the labour market and labour market stability by eradicating exploitative practices;

2 Purpose

The purpose of the Act is to advance equitable economic development and social justice by –

- (a) improving the wages of lowest paid workers;
- (b) protecting workers from unreasonably low wages and working poverty;
- (c) promoting improved wages which take into account the needs of workers and their families;
- (d) preserving and improving the value of the national minimum wage;
- (e) promoting collective bargaining and supporting economic policy.
- (f) reducing wage inequality

CHAPTER 2: NATIONAL MINIMUM WAGE

3 National minimum wage

- (7) No wages or conditions of workers prescribed by Sectoral Determinations or Bargaining Council Agreements, or private contracts, which are more favourable than the NMW, may be unilaterally decreased after, or in anticipation of, the introduction of the NMW.

4 Calculation of wage

- (1) Notwithstanding any contract, collective agreement or law to the contrary, the calculation of a wage in terms of this Act is the amount payable in money for ordinary hours of work excluding –
 - (a) any payment to enable a worker to work including any transport, equipment, tool, food or accommodation allowance, and any other allowances;
 - (b) any payment in kind including board or accommodation, with the exception of the deductions allowed in terms of the domestic, farm worker and forestry sectoral determinations;
 - (c) gratuities including bonuses, tips or gifts;
 - (d) employer contributions to UIF, medical aid schemes, or retirement funds;
- (2) Deductions which are allowed in terms of a law, collective agreement, court order or arbitration award, may not comprise in total more than 25% of the wage. No deductions may be introduced or made with the intention to avoid paying the national minimum wage.
- (3) A worker is entitled to receive the minimum wage for the number of hours that the worker works on any day, but may not be paid for less than four hours work on any day, subject to section 9A of the Basic Conditions of Employment Act⁶, and the transitional provisions in Section 16.

5 Annual review

- (3) The Commission must forward a report on its review and its recommendations for the next year to the Minister by 31 October of each year. The first report must be concluded by 31 October 2018.
- (6) If the Cabinet approves the adjustment to the national minimum wage, the Minister must –

⁶ We are making this proposal subject to the understanding that the provision for an investigation by the commission on moving to 5 hours will be contained in the Bills

- (a) By March 31 each year table the amended Schedules 1 and 2 with the National Assembly; and

CHAPTER 3: NATIONAL MINIMUM WAGE COMMISSION

6 Establishment of Commission

- (1) A National Minimum Wage Commission is hereby established, and replaces the Employment Conditions Commission.

7 Functions of Commission

The functions of the Commission are to –

- (a) review the national minimum wage and sectoral determinations and recommend annual adjustments;
- (b) investigate and report annually to the Minister on the impact of the national minimum wage on wage levels, the economy, working poverty, collective bargaining and the reduction in income differentials;
- (c) by January 2019 investigate income differentials and recommend benchmarks for proportionate income differentials⁷, including recommendation of a ratio between the top and bottom groups of earners;
- (d) set a medium term target for the national minimum wage which will stipulate the level which the national minimum wage must achieve within 3-5 years of its introduction . The medium term target should take into account appropriate benchmarks and relevant International Labour Organisation instruments ;
- (e) advise the Minister on further measures to reduce income differentials or any other matter on which the Minister requests the Commission's advice; and
- (f) oversee the functioning of the Commission Secretariat.

⁷ Amendments need to be made to the Employment Equity Act to deal with current flaws in Section 27.

8 Conduct of annual review

For the purposes of conducting an annual review and recommending adjustments, the Commission must –

(a) promote-

- (i) the medium term targets referred to in section 8(d);
- (ii) the eradication of working poverty, and exploitative employment practices;
- (iii) progressive improvement in the real value of the national minimum wage;
- (iv) the reduction of wage differentials and inequality; and

(b) consider-

- (i) inflation experienced by low income people;
- (ii) minimum living levels which quantify the basic needs of workers and their families;
- (iii) wage levels conditions of employment and collective bargaining outcomes;
- (iv) the health and safety and welfare of workers;
- (ix) the likely impact of the recommended adjustment on employment given the verifiable employment impact of previous national minimum wage increases, considered in conjunction with other economic factors ;

9 Appointment and termination of appointment of members of Commission

(5) Termination of appointment may be effected in any of the following ways:

- (d) A Constituency requests the Minister in writing to remove a member or members nominated by them

10 Secretariat

(1) Subject to the laws relating to the public service, the Minister must provide the Commission with an interim secretariat⁸ to enable the Commission to become operational.

(2)

(3) The Secretariat will perform the following functions under the guidance of the Commission:

(c) The monitoring and evaluation of the impact of the national minimum wage, and sectoral determinations, in achieving the purposes of this Act.

