**Submission to the National Council of Provinces on the National Minimum Wage Bill, the Basic Conditions of Employment Act Amendment Bill, and sections 32 and 49 of the Labour Relations Act Amendment Bill**

**Labour and Enterprise Policy Research Group**

**University of Cape Town**

**8 June 2018**

***Introduction***

The Labour and Enterprise Policy Research Group (LEP) has conducted socio-legal, policy-oriented research on a wide range of issues in the field of labour market regulation and development over the last 25 years. In 2017 LEP engaged in a study of how the proposed National Minimum Wage (NMW) could be aligned with existing labour legislation, in particular the Basic Conditions of Employment Act (BCEA), the Labour Relations Act (LRA) and the Employment Equity Act.[[1]](#footnote-1) Further, members of LEP provided advice to members of the organised labour negotiating team at NEDLAC during the course of the deliberations over the NMW. LEP made a submission to the Department of Labour on the NMW Bill, the BCEA Amendment Bill and sections 32 and 49 of the LRA Amendment Bill as well as to the Parliamentary Portfolio Committee for Labour. Our submission to the NCOP on the NMW Bill, the BCEA Amendment Bill and sections 32 and 49 of the LRA Amendment Bill is as follows:

***General***

First, the three bills each have a Memorandum of Objectives. Previous memoranda of this kind have provided explanations for the provisions in bills or amendment bills, i.e. they give the reasons for including the provision and often the thinking behind why the provision was included rather than alternatives. This is not the case with the current bills. The memoranda attached to the current bills provide almost no explanation; they merely restate what is in the bills. In their current form these memoranda serve little or no purpose and in certain instances merely cause confusion.

**NMW Bill**

*Section 1: Definitions of ‘ordinary hours of work’ and ‘wage’*

These definitions read together imply regularity to work that does not easily accommodate the expanded definition of ‘worker’, which could be a one-off piece of work or very irregular work. The definitions need to be amended to accommodate this irregularity.

*Section 4(8): The exclusion of the right to strike if there is a unilateral alteration of conditions, etc.*

It is our submission that section 4(8) is problematic for two reasons. First, by making the unilateral altering of wages, hours of work or other conditions of employment in relation to the introduction of the national minimum wage an unfair labour practice, it removes the right to strike in such a situation. Section 64(4) of the Labour Relations Act (LRA) specifically provides for employees to pursue strike action over an employer’s unilateral altering of conditions of employment.[[2]](#footnote-2) Such an option is excluded by section 4(8) with respect to a unilateral change in relation to the introduction of the NMW.

Second, sections 191, 193, 194(4) and 195 of the LRA provide that bargaining councils may hear ‘unfair labour practice’ disputes within their jurisdiction. Bargaining councils have the same jurisdiction in respect of section 64(4) disputes. However, this is at odds with the amended section 64(1)(*d*A), which grants the CCMA exclusive jurisdiction to hear disputes regarding non-compliance with the NMW Act.[[3]](#footnote-3)

*Section 4(9) and section 5:* *Permitted and impermissible deductions from the NMW*

We believe that these sections could create confusion and therefore it should be made clear, through the addition of section 34A of the BCEA to the list of sections referred to in section 4(9) and/or to section 5, that deductions in respect of benefit funds are permitted.

*Section 5(2): Minimum daily payment*

The application of section 5(2) is in conflict with section 9A of the BCEA Bill, the NEDLAC Agreement, and what we understand was the final draft Bill that left NEDLAC. The intent of the social partners was to provide for a guaranteed daily wage payment of not less than four hours. This intention is reflected in section 9A of the BCEA Bill. However, section 5(2) of the NMW Bill can be read as directly contradicting the BCEA Bill, thereby defeating its intention that workers are paid a daily minimum so that travel and related expenses are covered. Section 5(2) should be made subject to section 9A of the BCEA Bill. Section 5(3) should also be amended accordingly.

*Section 6: Annual review of the NMW*

A problem is likely to arise regarding the ‘coordination’ of bargaining council negotiations with the NMW annual adjustment. Bargaining councils that prescribe minimum wages at or close to the level of the NMW could negotiate an increase as from the 1st January of the year and then have the NMW push that increase up four or five months later. This could undermine collective bargaining arrangements and threaten jobs in certain sectors. There needs to be greater certainty regarding the timing of the NMW increase each year so that bargaining councils can factor this in to their negotiations (and their timing of negotiations).

