FREE MARKET FOUNDATION

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Submission on the National Minimum Wage Bill, 2017

Contents

A. **Introducing a National Minimum Wage is an act of economic insanity**

The plan to introduce a National Minimum Wage in South Africa threatens to turn an already untenable unemployment situation into a total calamity. South Africa's forgotten people, the 9.2 million unemployed, have endured a great deal but they must be reaching the limits of what they are capable of tolerating. Unrest is increasing and unemployment is the main source of the restlessness. Government's laws and regulations are primarily responsible.

Can you really believe that government is not responsible for the fact that unemployment keeps climbing? Do you believe that you can put half the nation on welfare and that this will make them happy? If you do, you are making a big mistake. The people want their self-respect and integrity back. And their integrity will be restored only when they have jobs, can provide for their families, and can hold their heads high.

What is deeply troubling is that authoritarian ideologues, who place ideology before the lives of the forgotten people, have persuaded the task force led by Deputy President Ramaphosa as he then was, to adopt a national minimum wage (NMW) policy that will significantly increase the number of unemployed people in the country.

Government's "academic" advisers churn out figures to try and convince everyone that the NMW will cause "minimal" unemployment, that government can forcibly increase the cost of production countrywide, and that the result will increase economic growth. If you believe that you will also believe that government can, by legislation, make rivers run uphill.

Gilad Isaacs keeps repeating that his organisation could find no studies that show anything more than a minimal loss of jobs caused by the introduction or increase of minimum wages. Either he is a poor researcher or he is not telling the truth. According to researchers Paul Kupiec and Ryan Nabil, "The impact on the economies of American Samoa and the Northern Mariana Islands was devastating. In American Samoa, by 2009, after only three of the ten scheduled minimum-wage increases, overall employment dropped 30 percent — 58 percent in the critically important tuna-canning industry. Real per capita GDP in American Samoa fell nearly 10 percent from 2006 levels. In the Northern Mariana Islands, by the end of 2009, employment was down by 35 percent, and real per capita GDP off by 23 percent." (See more details later in this document)

The events in Puerto Rico and the other US territories provide the most important evidence I could find of the serious disruption caused by instituting the same minimum wage in low-wage, low-income areas of a country as in high-wage, high-income areas. You know that incomes of employers and wages of employees are much lower in rural areas than in the cities. Are you comfortable with causing devastation in areas of the country that are already poor and ravaged by unemployment and poverty?

Whoever reads this document, I am addressing my questions to you personally. If you work in the Department of Labour or you are a member of Parliament and vote in favour of the NMW legislation, will you be able to sleep at night knowing that you have been complicit in causing even greater unemployment than we have now? That you have been complicit in the NMW act of insanity?

B. **The barriers to entry that prevent the unemployed from accessing jobs are unconstitutional in that they conflict with the constitutional rights of the unemployed as enshrined in the Bill of Rights**

Sections of the Bill of Rights that are being ignored by government:

Section 7(1) which "enshrines the right of all people of our country and affirms the democratic values of human dignity, equality and freedom".

Section 7(2) requires the state to "respect, protect, promote and fulfil the rights in the Bill of Rights"

Section 9(3) provides that "the state may not unfairly discriminate directly or indirectly against anyone "on one or more grounds".

Section 10 "Everyone has the right to dignity and the right to have their dignity respected".

Read these sections and ask yourself whether the 9.2 million unemployed have their human dignity respected, are accorded equality of opportunity, and enjoy freedom of contract.

In dealing with the unemployed, does the government respect, promote and fulfil the rights of the unemployed as promised in the Bill of Rights. Can anyone legitimately claim that the state does not unfairly discriminate directly or indirectly against the unemployed "on one or more grounds"? And can anyone claim that the unemployed are accorded their "right to dignity and the right to have their dignity respected" by the government as required by the Bill of Rights?

There are more sections in the Bill of Rights that government is ignoring in granting greater privileges to the employed while ignoring the consequences for the unemployed. That the poorest and most vulnerable people in the country are being denied their rights and will face even greater barriers to entry into the jobs market because of the institution of the NMW is a shocking travesty and a callous disregard for the most important right in the life of every individual, which is the right to work! (See the legal opinion on the unconstitutionality of the labour laws under section 3.1 of this document.)

C. **The Socio-Economic Impact Assessment (SEIA) that accompanied the Bill**

The SEIA, prepared by a Department of Labour official, revealed the following:

1. The **Department of Labour regarded government, business, organised labour and civil society to be the "affected parties" who needed to be consulted about the institution of the national minimum wage**. The **most "affected party", the unemployed**, who will find it even more difficult to find jobs due to the raising of the barriers to entry into the jobs market, **were not consulted**. They were not considered important enough to be consulted. Neither were the non-unionised low-income people who are in danger of losing their jobs for the same reason.
2. Cape Town and Johannesburg Universities predicted, depending on circumstances, that job losses could amount to an estimated 204,977 or 897,068. The latter estimate would take the

total unemployed over 10 million! Apparently, the government and other proponents of this legislation are not concerned at such a prospect.

