**RESPONSE TO PUBLIC COMMENT ON THE NATIONAL MIMIMUM WAGE BILL, BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL AND THE LABOUR RELATIONS AMENDMENT BILL**

**Submitted to the Portfolio Committee on Labour**

**March 2018**

1. **INTRODUCTION**

The Department would like to thank the Portfolio Committee on Labour for the opportunity to respond to the comments submitted to it by members of the public, trade unions and trade union federations, employers and employer organisations.

At the time of preparing its response, the Department had available to it fifty submissions commenting on the three bills that were submitted to the Parliament by the Department in November 2018. At the time of submitting the bills to Parliament, the Department also published the bills for public comment. At the time of the deadline for the submission of comment to the Department, on 10 January 2018, the Department had received comment from thirty nine individuals and organisations. Of these, sixteen also submitted comment to the Portfolio Committee.

The public interest in bills and, in particular, in the proposed National Minimum Wage Bill has been significant. The current responses should, however, be viewed in the context of the engagements between government, organised business, organised labour and the community constituencies that began in 2015 and resulted in the conclusion of a Declaration on Wage Inequality and Labour Market Stability and the signing of an Agreement on the introduction of a National Minimum Wage and an Accord on Collective Bargaining and Industrial Action in February 2017.[[1]](#footnote-1) Further comment on the process leading to the submission of the bills to Parliament will be provided below.

The response that the Department would like to provide will be grouped according to each of the bills, starting with the National Minimum Wage Bill. Response to the public comment on each of the bills will begin with a general comment on the policy objectives contained in the Bills. The policy objectives are important in setting out what it is that the bill seeks to achieve and what its limitations are. A number of the submissions have commented that the policy and legislative objectives were not clear to them and this is especially true with regard to the proposed deletion of chapters of the Basic Conditions of Employment Act. While the policy objectives were clearly spelt out during the NEDLAC process of engagement, it has been difficult to clarify all aspects in the Bills and their accompanying Memoranda of Objects to the public at large.

 Some of the comments submitted go beyond the objectives of the bills and these comments will not be responded to in each case.

Before responding to submissions made on each of the Bills, it may be useful to provide a short overview of the process that led to the submission of the bills to Parliament. This overview is intended to provide a context for assessing the outcomes of the NEDLAC engagement process, clarifying certain aspects of the process itself and addressing the extent to which engagement on the bills have complied with the NEDLAC protocol.

1. **PROCESS OF ENGAGEMENT ON THE LABOUR BILLS**

The origins of the process lie in the call made by President Zuma in his State of the Nation address on 17 June 2014 for social partners to deliberate on the state of the labour relations environment and in particular, to address low wages, wage inequality and violent and protracted strikes.

This call led to the convening of a Labour Relations Indaba held on 4 November 2014 that gave rise to the Ekurhuleni Declaration. The Indaba was the launch of a process of engagement that was, through the establishment of task teams, aimed at addressing the challenges considered during the Indaba and captured as the broad principles in the Declaration.

In January 2015, two task teams were constituted under the auspices of NEDLAC and began engagement on labour market stability and wage inequality and the national minimum wage. These were the Labour Relations Technical Task Team (LRTTT) and the Wage Inequality Technical Task Team (WITTT). The work of the task teams was overseen and guided by a Committee of Principals that was chaired by the then Deputy President, Cyril Ramaphosa. The work of all the Committee’s has been documented by NEDLAC and by a senior commissioner of the CCMA who facilitated the work of the task teams and reported to the COP.