*Section 11(c) and (e): Achieving proportionate income differentials*

The inclusion of section 11(c) and (e) within the functions of the NMW Commission is welcomed. However, as the section currently reads the purpose of the inclusion, which is to respond to requirements in section 27 of the Employment Equity Act (EEA), is not evident. The NMW on its own will have little impact on reducing differentials other than possibly at the very bottom of wage schedules. These sub-sections therefore only make sense if the appropriate amendments are made to section 27 of the EEA. Our report (see footnote 1 above) makes an argument for more extensive amendments to section 27 of the EEA

*Section 11(f): Sectoral determinations (SDs)*

The section needs to be expanded to make it explicit that the NMWC must regularly review SDs (i.e. at least every two years), and that it has the authority to conduct investigations for such reviews and with regard to the issue of new SDs.

*Section 13: Staffing the NMWC*

The NMWC must be given the power to appoint the staff it needs and to manage them properly, and it must have sufficient budget to perform all its functions effectively. The experience of the ECC is that management of the secretariat is by complaint to the Director-General about its performance. This is unworkable and should not be allowed to continue for the NMWC. The current section has the potential to significantly undermine the functioning of the NMWC.

*Sections 15 and 16: Exemption system*

The entire NMW enforcement system is an application of the BCEA enforcement system to the NMW, with some new components (e.g. the role of the CCMA). But when it comes to exemptions the Bill ignores the BCEA exemption infrastructure and does something different, relying almost entirely on regulations. The exemption system being proposed in the regulations (currently published for comment) is extremely problematic. Why not adopt the BCEA exemption infrastructure (or something similar) and rely on regulations for the finer details of the system?

*Schedule 1 Item 2(a) and (b): No limit for phasing in certain sectors to the NMW*

The NEDLAC Agreement provided for a lower minimum wage for farm workers and domestic workers, subject to them being phased in to the full NMW over a two-year period. However, Schedule 1 does not prescribe a target date by when farm workers, domestic workers, workers on the Expanded Public Works Programme (EPWP), and workers who have concluded learnership agreements in terms of section 17 of the Skills Development Act, will be phased in to the full NMW.

The Memorandum on the Objectives accompanying the NMW Bill states that provision for lower wages for these sectors is provided in the Schedule as “temporary exceptions to the national minimum wage for the first year”. The intention appears to be that the first three of the above categories of workers, i.e. farm workers, domestic workers and EPWP workers, will be paid the national minimum wage as at 1 May 2019. However, Schedule 1 does not make provision for a one-year period for a lower minimum wage for these sectors. An alternative reading is that the NMW Commission will recommend minimum wages for these sectors from 1 May 2019. But, if this is the intention, the Schedule should make this explicit (and it should not be left to the Memorandum of Objects). We accordingly submit that this intention be incorporated into Schedule 1 of the NMW Bill.

Notably, the Memorandum of Objects provides no explanation why the relevant clause in the NEDLAC agreement has been dropped in the Bill.

*Schedule 1 Item 3(d): Discretion of the Minister as to the definition of the EPWP*

The definition of ‘expanded public works programme’ in Schedule 1 effectively gives the Minister the discretion via section 50 of the BCEA to partially exempt categories of workers from the NMW. We do not believe that it is the intention of the NMW Bill to give the Minister such powers and the result could be fragmentation of the NMW; it should be Parliament that makes such a decision, albeit through the tabling of the schedule.

**BCEA Amendment Act**

*Section 9A: Daily minimum payment*

See above under section 5(2) of the NMW Bill.

*Section 51: Sectoral determinations (SDs)*

The Bill retains SDs, transferring the process to make an SD and the functions of the ECC to the NMWC. This implies that the NMWC will deal with the regular review of SDs and increase minimum wages and amend other conditions as required.

However, s 51(3) provides that where SD wages are higher than the NMW then they must increase proportionally by the adjustment to the NMW. This will clearly conflict with the NMWCs function to review and adjust SD wages, i.e. there will be two mechanisms to adjust SD wages that could conflict with one another. It also suggests that the Minister of Labour will argue that she does not need to initiate reviews of the SDs because wages will adjust automatically. The implication is that there is no need for the NMWC to do a proper review and amendment of the SD. This would be contrary to the intention of the Bill.

The BCEA is not clear on the issue of regular reviews and adjustments to SDs. This needs to be added as a specific power of the NMW Commission, i.e. not just to issue new SDs but to review and update SDs. Otherwise this depends entirely on the Minister of Labour.

In line with the above point, the Bill leaves it up to the Minister to trigger an investigation to create a new SD. The Commission should be allowed discretion to do this on its own authority.