3. The estimated effect on the institution of the NMW on the country's GDP varied from "**positive growth of 0.1 per cent to a negative impact of -2.1 per cent"**. Apparently, the potential negative impact of -2.1 per cent did not give the proponents of the NMW pause to reconsider its implementation.
4. The CCMA estimated that it would require **R20.8 million for training activity, advocacy and increase in case load**. The question is: Why would the CCMA conclude that there will be a larger case load, that they must train additional staff and engage in advocacy? The only reason can be that they are expecting, as concluded in this comment, a substantial number of additional dismissals resulting from the institution of the National Minimum Wage. Does this not contradict the claim of the academic advisors that the loss of jobs is likely to be "minimal"?

D. **Job Seekers Exemption Certificates (JSECs)**

Summarised version of the proposed exemption to be given to the unemployed to enable them to access jobs (for a detailed description of the proposal see Addendum 1).

1. **No intention to interfere with the high level of job security of the workers who already have jobs.**
2. **Sole purpose it to set the unemployed free to access jobs.**
3. **Proposed:**
   - Government issues JSEC's to all people who have been unemployed for 6 months or more that allows them to enter into written employment agreements with employers of their choice on conditions acceptable to them.
   - JSEC's to be valid for at least two years to allow holders to change jobs freely and find a job that best suits them.
   - Employers required to comply with all the labour laws for other employees but the employment conditions for employing JSEC holders will be set by mutual agreement.

Expected economic consequences

- Estimated labour law compliance costs per employee amount to R2,000.
- Total cost to employer of employing at NMW rate is R3,500 + R2,000 = R5,500.
- If 2 million of the current 9,2 million unemployed were to access jobs through the JSEC programme at R2,000 per month they would earn a total of R4 billion per month or R48 billion per year.
- Another scenario – if the unemployment rate in SA is reduced to 10% – it would reduce the number of unemployed to 2.5 million.
- That would mean an additional 6,7 million people with jobs. If the 6,7 million were paid R2,000 per month, their monthly earnings would be R13.4 billion and an annual R160.8 billion.
- These calculations do not suggest that R2,000 is an adequate salary. What it does demonstrate is that even low wages can amount to substantial amounts of money in the hands of people that currently earn zero.
- It is an argument in favour of allowing the unemployed the freedom to decide for themselves what level of wages they are prepared to accept.

1. About the Free Market Foundation

The Free Market Foundation (FMF) is an independent non-profit public benefit organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction and human welfare (including better healthcare, increased life expectancy, literacy and educational quality). The foremost question the FMF asks in addressing any policy question, including the contents of the above-mentioned Bill is, will this policy be to the long-term benefit of the people of South Africa and especially those who are the poorest and most vulnerable?

In commenting on the Bill, the author takes full responsibility for the statements made in the document. The views expressed are the author's and are not necessarily shared by the members of the Foundation. At the outset, the author declares that he would like nothing more than to see workers in South Africa, especially low-wage workers, earn higher wages, but not at the cost of jobs lost and the creation of higher barriers to entry into the job market that will make it even harder for the currently unemployed 9.2 million people to get jobs. This is a view that is shared by all members and supporters of the FMF.

Critical comments in this submission emanate from a real concern for the welfare of the huge number of unemployed people and the knock-on effect unemployment has on their families. The proposal for the implementation of a Job Seekers Exemption Certificate is a serious attempt to help solve one of South Africa's most troubling socio-economic problems, which is crying out for an innovative solution for the sake of all who live in this wonderful country. Co-operating and working together is the best way to improve conditions for everyone. The FMF is a totally non-partisan organisation and is at all times available for discussion with government on matters of mutual concern in its attempts to transform our country into a high growth, peaceful and safe haven for all its citizens.

2. Satisfying the fundamental needs and wants of the people

Satisfaction of the fundamental needs and wants of the people is generally achieved by an absence of barriers to entry into the labour market and the provision of goods and services, allowing the people a choice between the offerings of freely competing providers, including the providers of employment. The Bill will therefore be assessed to ascertain whether it is likely to result in the most beneficial conditions for the country's people.

3. Does the Bill comply with the Constitution?

This comment deals fundamentally with the nature of the Bill and the extent to which it is inconsistent with the requirements of South Africa's Constitution. It therefore does not contain a section by section comment on the detail of the Bill except to demonstrate the extent to which aspects of the Bill do not comply with the Constitution and on the potential economic consequences of its implementation.

Matters in the National Minimum Wage Bill requiring discretionary decision-making on the part of the Department should be reduced to a minimum by preferably setting out objective criteria in the legislation, with which firms and individuals can comply in conducting their affairs, removing the necessity for prior regulatory approval or administrative consent. Where formal prior approval is considered necessary, objective criteria should be set in legislation to guide the administrative process

and ensure that the exercise of discretion is carried out uniformly and impartially. The purpose in all cases is to make the law as clear and objective as possible, which facilitates economic activity, the provision of goods and services, and economic growth. Uncertainty resulting from a lack of clarity in laws and regulations, and lack of consistency in official decision-making, imposes unnecessary costs on entrepreneurs and diminishes economic activity.

An important Founding Provision of the Constitution, described in section 1(c), is "Supremacy of the constitution and the rule of law". Note that the constitution and the rule of law are coupled in describing the values upon which the Republic of South Africa is founded. Section 2 of the Constitution states that, "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". Among those obligations is to ensure that laws that are adopted are not in conflict with the rule of law. This submission describes why the proposed National Minimum Wage Act conflicts with the Bill of Rights and is therefore unconstitutional. In addition, it describes why all the legislative provisions that impinge on the right to work of the 9.2 million unemployed people in South Africa (according to the expanded definition) are similarly unconstitutional. This submission further suggests that if the unemployed are not set free from the legislative strictures that keep them unemployed, the unemployed will have a strong constitutional case to take to the courts to request relief.