In brief, progress in the NEDLAC engagements over the period January 2015 to September 2017 was as follows:

* 1. The LRTTT concluded its work in September 2016 having agreed to the following outcomes:
* A Code of Good Practice on Collective Bargaining, Industrial Action and Picketing – the Code is intended to provide practical guidelines on collective bargaining, the resolution of disputes of mutual interest and conduct of industrial action.
* An Accord on Collective Bargaining and Industrial Action – intended to obtain commitment by the parties to take steps to prevent violence, intimidation and damage to property and to improve the capacity of the social partners and other agencies to resolve disputes peacefully and expeditiously.
* Amendments to the Labour Relations Act (these will be dealt with further below).
	1. The WITTT reached deadlock in April-May 2016 on the appropriate level for the first minimum wage and other factors. The WITTT had reached consensus on a number of aspects of the NMW, including the definition of the NMW, its application and the calculation of the NMW.
	2. At the meeting of the COP in June 2016, the Deputy President announced his intention to establish a special advisory panel to make recommendations on, inter alia, the level of the first NMW.[[2]](#footnote-2) The Panel engaged with all social partners and produced its report during November 2016.
	3. The COP met again in early December 2016 and February 2017 to conclude agreements on labour market stability and the national minimum wage. These meetings laid the basis for the Declaration that was issued after a meeting of 7 February 2017 (**Annexure A**), together with an Agreement on the Introduction of a National Minimum Wage (**Annexure B**) and the signing of an Accord on Collective Bargaining and Industrial Action **(Annexure C**). At this point, COSATU did not sign the various documents having requested more time to consult its National Executive Committee.[[3]](#footnote-3)
	4. Between February and May 2017, the Department drafted the National Minimum Wage Bill and the Basic Conditions of Employment Amendment Bill. As soon as these were ready, the Bills were tabled in NEDLAC for consideration by the WITTT, then referred to as the NMW and BCEA Task Team.
	5. The initial position of government in the task team was to proceed in the usual manner to consider the Bills on a line by line basis. This was objected to by Labour who proposed an engagement on the basis of thematic areas which was the approach finally agreed to. The NEDLAC report contains the details relating to the work of the task team and the final areas of agreement and disagreement. It is worth noting that no principle areas of disagreement are recorded in the final NEDLAC report although the report acknowledges that the NEDLAC parties may continue to advocate their views in relation to areas of interpretation that may require input during the public consultation process.
	6. The Department is of the view that the process of engagement leading up to the tabling of the bills in Parliament has been comprehensive and has resulted in significant outcomes that could, if properly implemented, have important consequences for the South African labour market. The process has been in line with the NEDLAC protocol and has benefited from the oversight role played by the Committee of Principals and, in particular, the leadership provided by the then Deputy President.
	7. It is worth noting that the Department has conducted a series of public information sessions on the labour law amendments starting in February 2017 when stakeholders affected by Sectoral Determinations were briefed on the proposed National Minimum Wage and the modalities for its implementation. A series of national information sessions were then conducted aimed at trade unions between November 2017 and February 2018 and there is currently a national roadshow in progress to brief employers about the exemption process in relation to the national minimum wage. Throughout the period of engagement in NEDLAC through to the final tabling of the bills in Parliament, all bargaining councils and the parties to the councils have been kept abreast of developments. This process included one on one meetings between officials of the Department and representatives of parties to each bargaining council.
1. **THE NATIONAL MINIMUM WAGE BILL**
	1. **Policy objectives**

The main objective of the NMW should be to improve the wages and productivity of the lowest-paid members of the work-force. These are workers who are not unionised and who have limited resources to improve their conditions of work and their earnings. The **first** objective of a NMW is therefore to improve the wages of the lowest-paid workers in the labour market.

A **second** and related objective is to reduce poverty among workers. It is well established that in South Africa, access to wage income and poverty go hand in hand. The average size of a household in South Africa is 3.3 persons, but this differs depending on level of income. In poorer households, with an average monthly income of R1 671.00 per month, household size is closer to 5 persons whereas in a household earning an average monthly income of R24 090.00, the household size is closer to 2 persons. Improved earnings for poorer households will reduce poverty and contribute to improved capabilities among the poorer members of society. But reducing poverty among workers does not mean that there must be a living wage. A national minimum wage will impact on poverty through lifting the wages of low-paid workers but not to the extent of increasing it to the level of a living wage. Clearly a living wage would be preferable, but this is not a level that can be set through legislation. A living wage and a national minimum wage are two quite separate concepts and instruments.