*Section 64(dA): The exclusive jurisdiction of the CCMA to hear disputes regarding non-compliance with the NMW*

Minimum wages for the lowest paid workers at a number of bargaining councils will effectively be increased by the NMW. This means that non-compliance with the bargaining council minimum wage will also constitute non-compliance with the NMW. This creates an anomaly in that bargaining council agents will likely be the ones to identify the non-compliance but only Department of Labour inspectors may institute proceedings against the non-compliant employer and only the CCMA has the jurisdiction to hear the dispute. See also above with regard to section 4(8) of the NMW Bill.

*Section 68(3): Non-compliance with an undertaking*

It is anomalous that where an employer does not comply with a compliance order it can be fined, but if it does not comply with an undertaking it is just the amount in the undertaking that constitutes the arbitration award. There is no reason why these should be treated differently, so there should also be scope for a fine in terms of s76A for non-compliance with an undertaking.

*Section 73A: Claims for failure to pay an amount*

Collective agreements are included in the section, which would include a bargaining council agreement. Why should an employee be allowed to refer a claim to the CCMA if he/she falls under an accredited bargaining council? Where possible we should be channelling claims to bargaining councils so as to lessen the load on the CCMA, but this section does the opposite.

*Item 24: Transitional provisions*

We do not know how long it will take to set up the NMWC, so it is short-sighted to immediately disestablish the ECC. We recommend that the ECC continue pending the establishment of the NMWC, with the condition that the NMWC must be set up within 4 months of the passing of the NMW Act. The ECC will be disestablished by proclamation by the President and the NMWC established by proclamation by the President at the appropriate time.

Further, it is unclear from the Bill whether this section constitutes a schedule on its own or will form part of an existing schedule. Either way the numbering is confusing.

**LRA Amendment Bill**

*Section 32(3): Representativity for the extension of bargaining council agreements*

The amendment is ostensibly intended to ‘protect’ the ability of bargaining councils to extend agreements in the context of declining trade union representativity across the council system. It is not clear that it will achieve its objective. While bargaining councils might continue to exist and can get their agreements extended, in most cases this will be entirely dependent on the majority representation of employers’ organisations. Weakly organised trade unions will therefore be beholden to employers’ organisations on bargaining councils, which they will surely experience in the trade-offs that are likely to be demanded in the collective bargaining process.

The amendment refers to ‘or’ rather than ‘and’, makes the extension of agreements contingent only on one party being representative. This seems to be contrary to the approach of the ILO. Gernigon *et al* state, with respect to the ILO’s position, that: ‘The extension of an agreement to an entire sector of activity contrary to the views of the organization representing most of the workers in a category covered by the extended agreement is liable to limit the right of free collective bargaining of that majority organization.’[[4]](#footnote-4)

The Memorandum also makes a distinction with regard to determining representativity between “the majority of employees in the sector or to the scope of application of the agreement. In other words, the principle is now one of coverage rather than strict representativeness.” First, this explanation of what section 32(3) is apparently seeking to do is unclear and confusing. Second, there is no evidence in section 32(3) (or in section 49) of this distinction. The wording of section 32(3)(b) and (c) is effectively the same as the current wording of the section, except for the amendment to make the registrar responsible for this determination.

*Section 32(3)(b) and section 49(4A): Determining representativity*

Section 32(3(b) refers to section 49(4A) for authority regarding the determination of representativeness and section 49(4A) refers to section 32(3)(b) – this is circular and is open to challenge because of this lack of clarity. It is, furthermore, currently an extremely contentious issue that is likely to be challenged.

Section 49(4A): Determining representativity

It is anomalous that subsection (a) refers only to employers’ organisations and not trade unions. There should be an equivalent clause for trade unions.

1. Shane Godfrey and Mario Jacobs. 2017. *An examination of how a National Minimum Wage can be optimally accommodated by the existing labour market legislative framework*. The report was funded by the Freidrich Ebert Stiftung. [↑](#footnote-ref-1)
2. Alternatively an employee may elect to approach either the Labour Court or High Court to seek specific performance (see Monyela v Bruce Jacobs (1998) 19 *ILJ* 75 (LC)). [↑](#footnote-ref-2)
3. Noting that employees can approach the Labour Court, High Court, Magistrates Court or Small Claims Court. [↑](#footnote-ref-3)
4. Gernigon, B, Odero y, A & Guido, H. 2000. Collective Bargaining: ILO Standards and the principles of the supervisory bodies. International Labour Office: Geneva (at 63). [↑](#footnote-ref-4)