3.1 Constitutional Rights of the Unemployed that are not being applied

The following Bill of Rights sections of the Constitution should, if properly respected, prevent mass unemployment:

Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected: The booklet on Human Rights issued by the Department of Justice says on the question of dignity: "Everyone has an inherent (inborn) dignity and the right to have his or her dignity respected and protected. No person should be perceived or treated merely as instruments or objects of the will of others. Every person is entitled to equal concern and to equal respect. This right is related to our constitutional purpose of establishing a society in which all human beings will be given equal dignity and respect."

The harm done by the impugning of the dignity of the unemployed person was tragically illustrated by the suicide on February 8, 2011 in Qwaqwa, Free State, of Mbulelo Mjekelo, a 35-year-old husband and father of two children who was so distraught about the fact that he could not find a job to earn money to support his family that he committed suicide. He drank beer laced with rat poison and died an agonising death. Had his right to the dignity of being free to work been respected, this tragic event would not have occurred.

Section 12(1): Everyone has the right to freedom and security of the person, which includes the right: section12(1)(c) to be free from all forms of violence from either public or private sources: Violence can take many forms, not all of them physical. The violence to which unemployed South Africans are being subjected is that they are legally deprived of the right to enter into contracts of employment on terms and conditions acceptable to them. That the violence is perpetrated indirectly makes it no less real.

Section 12(1)(d) not to be tortured in any way: Torture can be either physical or psychic. Deliberately denying unemployed people of the right to negotiate voluntary employment agreements on their own terms with employers is a form of psychic torture when the consequence is to make it impossible for them to find jobs. This results in the desperation of long term unemployment, which destroys the self-

respect and self-worth of the individual due to the frustration of not being able to earn an income to sustain themselves and their families.

Section12(2): Everyone has the right to bodily and psychological integrity, which includes the right – 12(2)(b) to security in and control over their body: Having control over their body means that they have the right to sell their labour on terms and conditions acceptable to them and any law or regulation that denies them that right is unconstitutional.

Section 18: Freedom of Association – Everyone has the right to freedom of association. The Human Rights guide says, "Everyone may therefore choose to associate with whomever he or she wishes". Any legislation that interferes with freedom of association between an employer and an unemployed person wishing to enter into a contract on conditions of employment acceptable to the jobless person, is unconstitutional.

Section 22: Freedom of trade, occupation and profession – Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law: The Human Rights guide says, "This right protects activities by means of which a livelihood is pursued and is aimed at enabling individuals to live profitable, dignified and fulfilling lives". It is impossible to learn a trade or profession through on-the-job training if you are prevented from getting your foot on the first rung of the jobs ladder. And the NMW will make it even harder.

The unemployed people of South Africa are subjected to appalling indignity by the fact that they are being denied their right to negotiate freely with potential employers who are blocked by the labour laws from employing them on mutually agreeable terms. It is time for all parties to recognise the wrong that is being done to the unemployed and to give them their constitutional right to work by adopting new measures that will allow them to negotiate freely with employers. This can be done by exempting the unemployed from the labour laws. Such a measure would restore constitutionality without threatening the job security of those who already have jobs.

3.2 See Addendum 2 – What is the rule of law?

4. Comment on the contents of the Bill

4.1 The Preamble to the Bill

The Preamble says that:

Recognising that the Republic of South Africa is one of the most unequal societies in the world and that there are huge disparities in income in the national labour market;

Noting the need to eradicate poverty and inequality;

Acknowledging the need to promote fair and effective competition in the labour market and labour market stability;

Noting the constitutional obligation on the State and employers to promote and fulfil the right to fair labour practices;

(the above conditions are given as the reasons why the National Minimum Wage Bill is to be enacted.)

4.2 Comment on the Preamble

4.2.1 South Africa is one of the most unequal societies in the world

No mention is made in the Preamble of the existing mass unemployment in the country. The government appears to be blithely unaware that its policies, legislation and regulations are the primary cause of the fact that "South Africa is one of the most unequal societies in the world". The first damning inequality is between those who earn something and those who earn nothing, prevented from earning something by the legislative barriers into the job market. Any finger the government wishes to point at the supposed culprits for this situation points straight back at them.

It is chillingly incongruous that the government has embarked on this massive authoritarian exercise in economic manipulation without reference to, or apparent consideration for, the 9.2 million hapless unemployed South Africans. It is obvious to economists whose views are grounded in economic reality that the implementation of the NMW will add to the ranks of the unemployed. Despite warnings to this effect the government is ploughing ahead with callous disregard for the millions of people who are currently unemployed because of the already existing barriers to entry into the job market.

As could be expected, many employers immediately froze the hiring of unskilled people when the NMW was first mooted, refraining from employing unskilled people to avoid the consequences of implementation of the NMW. Others are reducing the numbers of unskilled people in their employ (those earning less than R3,500 per month or R20 per hour). In the current economic conditions, they cannot afford to be burdened with higher wage rates. In some cases, they will be taking such steps to avoid being bankrupted.