(2) (3) The Minister must request the relevant government departments and agencies to provide the Commission and the Secretariat with relevant data, including on exemptions, levels of compliance and enforcement, and wage levels in the economy

CHAPTER 4: GENERAL

12 Regulations

(3) The Minister, after consulting NEDLAC and when appropriate, the Commission, must make regulations⁹ relating to-

(a) The form and manner in which exemptions must be made in terms of section 14(1) and must contain–

(iii) the obligations on employers to consult with employees and trade unions concerning an exemption application;

⁸ The Minister should be required to consult with social partners on the appointment of senior members of the Secretariat

⁹ A clear and comprehensive framework for exemptions must be contained in the Bill. The Regulation must only deal with the detail

- (iv) requirements for employers to submit financial statements in support of their application;

11 Transitional provisions

(1) The Commission must-

- (a) investigate the feasibility of increasing the minimum daily wage payment in terms of section 9A of the Basic Conditions of Employment Act from four to five hours;
- (b) investigate the feasibility of introducing a premium payment for workers working for less than 8 hours on a particular day; and

SCHEDULE 1: NATIONAL MINIMUM WAGE

- 1** Subject to item 2, the national minimum wage is R20 for each ordinary hour worked, from 1 May 2018 to 30 April 2019.
- 2** [Insert illustrative table which shows the weekly and monthly calculation of the national minimum wage for 40 and 45 hours, as previously done, and undertaken by government in the negotiations]
- 3** Notwithstanding item 1 –
- (c) workers employed on an expanded public works programme are entitled to a minimum wage of R12 per hour from 1 May 2018;

4. The Commission will propose a schedule of increases for items 2a) and 2b) to phase them into the hourly rate for the national minimum wage by May 2020. Any proposal for a longer phase in period for these sectors will have to be based on compelling evidence as to why this is necessary.

SCHEDULE 2: LEARNERSHIP ALLOWANCES

(c) who was not in the employment of the employer party to the learnership agreement when the agreement was concluded

6. Proposed Amendments to The Basic Conditions of Employment Act, 75 of 1997

Daily wage payment

- (3) The minimum daily payment for hours worked will be subject to the investigation to be conducted by the National Minimum Wage commission, as set out in Section 16 of the National Minimum Wage Act.

Deletion of Chapters 8 and 9 in Act 75 of 1997

- (2) [~~The principal Act is amended by the deletion of the whole of Chapters 8 and 9¹⁰.~~]

Amendment of section 68 of Act 75 of 1997¹¹

Insertion of section 76A in Act 75 of 1997

- (3) The principal Act is amended by the insertion of the following sections after section 76:

“76A Sanction for not complying with national minimum wage

1.

(a) 2. Further to the above provision, a schedule of escalating fines will be published in regulations which will apply to an employer who fails to pay the national minimum wage more than once.

(b) 3. In addition to these fines, it will be a criminal offence for an employer to contravene this section four or more times within a specified time period. A

¹⁰ Aspects of Chapter 8 and 9 will need to be amended to give powers to the NMW Commission to amend Sectoral Determinations.

¹¹ These and other sections of the Act giving additional responsibilities to the CCMA, require additional resources and capacity. The memorandum of agreement accompanying the Bills need to specify a commitment to release the necessary resources in this regard. In addition to beefing up the Labour Inspectorate

schedule of penalties for such offences will be published in terms of Section 93 of this Act.¹²

4. An employer who fails to pay the national minimum wage on more than one occasion will not be eligible to apply for state contracts or incentives, and it will be a condition of all state incentives and contracts that the state will be entitled to cancel such arrangements in the event of such violations.

(4) 5. Employers who have compliance certificates from Bargaining Councils, or other designated institutions, reflecting their compliance with minimum wages and conditions will be eligible¹³ to

(5) a) supply government or SOEs with goods or services

(6) b) receive incentives, loans and other support measures from government or DFIs

(7) c) receive discretionary funding from SETAs

(8) 6. A register of repeat offenders will be published.

Transitional provisions

(9) For the purposes of these transitional provisions, a sectoral determination means a determination promulgated in terms of section 18 that is in force at the commencement of the National Minimum Wage Act.

(10) Subject to sections 22 and 23 of this Schedule, any minimum wage, associated benefit based on a minimum wage, or condition of employment, in a sectoral determination remains in force except to the extent that it prescribes a wage or condition that is inferior to the equivalent provision in the National Minimum Wage Act, in which case, the equivalent provision in the National Minimum Wage Act prevails..

¹² If it is not possible to introduce these offences through regulation, then they should be introduced in the parliamentary process.

¹³ If necessary this provision can be contained in other legislation

(11) The minimum wages and conditions in a sectoral determination and the remuneration and associated benefits based on those wages will be reviewed, annually by the National Minimum Wage Commission, which will recommend to the Minister the alteration, deletion, or inclusion of conditions of work and an increase in respect of minimum wages..

The Department of Labour will implement a three year programme to establish bargaining councils in all sectors currently covered by Sectoral Determinations. Collective agreements regulating minimum wages and conditions of employment agreed by the Bargaining Councils will supersede the sectoral determinations. The National Minimum Wage Commission will investigate those sectors in which Bargaining Councils are not established within the three year period and will make a recommendation to the Minister whether they should be extended for a further three year period.