The South African constitution recognises the right to collective bargaining and freedom of association. Close to 30 percent of people in employment belong to trade unions and are covered by collective bargaining arrangements. This is reasonably high by international standards and bears testimony to the long history and tradition of trade unionism and collective bargaining in South Africa. An important, **third** objective of wage policy must be to promote collective bargaining and not to undermine it. Through collective bargaining, employers and trade unions are able to regulate wages and conditions of employment in a manner appropriate to their conditions. There is therefore an important relationship between minimum wage setting, including the NMW, and bargained wages.

A **final** objective of a national minimum wage is to support employment policy. Increasing employment and labour market participation is a critical goal in the National Development Plan, as is the creation of more and decent jobs. Employment growth is unlikely to be achieved if the labour force is divided between small, well trained, well-paid and unionised segments and other labour market segments where labour is under-utilised, denied access to wage levels sufficient to ensure adequate standards of work efficiency. A NMW will therefore have to strike a balance between incentivising efficient utilisation of human resources on the one hand and minimising the risk of significant job losses on the other hand.

Two further issues are worth noting. The one relates to the risk of job losses that may accompany the introduction of the national minimum wage. The Department is of the view that the international empirical evidence is mixed on this issue but, on balance, most commentators suggest that job losses have not been particularly high in countries that have introduced a national minimum wage. In South Africa, the minimum wages introduced through Sectoral Determinations have also not been associated with significant job losses, with the exception of the agricultural sector following the 2012 increase in the farm worker minimum wage. Both in South Africa and internationally, evidence suggests that while there may be job loss initially, employment recovers over time. Whether employment will recover to the levels seen prior to the introduction of minimum wages is very difficult to answer is general, as this will depend on sector characteristics, the state of the economy and other factors.

A critical aspect of the proposed NMW Bill is the provision for any employer to apply for an exemption. This is the most important mediating factor in relation to the risk of job losses. Another is the employment tax incentive which continues to operate to the benefit of young entrants to the labour market.

The second issue relates to the high rate of unemployment in the South African labour market. A number of submissions have commented on this feature, either as a way of criticising the introduction of the NMW or by raising the objection that the unemployed have not been consulted. And if they were consulted, they would say that they would be willing to work for any level of pay, simply to receive some income. The introduction of the NMW cannot be held hostage to the fact of high and systemic unemployment in South Africa. The intervention aims at those who are active in the labour market and do not have as a policy objective addressing unemployment per se. Active labour market policies are the ones that aim to assist the unemployment to re-enter the labour market.

Clearly the NMW is not intended to make the problem of unemployment worse than it already is, but the real test of the impact of the NMW will come after its implementation through careful monitoring and evaluation and evidence based adjustments to the NMW in future years. It may also be that the prospect of higher earnings may stimulate job-seeking, especially among discouraged work-seekers.

With regard to the voice of the unemployed in the process for finalising the NMW, both the organised labour and community constituencies in NEDLAC aim to represent the interest of the unemployed. The Department also commissioned research into how the NMW might affect young people’s labour market outcomes. One the findings of the interviews and focus group discussions with unemployed youth, was that a lower minimum wage for young persons was seen as “unfair”. The research uncovered substantial evidence of non-compliance with existing minimum wages and led the authors to conclude that a national minimum wage “could also reduce the exploitative pay practices uncovered by this research.”[[4]](#footnote-4)

* 1. **Definitions in the NMW Bill**

The definition of worker as an employee defined in section 1 of the BCEA is not the definition intended by the Department as has already been clarified in the media. A wider definition of worker is intended and is deliberately cast widely in order to cover all forms of employment and to avoid disputes as to whether or not the worker is an employee and to prevent the contractual circumvention of the national minimum wage through disguised employment.