Why did the government not concentrate its efforts on discovering why there are 9.2 million unemployed people in the country and set about corrective action, instead of embarking on this exercise in economic insanity? And once they had discovered the truth, they could have removed the causes of the unemployment, which would have led, not only to a rapid reduction in the unemployed numbers, but also to a substantial increase in economic growth. What is more, it is robust economic growth that will lead to economically justified higher incomes for low-income workers, not unrealistic impositions and authoritarian threats of force and actual force, which will have severe negative outcomes.

4.2.2 The need to eradicate poverty and inequality

The most direct route to eradication of poverty and reduction of inequality is removal of barriers to entry into the job market. The barriers generally consist of costs imposed on employers by legislation and regulations aimed at creating a high level of job security for people who have jobs, and the imposition of minimum wage laws to compel employers to pay wages that are above the level that would otherwise have evolved in the voluntary competition for labour.

Whoever prepared this Bill appears to live in a place where there is no unemployment and the legislators can indolently concentrate on increasing the wages of the people who are fortunate enough to have jobs in a country that is rapidly disintegrating because of government decisions that do not take account of reality. This Bill is a prime example of proposed legislation that similarly ignores reality.

According to Stats SA's Q3 2017 figures, South Africa has a total of 9.2 million unemployed people (expanded definition), 6.0 million of whom are aged 15-34. Those aged 25-34 number 3.6 million (42.5%). The unemployed young people aged 15 to 24, number 2.4 million (64.5%). To put these staggering numbers into context, the 9.2 million unemployed people are equivalent to the total populations of Johannesburg, Soweto and Pretoria added together. The under 34's who are unemployed would fill Cape Town and Port Elizabeth and then you would have to accommodate another 1.34 million of them elsewhere.

The fact that South Africa is "one of the most unequal societies in the world" is primarily the consequence of the barriers to entry into the job market, which have prevented 9.2 million people from finding jobs. The difference between people who have jobs paying R2,500 per month and the zero earnings of the unemployed is R30,000 per annum. R30,000 X 9.2 million = R276 billion per annum. The difference it would make to the lives of the unemployed if they were to get jobs would be impossible to aggregate. It is not possible to put a price on the difference between enforced unemployed misery and productive gainful employment.

Mass unemployment is caused, as it is in any country with high unemployment, by regulatory barriers to entry into the job market created by government policies and legislation that prevent employment from occurring. Take away the barriers and unemployment will rapidly decline, as will poverty and inequality. The institution of a National Minimum Wage at a level of R200 per hour or about R3,500 per month will: (1) raise the barrier to entry into the job market and make it harder for the 9.2 million unemployed to get jobs; (2) cause employers to explore ways and means of firing low wage employees. Employers have not waited for 1 May to adopt staff reduction programmes. The programmes will already have been implemented.

4.2.3 The need to promote fair and effective competition in the labour market and labour market stability

In Section 2 the **Purpose of the Act** is described as:

(a) Improving the wages of lowest paid workers;
(b) protecting workers from unreasonably low wages;
(c) preserving the value of the national minimum wage;
(d) promoting collective bargaining; and
(e) supporting economic policy.

Comments on the items in Section 2 of the Act

(a) **Improving the wages of the lowest paid workers:** Once again, we see no mention of the unemployed. The focus is confined to "the wages of lowest paid workers", which is people who have jobs, with not a word about those who have no job at all. As far as the Ministry of Labour is concerned they are South Africa's forgotten millions. The department is obviously aware of the myriad difficulties that will eventuate, especially relating to individual employers and small businesses that find that they cannot afford the additional labour cost imposed on them by the NMW and have to retrench staff to stay in business. This is revealed in the estimate in the SEIAS of R20.8 million that the CCMA will require to handle the increased workload resulting from desperate individuals and small businesses that will end up in CCMA cases. Also in the SEIAS are two estimates of the effect of the NMW on the GDP, the one estimating positive growth of GDP

of 0.1 percent and the other estimating a negative impact of -2.1 percent. Potential job losses were estimated at between 204,977 and 897,068. It is of great concern that these potential job losses did not suggest to government that the NMW is a bad idea.

(b) **Protecting workers from unreasonably low wages:** This purpose clearly establishes the reason why South Africa has mass unemployment. If unemployed people are to be "protected" from themselves, from agreeing to work for wages that the Ministry of Labour regards as "unreasonably low" then in a struggling economy many people will be unemployed. Adopting such a position is not based on economic logic. It is based on ideology and the notion that a government has the right to prevent people from working for a salary and under working conditions acceptable to them, a notion that causes endless misery in the lives of people who cannot understand why employers do not want to employ them. Employers who appear to turn a deaf ear to the plea: "Please give me a job, any job. Pay me what you think I am worth. I will show you what I can do. And if you think my work is not good enough, tell me and I will leave, immediately. Just give me a chance!" And the sorrowful employer has to say, "I am sorry, I can't. What you are suggesting is against the law!" Just as Mrs Winnie Serobe of Soweto had to say when the young girl whose parents had died and who had two young siblings to support pleaded "Please Aunty Winnie let me work for you for a little bit of money so that I can earn the help you are giving us." Mrs Serobe's answer had to be, "Sorry my darling, I can't. It's against the law." So, true compassion is converted by a pretence of compassion into the "protection" of people who want to work, which in turn converts into mass unemployment and smug righteousness with evil consequences.

(c) **Preserving the value of the national minimum wage:** This objective requires the spending of a great deal of taxpayers' money on complicated calculations to determine what the NMW "should" be and to advise government to what amount to increase it. Predictably, as the labour situation is approaching conditions in which there is an increased demand for labour at the existing NMW, the Commission's advice is likely to be, no matter what the consequences, to increase the minimum wage once again to a point where employment comes to a shuddering halt. What is labelled as "preserving the value of the minimum wage" will have the effect of continually raising the barrier to entry into the jobs market and rendering people unemployable who might have got jobs if the NMW had remained static. The result will be to continue to keep millions of people unemployed with no hope of overcoming the continually rising barrier to entry. This is not a cynical observation. If the fact that 9.2 million is not a strong enough reason to prevent the institution of the NMW, then there is no reason to believe that caution will be exercised in raising the level in the future.

(d) **Promoting collective bargaining:** How does "promoting collective bargaining" sneak into a Bill with the stated objective of improving the wages of low paid workers? There is a misguided view that knocking potential competing workers out of the job market with legislative and regulatory measures bodes well for those that continue to be employed. Collective bargaining has been a threat to small businesses and their employees, due to the imposition of wage levels agreed by big business and big labour, resulting in loss of jobs and closure of small businesses. Nowhere in the entire document, including the SEIAS was there mention of the fact that a NMW would impact negatively on the job prospects of the unemployed. This must surely have entered the minds of the people that were involved in the formulation and approval of the NMW proposal and draft Bill. If so, it is a scandalous omission to not show any concern whatsoever for the huge

number of unemployed people in the country.

(e) **Supporting economic policy:** This objective could mean anything. If it was to support economic growth, it would have meaning because specific policies would have to be followed in order to bring about growth. The NMW will not result in higher economic growth but will impede it. It will disrupt business, especially the small businesses that employ most of the low-skilled and low wage workers. It will bring about dissension between employers and employees, cause a large number of dismissals, create a large new government bureaucracy, and make it even more impossible for the unemployed to find jobs. Instead of supporting economic growth it will create economic decline. A much better option than the implementation of a NMW would be to concentrate on freeing the unemployed to enter the job market and allow them to earn something rather than nothing.

4.2.4 Freeing the unemployed rather than destroying small firms and potential jobs for the unemployed

It is time for government to stop turning a blind eye to the problem of mass unemployment and stop pretending that the problem does not exist. Government is aided and abetted by academics who call themselves economists and yet urge the government to make matters worse by adopting a National Minimum Wage. According to the economists making the case for adopting the NMW, they could find no evidence from countries that had applied a NMW that they had experienced major job losses. A very strange finding considering the classic case of major job losses and economic ruin experienced in Puerto Rico and other US dependencies when they implemented the US mainland NMW in 2007.

The following is an article describing the tragic consequences:

What Puerto Rico Can Teach Us About the Minimum Wage

https://mises.org/blog/what-puerto-rico-can-teach-us-about-minimum-wage

01/05/2017 *Brittany Hunter*

This week, twenty states began implementing minimum wage increases that were passed during 2016. As the country waits to see how these increased wages this will affect the economy, the U.S. territories have already provided us with a grim example.

After the 2007 Fair Minimum Wage Act was passed, each of the fifty states was required to raise the minimum wage from $5.15 an hour in 2006, to $7.25 by 2009. Few Americans realize that this legislation was also applied to the U.S. territories of Puerto Rico, American Samoa, and the Northern Mariana Islands, who were also forced to raise wages.

When the minimum wage is increased, the private sector is responsible for finding the means to actually pay for these increases. Though many companies will be forced to raise prices in order to continue operating within their profit margins, some might be left with no choice but to lay off employees or dramatically cut employee hours.

Since minimum wage pay is typically associated with entry-level workers, if employers are forced to let these employees go, they will lack the skills necessary to quickly rebound in the job market. As a result, unemployment rates begin to rise.

When minimum wage requirements are made at the city or state level, the losses experienced from high unemployment rates are offset in the local economy, since many who are unable to find work often relocate to an area where the minimum wage isn't as restrictive.

However, for those living in U.S. territories, relocation is not as easy as it is for residents in the continental states. Without the flexibility to relocate, the economic catastrophe that resulted from 2007 minimum wage increase was felt on a grander scale.

According to researchers Paul Kupiec and Ryan Nabil, "The impact on the economies of American Samoa and the Northern Mariana Islands was devastating. In American Samoa, by 2009, after only three of the ten scheduled minimum-wage increases, overall employment dropped 30 percent — 58 percent in the critically important tuna-canning industry. Real per capita GDP in American Samoa fell nearly 10 percent from 2006 levels. In the Northern Mariana Islands, by the end of 2009, employment was down by 35 percent, and real per capita GDP off by 23 percent."

As the situation grew desperate, the governor of American Samoa testified before the U.S. Congress explaining that the new minimum wage policy created, "the real possibility that American Samoa could be left substantially without a private-sector economic base except for some limited visitor industry and fisheries activities." He continued, "American Samoa's economic base would then essentially be based solely on federal-government expenditures in the territory."

Puerto Rico met a similar fate after the new minimum wage rate went into effect. The increase resulted in a minimum wage that was 75 percent of the Puerto Rican median wage. In fact, the situation grew so dire, unemployment in Puerto Rico surged and its GDP per capita declined by almost 7 percent between 2007 and 2013. As a result, many young and able-bodied Puerto Ricans left for the U.S. mainland, creating an imbalance as the old and less motivated were forced to stay behind.