Response:

*A revised definition to be included in the final bill defining worker as any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or kind.*

* 1. **Application**

The Bill is intended to apply to all workers except those specified in section 3. This includes seafarers.

With regards to comments about forestry and sawmill activities and whether they are included, where forestry activities include sawmill activities on a farm this will be classified as ‘secondary agriculture’ as referred to in the Scope of Application of the Sector Determination.

Response:

*To amend section 3 of the BCEA to read:*

*“This Act, except section 41, does not apply to persons employed on vessels at sea in respect of which the Merchant Shipping Act (Act 57 of 1951) applies, except to the extent provided for in a sectoral determination and with the exception of the National Minimum Wage Act.*

* 1. **Nature of National Minimum Wage**

Submissions have been made questioning whether commission earners and independent contractors will be affected by the NMW as outlined in section 4 (2) of the bill.

Response:

*The NMW requires payment of a minimum wage for hours worked. Employers of commission earners will have to comply with this requirement and adjust commission payment where necessary. The intention is to amend the definition of worker to apply a wider definition which will include independent contractors. Independent contractors will only be affected where their payment is below or at the minimum wage and where they work for another and are entitled to receive payment.*

* 1. **Calculation of Wage**

A number of comments have pointed to the need to retain the provision for deductions that are currently allowed in terms of the Farm Worker Sectoral Determination. The continuation of these Sectoral Determinations is dealt with below.

Another comment on this section of the bill has been to point to the need for greater clarity, possibly by way of examples in Schedules or Guidelines, about what deductions are allowable from the minimum wage.

Response:

 *The Department will investigate whether there is any conflict between the current drafting of section 5, in particular, section 5(1) (d) and other legislation making provision for deductions for medical aids and pension/provident funds and any other statutory deductions. If appropriate, a further amendment will be made to provide greater clarity.*

* 1. **Annual Review**

There have been three common issues raised in relation to section 6 of the NMW Bill. The first is around public participation and public input to the NMW Commission when it reviews the national minimum wage. The second issue relates to the power of the Minister of Labour in dealing with the recommendations of the Commission and the third issue relates to the role of the Commission’s recommendations in relation to the National Assembly.

Response:

*Three further amendments are proposed to section 6 to take account of the public input. The amendments will be as follows:*

1. *Section 6 (2): The review report to the Minister must reflect any alternative views, including those of the public, in respect of any recommendations made in terms of subsection (1).*

*This amendment will enable to the NMW Commission to decide when and how to seek public input and obliges the Commission to reflect those views in its report.*

1. *Section 6 (4): If the Minister does not agree with, or requires clarity in respect of the recommendations, the Minister may, in the prescribed manner, refer the report and recommendations back to the Commission to clarify or reconsider (delete: alter their) the recommendation.*

*Asking the Commission to reconsider their recommendation(s) is more appropriate that the instruction implied in the word ‘alter’.*

1. *Section 6 (6)(a) table the report of the Commission with the amended Schedules 1 and 2 in the National Assembly;*

*By tabling the report together with the Schedules that will contain the adjusted minimum wages, the National Assembly will have sight of the background information considered and the deliberations of the Commission that will inform the annual adjustment.*

**3.7** **Conduct of annual review**

The section dealing with the conduct of the annual review reflects the broad areas that the Commission should promote and consider when carrying out the Review. In doing so, it will be supported by the Secretariat and it is envisaged that the Secretariat will table information on the areas identified in section 7. These areas are not exclusive and the Commission and Secretariat may well identify other information and evidence that will be required to inform the deliberations of the Commission during the review process. The Department is of the view that legislation should not outline every last detail of the information that should be considered, nor should it be too prescriptive to the Commission with regard to the annual review.