Additionally, foreign investors were turned off by hiring Puerto Ricans, since residents of Jamaica and the Bahamas would only cost half as much to employ.

By raising the minimum wage to as much as $15 an hour, states like California and New York are not just setting an American record for highest minimum wage, they are setting a global record as well. Even France, where socialism thrives, has a minimum wage equivalent to only $10.90 an hour.

In fact, the only time in history that the minimum wage was increased at economic levels comparable to that of New York and California was in 2007, when the U.S. territories implemented the Fair Minimum Wage Act. As we all know how that situation ended, we can only hope that in the future, governments can learn from history and avoid causing economic catastrophes.

Relevance of the experience of Puerto Rico, American Samoa and the Northern Marian Islands to implementing a National Minimum Wage in South Africa:

The reason why the implementation of the NMW in the American territories devastated their economies was that the wage levels in the territories were significantly lower than they were on mainland USA. The attempt to apply the same minimum wage in the territories as in mainland USA, even though the implementation was to be gradual, was devastating. This example is a perfect illustration of what is likely to happen in South Africa with the substantial difference in the wage rates that apply in the cities as compared to those paid in the rural areas. The economies of the rural areas will suffer a similar fate as the American territories. Employers in rural South Africa will not be able to

afford to pay the same wages as city employers. This was well illustrated by the difficulties experienced by the Newcastle clothing manufacturers when the Bargaining Council for the Clothing Industry demanded that they apply the same wage levels as the city factories, even when given time to adjust to the new minimum. The consequences for the rural areas will be dire.

The provision for exemptions in terms of Section 15 of the Act:

Anyone familiar with provisions for exemptions under labour legislation is that such provisions are of little or no value to the individual and small business employers who are likely to most need the exemptions. Such employers are generally not aware of the possibility of obtaining an exemption, and, if they are aware of the possibility, they find the processes difficult and costly to access. And if an exemption is granted, the period may not exceed one year.

5. Conclusion

This comment deliberately concentrates on the nature of the provisions contained in the law. The reason is that a sound legal system, and particularly adherence to the rule of law, constitute the bedrock upon which the highest and most enduring economic growth and improvement in the living standards of nations have been built. Disrespect for the principles of good law and the rule of law, on the other hand, have led nations to slide into greater lawlessness, erosion of economies, and a decline in living standards. Such developments should be guarded against and the National Minimum Wage Bill unfortunately contains elements that should be avoided.

While the executive branch of government prepares proposed legislation, the legislature has the responsibility to ensure that the Bills that are presented to Parliament are consistent with the rule of law, Constitutional in every respect, and consistent with the principles of good law. This Bill does not meet those requirements and should be rejected by the legislators.

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(Addendums Attached)

ADDENDUM 1 – Job Seekers Exemption Certificates

Allowing the labour market to work

The proposal

People who have been unemployed for six months or longer should be entitled to a job seekers exemption certificate (JSEC), which would: *a)* grant them exemption from all labour legislation for a period of two years; and, *b)* protect any employer who hires them from prosecution under the labour laws.

This would allow the unemployed to accept work at less than the minimum wage and to agree to less favourable employment conditions (such as longer working hours or less rigid employment termination procedures) than those mandated by the labour laws. They would then have the opportunity to acquire skills and build up an employment history. It is important to note that these individuals, while relinquishing statutory protections, would still have all the protections against abuse that are afforded by the common law.

Why create a two-tier system with some workers subject to labour laws and others not? Why not simply allow freedom of contract between all employers and all employees? The simple answer is that neither the government nor the unions would agree to this. Most countries have, to a lesser or greater extent, sacrificed contractual freedom in labour markets in favour of worker protections. South Africa has embraced the global trend and appears unlikely, in the near future, to make fundamental changes to its laws. The solution offered here is one that will disturb the existing labour dispensation as little as possible, yet allow large numbers of extra jobs to be created.

If a JSEC certificate were available, it would reduce unemployment rapidly and dramatically, and accelerate economic growth. These results would all be quantifiable. A less tangible, but equally important consequence, would be the improvement in the psychological health and emotional outlook of millions of people.

JSEC certificates would empower the unemployed, not the employer.
Organised labour is likely to oppose any labour law reform that reduces demands on business. This factor can be removed from the equation by placing the benefits of the reforms in the hands of the unemployed – in other words, by empowering the unemployed rather than the employer.

Thus, the JSEC certificates would be issued to the unemployed, exempting them for a period of two years from the Basic Conditions of Employment Act, the Labour Relations Act and all other labour laws that restrict their ability to determine their own conditions of employment. The JSEC holder would become a free agent, entitled to make any form of employment arrangement she/he wishes with an employer, who would in turn be protected by the JSEC certificate from prosecution under the labour laws.

Empowering the unemployed person in this way would have several important benefits:

- no changes need be made to the current labour laws, except for a brief section exempting the unemployed and determining the conditions of the exemption;
- the job security of existing employees would not be affected;

- the concept is simple for unemployed people to understand and utilise; and
- potential employers, most of whom are likely to be small firms, would have a minimum of red tape to comply with.

Unemployed people would decide for themselves whether to apply for a JSEC certificate: the choice would be entirely in their hands. After acquiring a certificate, they would remain in control of the situation and be able to choose any of the following options:

- refrain from using the JSEC certificate but keep it in reserve in case of need;
- use the JSEC certificate to get a job and stay in it for the full two-year term;
- use the JSEC certificate to job-hop and find the most satisfactory job; or
- take back the JSEC certificate by agreement with the employer once firmly established in a job, thereby bringing all the labour laws into operation, but keep it to cover future contingencies.

The introduction of JSEC certificates would have major advantages for the jobless and no disadvantages. Employers would gain by having extra labour only for as long as conditions of employment remain mutually beneficial.

Conditions of issue of JSEC certificates

The following conditions are proposed to satisfy potential critics while allowing the JSEC certificates to perform their intended function of helping the unemployed to get jobs:

1. People who have been unemployed for six months or longer should automatically qualify for certificates

Ideally, all unemployed people should become eligible for JSEC certificates upon losing their jobs. However, critics may argue that immediate qualification would encourage employers to circumvent the labour laws by firing their workers and re-hiring them once they have obtained JSEC certificates. As it is not the purpose of this proposal to help people evade the labour laws, a method must be devised for identifying the genuinely unemployed. Whatever method is chosen must:

- not present opportunities for cheating;
- not present so many obstacles to qualification that unemployed people lose heart.

A waiting period is probably the simplest way of doing this. Initially, this period could be set at six months of unemployment, but it should be reviewed if it is found to be too long, or if government finds a better way of identifying the genuinely unemployed. A six-month wait for a JSEC certificate is better than having no prospect at all of getting a job, and a large number of the existing unemployed would in any case qualify immediately as they will already have been unemployed for longer than six months.

2. A simple and quick procedure should be adopted for issuing JSEC certificates

The task of identifying JSEC certificate qualifiers and issuing the certificates could be assigned to any agencies or institutions (such as local authorities) that operate or are to be found countrywide; it would not necessarily have to be carried out by the Department of Labour. A simple procedure could be adopted, requiring an applicant to complete an application form and sign a declaration confirming the period for which she/he has been unemployed. All applicants would have to be made aware of the penalties for making false declarations. Placing an onerous and time-consuming burden of proof on applicants regarding the length of time they have been jobless would be unfair, and should be avoided.

No official should have the discretionary power to refuse to issue a JSEC certificate to a genuinely qualifying unemployed person: legislation should set objective criteria that will allow qualifying individuals to claim certificates as of right. No fees should be payable by the unemployed, and this fact should be widely advertised to avoid corruption.

Government would have to ensure that the certificates are issued expeditiously. Ideally, they should be issued immediately on receipt of applications and signed declarations.

3. The exemption should cover all the labour laws

If the JSEC certificates are to be effective, they should exempt the unemployed from all the laws and regulations under the jurisdiction of the Department of Labour. This would allow the certificate-holder to offer a prospective employer an agreement that is free of the possibility of inadvertent transgressions. Firms that currently do not hire labour because they are fearful of prosecution for breaking laws they are not aware of, or that avoid hiring because of the administrative complexity related to employing staff, would then be encouraged to hire holders of exemption certificates.

A partial exemption would compel prospective employers to study the legislation in order to determine their legal responsibilities. Such an exercise is beyond the capabilities of many potential employers, and it would tend to become another barrier to employment. The thrust of this proposal is that long-term unemployed people are better off being employed and protected by the common law than being unemployed and kept in that condition by laws providing a high level of job security to others.

No one can seriously contend that an unemployed person is better off remaining unemployed than relying on an employment contract and the common law as protection against a potentially unscrupulous employer. Reasonable employers significantly outnumber bad employers, but in any event the holder of an exemption certificate would also be in a better position than a non-holder to leave poor employment and find a better job. In fact, one of the primary purposes of the JSEC certificate would be to give its holder the opportunity to change jobs more easily.

4. Employee exemption must provide the employer with total protection

While it is the employee and not the employer who enjoys the exemption from the labour laws, it does mean that employers of exempted employees are protected from the provisions of any legislation from which those employees have been exempted. The exemption should remain valid only as long as the employee chooses.

JSEC certificate-holders should have the right to cancel their exempt status at any time within the two-year validity period of the certificate, on giving appropriate notice to their employers in terms of their employment contracts. They may then either leave their employment or negotiate new contracts that are fully subject to the labour laws. However, there should be no requirement compelling employers to transfer exempted employees to regular employment contracts as this would almost totally negate the contractual freedom that is the principal benefit of the JSEC certificates.

Exempted employees and their employers should be required to enter into simple straightforward written employment contracts detailing the essential terms of their agreements. Employers should further be required to retain certified copies of their exempted employees' JSEC certificates, but

should under no circumstances be entitled to keep the originals, which would be the exclusive property of the holders. The written contracts together with the copies of the JSEC certificates should be all that is necessary to protect employers from charges of infringing the labour laws.

5. Why JSEC certificates should be valid for at least two years

Exemption terms for the JSEC certificates should be long enough for their holders to consolidate their positions on the job market. Firstly, the possession of an exemption certificate will not necessarily be a passport to an immediate job. Secondly, the exempted person may change jobs several times before finding suitable employment. Thereafter, the employee will need to build up an employment record that will satisfy potential future employers of her/his abilities and reliability, or to satisfy an existing employer that she/he deserves to be appointed to permanent formal employment.