* 1. **National Minimum Wage Commission**

The Bill provides for the establishment, functions and composition of the Commission. Read with the amendments to the BCEA, the Commission will take over many of the functions of the repealed Employment Standards Commission.

The primary function of the Commission is to review the national minimum wage and to make recommendations annually for its adjustment. It has ancillary functions such as investigating the impact of the national minimum wage on the economy, collective bargaining and income differentials and to report annually to the Minister. The Commission will set medium term targets for the NMW and must do so within a three year period. The Agreement between the NEDLAC social partners makes reference to the use of appropriate benchmarks when the Commission sets medium term targets. It is the Department’s view that it is not necessary to specify this in the legislation. These are operational matters and details that the Commission and the Secretariat will be fully briefed on.

* 1. **Exemptions and regulations**

The Bill provides for the Minister to grant exemptions from the national minimum wage, the exercise of which is to be regulated by regulation. The regulations must include the procedure for exemption, the obligation on employer to consult with employees or their trade unions, the criteria for evaluating exemptions etc.

The Regulation has been drafted and engagement in NEDLAC has been concluded. The design of an electronic exemption system is in an advanced stage and testing of the system is planned to take place in the next few weeks.

Many comments have highlighted difficulties faced by certain sectors of the economy that may lead to dismissals.

Response:

*It is important to note that the exemption system provides a remedy for employers who cannot afford to pay the national minimum wage and it is expected that this will be utilised. The exemptions process will be made simple and transparent and dismissals should not be required if the financial constraints facing an employer can be demonstrated.*

*Most countries that have introduced a minimum wage make provision for some exemptions but these are usually targeted at particular categories, for example, youth or at particular sectors. South Africa may well be one of the only countries that will allow for exemptions for any employer – and individual, small employers may obtain assistance of the employer organisations to which they belong.*

*The Department will also consider a provision for a review of the exemption system that will most likely be incorporated in the Regulations.*

**3.10 Schedules 1 & 2**

The NEDLAC constituencies agreed that the farm workers and domestic workers that are currently on a tier of 90 percent and 75 percent of the national minimum wage should be brought up to 100 percent of the minimum wage level within 2 years. This is to be subject to research by the NMW Commission on the timeframe.

Response:

*The Department will find an appropriately worded amendment to section 2 of Schedule 1 to reflect the agreement in NEDLAC.*

1. **BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL**

**4.1** **Policy Objectives**

The amendments to the Basic Conditions of Employment Act (BCEA) should be read alongside of the National Minimum Wage Bill. The two bills complement each other insofar as the BCEA will continue to regulate basic conditions of employment and deal with monitoring, enforcement and legal proceedings. The latter will also apply to enforcement of the national minimum wage.

The policy objective for government is to introduce a national minimum wage as a basic floor with collective bargaining varying and improving earnings above the national minimum. The system whereby wages have been regulated on a sector or occupational basis has resulted in a system that has considerable complexity. According to research undertaken for the Department of Labour, South Africa has more wage schedules attached to sectoral determinations than several other African countries. In 2015, there were 124 minimum wage schedules in South Africa compared to 55 in Kenya, 32 in Namibia and 1 in Ghana.[[5]](#footnote-5) The complexity of the sectoral determination system makes it difficult to understand for workers and small firms, in particular, and increases the likelihood of poor compliance.

Introducing a national minimum wage provides an opportunity to simplify minimum wage regulation and improve compliance. This is a key consideration for government in proposing to phase out the Sectoral Determinations after a three year period. In doing so, the Department is guided by the International Labour Organisation (ILO) which clearly advocates for simpler minimum wage systems. The ILO suggests the following;

“While a system based on a single minimum wage may have the disadvantage of not reflecting the payment capacities of all employers across the country, it has the advantage of simplicity, which makes it easier for employers and workers to know the minimum wage rate applicable to a particular employment relationship, and for the labour inspection services to enforce the relevant provisions. On the contrary, the more complex a minimum wage system is, and the more sectoral, occupational and geographical rates it involves, the more difficult it is to monitor, particularly in countries where the labour administration services have very limited resources.”[[6]](#footnote-6)

There are relatively few sector specific conditions of employment contained in the Sectoral Determinations that would be affected by the phasing out of the system of sectoral determinations (see **Annexure D**). The continuation of the BCEA would therefore provide adequate protection for basic conditions of employment. Phasing out the sectoral determinations also provides a strong incentive for collective bargaining arrangements to take over from minimum wage regulation. This is already taking place in the Private Security sector where an application to register a bargaining council was lodged during 2017.

The following are particular areas of the BCEA Bill where a number of comments have been made and the response of the Department to these comments.

**4.2**  **Application**

A number of submissions by organisations in the fishing sector have pointed to the exclusion of seafarers or persons employed on vessels at sea from the application of the BCEA. Their conditions of employment are regulated by the Merchant Shipping Act (Act 57 of 1951). These submissions have also called for an exclusion from the NMW Bill.

Response:

*The NEDLAC engagement highlighted the need to include seafarers within the scope of the NMW Bill. This can be achieved by a further amendment to section 3 of the BCEA to include persons employed on vessels at sea in the scope of the NMW and to extend the application of sections of the BCEA, such as chapter 3: Leave, chapter 4: Particulars of Employment and Remuneration, etc.*

**4.3** **Daily wage payment**

Section 9A is inserted which provides that an employee who works for less than four hours on any day is entitled to be paid for four hours’ work. This only applies to employees earning less than the threshold set by the Minister of Labour in terms of section 6(3) of the BCEA, currently R205 443.30 per year. Provisions to this effect are currently found in several sectoral determinations.

A number of comments have been submitted on this amendment that mainly deals with clarification of the circumstances where the guaranteed minimum hours will apply. Some comments have also objected to the clause arguing that it should only apply to the minimum wage and those who earn the minimum wage. BUSA have raised two further points that were considered during the NEDLAC process but that have been omitted. These relate to the NMW Commission investigating the feasibility of increasing the minimum to 5 hours and limiting the applicability to an earning ceiling of between R40 and R60 per hour to be determined by the Minister of Labour.

Response:

*The Department is considering limiting the application of the guaranteed minimum hours to an hourly earning ceiling of between R40 or R60 per hour. This can be accommodated by amending clause 9A(2) to include the words; “…or as prescribed by the Minister.”*

*The investigation by the NMW Commission into the feasibility of raising the minimum hours to 5 need not be legislated as it is required to advise the Minister on any matter on which advice is requested (s.11(e)).*

**4.4 Repeal of chapter 8 and 9**

The phasing out of sectoral determinations is dealt with in 4.1 above. By extension, so is the repeal of chapter 9 that provides for the establishment of the Employment Conditions Commission. Most of the submission on the BCEA deal with this amendment and seek to retain sectoral determinations.

Response:

*A three year transitional period is provided for in section 20 of the BCEA Bill for sectoral determinations. This should provide sufficient time in which to assess the continued need for sector specific regulation of conditions of employment, including any wages that are higher than the national minimum wage.*

*Should it be necessary it add a further amendment to the NMW Bill to enable the NMW Commission to take over the relevant functions of the ECC this can be done. An amendment would add a function to those of the NMW Commission to specify that it may advise the Minister on any matter concerning basic conditions of employment.*

*The Department is also considering an amendment to the BCEA Bill, section 20(3) to read; “….for a period of three years from the commencement of the NMW Act, 2017 unless the Minister, after consulting NEDLAC, prescribes a longer period.”*

**4.5** **Monitoring, enforcement and legal proceedings**

Many comments have been submitted on the amendments to sections 64 to 80 of the BCEA that deal with enforcement, legal proceedings and fines for non-compliance. The submissions express concern about the ability of the CCMA to deal with the expanded jurisdiction to arbitrate underpayment disputes in terms of the amendments to the BCEA. Recommendations have also been made to make provision for an appeal process for employers in relation to compliance orders that are to be made arbitration awards in terms of the amendment to section 69.

Response:

*A number of further amendments to the relevant sections will be incorporated to improve on the legal proceedings. These amendments are highlighted in the submission by the CCMA and drafting of the amendments has commenced.*

*The Department will also consider amended wording to section 76A to make provision for fines to apply to employers who obtain an exemption but are found to have supplied false information.*

1. **LABOUR RELATIONS AMENDMENT BILL**
	1. **Policy objectives**

There are two major policy objectives contained in the amendments to the Labour Relations Act (LRA). The first is to strengthen collective bargaining and the second relates to dealing with violent and protracted strikes.

The way in which the Bill deals with these is to change the representativeness requirements for the extension of collective agreements under section 32(2). That section required both the trade union party to the agreement to represent the majority of employees and that the members of the employer organisations party to the agreement to employ the majority of employees within the scope of the agreement. The amendment now only requires one or the other. In order to promote collective bargaining at sectoral level and in accordance with the jurisprudence of the International Labour Organisation (ILO), the operating principle underlying the extension of agreements is whether agreement applies to the majority of employees in the sector or scope of the agreement. In other words, the principle is now one of coverage rather than strict representativeness**.** This is a significant shift which has been agreed to with the NEDLAC social partners and which will contribute to supporting collective bargaining arrangements and ensuring that conditions of employment and wages can be regulated in sectors where bargaining councils exist.

The second objective is to be achieved by amendments that will prohibit a picket unless picketing rules are in place, by clarifying that a ballot means any system of voting by members that is recorded and secret and by introducing an amendment that will provide for the establishment of an advisory arbitration panel to investigate a strike or lockout and to make an advisory award to assist the parties to resolve the dispute.

With regard to both strengthening collective bargaining and dealing with violent and protracted strike action, it will be important to recognise the limits to the law and the extent to which it is able to change behaviour. In this regard, the NEDLAC process has two further outcomes that will make important contributions to changing behaviour over time. The Accord on Collective Bargaining and Industrial Action commits social partners to take all steps necessary to prevent violence, intimidation and damage to property and improve the capacity of the social partners and other agencies to resolve disputes peacefully and expeditiously. A number of parties to Bargaining Councils have signed the Accord and further efforts will be made by the Department and the NEDLAC Social Partners to advocate the Accord and the commitments that it contains.

The Code of Good Practice on Collective Bargaining, Industrial Action and Picketing provides practical guidance on collective bargaining, the resolution of disputes of mutual interest and the use of peaceful industrial action and picketing processes. The Code is to be published with the Regulations to the LRA and further efforts will be made to provide training to the parties to collective bargaining arrangements and to advocate the use of the Code of Good Practice.

The following are the main sections of the LRA Bill where comment has been made and the response of the Department to these comments.

* 1. **Extension of Bargaining Council agreements**

Comments on the amendments to section 32 of the LRA are of two kinds – those who oppose the amendments on the basis that it interferes with the majoritarian principle and those who oppose it on the basis that the amendments may lead to abuse by minority parties to bargaining councils.

Response:

*As indicated above, the amendment shifts the way in which representativeness is to be determined, from considering the number of employees who are members of trade unions and the number of employees who are employed by employers that members of employers organisations that fall within the scope of a collective agreement. Once amended, the deciding factor will be whether there is a majority of employees covered by the agreement – by either trade union membership or employment by members of employer organisations. The majoritarian principle still applies but to the number of employees covered by one of the parties to the agreement.*

*Secondly, section 30 of the LRA requires the constitution of bargaining councils to make provision for equal representation by trade unions and employer organisations in the bargaining council. When deciding whether to request the Minister to extend a collective agreement, Section 32 (1) requires that there be a majority of the trade unions that are party to the council and one or more employer organisations whose members employ the majority of employees employed by employer organisations party to the council, vote in favour of the extension of the collective agreement. These requirements would rule out the possibility of abuse by minority parties to a bargaining council*.

*The only amendment that provides for a minority party to request that a collective agreement be renewed or its period of operation extended is the new section 32A (Renewal and extension of funding agreements). This amendment seeks to address a situation where parties to a council cannot agree to extend or renew a collective agreement that provides for funding to a council, pension or provident fund agreement, medical aid and other funding agreements. The amendment makes provision for the Minister to renew and extend a funding agreement for up to 12 months at the request of any of the parties to the bargaining council.*

* 1. **CCMA and accreditation of bargaining council panellists**

A number of submissions, including by bargaining councils, have objected to the amendments to section 127 and 128 of the LRA, especially section 128. The amendments provide that a council or private agency may apply for the accreditation or the accreditation of its dispute resolution panel. The amendment to section 128 requires that an accredited bargaining council or private agency may only appoint a person to resolve a dispute if that person is accredited by the Governing Body of the Commission.

Response:

*The amendments are introduced to ensure that persons appointed have the requisite qualifications and experience to resolve disputes.*

*The intention of the LRA is to ensure that the CCMA is the standard setter for dispute resolution. The amendment is aimed at giving effect to this by formalising authority of the Governing Body to accredit panellists of bargaining councils. The accreditation of councils and panellists is not intended to interfere with self-governance of a council’s dispute resolution process, but it will require panellists to be accredited and qualified according to the standards set by the CCMA.*

*The CCMA have proposed a further amendment to section 130 of the LRA to deal with the withdrawal of accreditation of bargaining councils and private agencies including the withdrawal of panellist’s accreditation.*

**5.4** **Advisory arbitration panel in the public interest (sections 150A to 150E)**

The response to the introduction of an advisory arbitration panel to assist parties in resolve strikes or lockouts that are intractable, violent or that may cause a local or national crisis, has generally been positive. Some have called for the right for a party to approach the Labour Court for an interdict declaring a strike unprotected where there is violence and intimidation during a strike. Others have raised more technical issues relating to the operation of an advisory panel in the public service (PSCBC).

Response:

*The Department has made a number of editorial corrections to the cross referencing in the sections 150A to E and would like to introduce a further amendment to section 150C Advisory Arbitration Award. The amendment would require the employers’ organisation or trade union party to a dispute to conduct a secret ballot of its members prior to rejecting an advisory arbitration award. The conduct of a ballot should be in accordance with its constitution. This ‘second ballot’ was not agreed to in the NEDLAC engagement, but the Department is of the view that it is appropriate to make provision for this ballot given the potential consequences of rejecting an award and thereafter continuing with strike action or a lockout that would already have been characterised by violence, intimidation and damage to property.*

1. COSATU only officially signed these documents during July 2017. [↑](#footnote-ref-1)
2. The report by the Advisory Panel reproduces the ten points that constituted its Terms of Reference. See page 15 of the National Minimum Wage Report of the Advisory Panel to the Deputy President (2016). [↑](#footnote-ref-2)
3. COSATU finally signed the February 2017 documents in July 2017. [↑](#footnote-ref-3)
4. L.Patel et al. An Investigation into how a National Minimum Wage may affect young people’s labour market outcomes. Centre for Social Development in Africa (CSDA), University of Johannesburg, 2016 and L.Patel, Z.Khan & L. Graham, Basic Wage Talks sideline Youths. Mail & Guardian Business, 23 to 29 September 2016. [↑](#footnote-ref-4)
5. DPRU & CSDA, Investigating the Feasibility of a National Minimum Wage for South Africa. University of Cape Town and University of Johannesburg, February 2016, page. 110. [↑](#footnote-ref-5)
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