Employers become understandably wary of employing people who have been without work for a long time. Unemployed people therefore need the opportunity to prove their worth. They need to be able to say to an employer, 'Give me a chance and I will show you what I can do!' The JSEC certificate would make that possible. Certificate-holders may, for example:

- agree to start at very low wages in order to learn skills on the job that they could not acquire otherwise;
- settle for low starting wages with periodic adjustments as they demonstrate their worth;
- change employers regularly as they find increasingly attractive employment and discover better ways to exploit their newly-learned skills;
- work long hours in order to get their feet on the first rung of the employment ladder;
- engage in day-to-day employment terminable at 24 hours' notice from either side.

Experimenting with job opportunities and acquiring skills requires time and the kind of latitude provided by the proposed JSEC certificates. A period of at least two years is necessary to give exempted people a chance of obtaining regular employment after the expiry of the certificate.

6. Exempted persons should face a minimum of restrictions in their choice of employers

Unemployment would decline most rapidly if no restrictions whatsoever were to be placed on the type of employer that exempt persons might choose to contract with. However, such an arrangement would be inclined to conflict with the interests of trade union members. Even if trade unions were to accept the exemption certificate concept in principle as a least-costly method of reducing unemployment, and recognise the future benefits of an overall larger workforce, they would nevertheless probably wish to limit potential competition from JSEC certificate-holders.

The unions would therefore probably suggest limitations on the size of the firms that would be entitled to employ such workers. There is no scientific way of determining what the 'right' size of a firm should be, as measured by number of employees, that should qualify to employ exempted workers. Therefore, an arbitrary figure would have to be chosen, which should be as high as interested parties will allow. The greater the number of firms that are allowed to participate, the more rapidly the unemployment rate will be reduced.

One possibility is to allow all small, medium and micro enterprises (SMMEs) to employ holders of exemption certificates. All firms, for instance, with 200 employees or fewer should qualify, without restriction to employ JSEC certificate-holders.

Another possibility is not to exclude any firms at all but to adopt a reverse sliding scale, allowing very large firms to employ very small numbers of exempted unemployed as a percentage of their total workforce and increasing the percentage for smaller firms, to a point where the smallest firms are allowed to employ as many certificate-holders as they can afford. The formula could be devised in such a way that competition with unionised workers is reduced to a minimum.

7. Basic, simple, employment contracts

Written employment contracts between exempt employees and their employers should be obligatory so that there can be no doubt as to the basis of their agreements. In the interests of the employees, however, these should be as simple and uncomplicated as possible. Items that should appear in every agreement are:

1. Names of the parties to the contract together with identifying information such as identity numbers and company or close corporation registration numbers.
2. Nature of the work to be performed by the employee.
3. Date of commencement of the contract.
4. Salary or wage payable per hour, day, week or month.
5. Hours of work.
6. Overtime conditions and remuneration.
7. Day of the week or month upon which remuneration will be paid.
8. Annual leave conditions.
9. Sick leave conditions.
10. Notice required for termination of the contract.
11. Date of issue of the applicable exemption certificate and the period for which it is valid.
12. Date and place of signature of the contract.
13. The signatures of the parties.

Example of a simple contract of employment:

CONTRACT OF EMPLOYMENT
(entered into by the holder of a Special Exemption Certificate)

between _____ **(Employee)**

and _____ **(Employer)**

PREAMBLE
This contract is entered into in terms of the requirements of Special Exemption Certificate No _____held by the employee, which entitles her/him to negotiate and enter into agreements with employers on terms that do not conform to the standard labour legislation and regulations.

CONDITIONS OF EMPLOYMENT

1. This contract commences on_____.
2. Remuneration will be_____.
3. The total number of ordinary working hours per day/week (delete whichever is not applicable) will be _____ hour(s) and the maximum number of working hours in any one day will be_____hour(s).
4. The rate of pay for overtime will be_____times the rate of pay for normal time worked.
5. The number of paid working days leave per year will be___days.
6. The number of paid working days sick leave will be_____day(s) for every month worked with a maximum of_day(s) in any cycle of_____months.
7. Normal hours of work will be from_____to_____from Monday to Friday (with a_____lunch break) and from_____to_____on Saturdays.
8. This contract is subject to a probation period of____month(s) after which notice of termination will be at least_____calendar week(s) by either party.
9. During the first period of_____month(s) the contract may be terminated by either party by giving the other party 24 hours' notice of termination.

SPECIAL EXEMPTION (JSEC) CERTIFICATE
It is agreed that the employer will be entitled to make and retain a certified copy of the JSEC certificate as evidence that the employee is empowered to enter into this contract but shall hand over this copy on demand to the employee on termination of the contract. It is further agreed that at the expiry of the term of the JSEC Certificate this contract will terminate automatically and further employment will be subject to negotiation between the parties.

Signed at_____on this_____day of_____20__.

_____ _____
Employee **Employer**

Witness: _____

ADDENDUM 2 – WHAT IS THE RULE OF LAW?

President Nelson Mandela described the rule of law as follows:

> The rule of law, as I (admittedly a long retired old lawyer) understand it, refers to a structural exercise of rule as opposed to the idiosyncratic will of kings and princes. Even where the latter may express itself benevolently the former is morally and politically superior. Where the rule of law does not apply, rulers assume entitlement to rule; the rule of law, on the other hand, places the emphasis upon structured responsibility and obligation.

What follows is an excerpt from a 2007 paper by Leon Louw, Executive Director of the Free Market Foundation, titled What is the Rule of Law? It provides a comprehensive and detailed list of specific elements of the rule of law, explanations as to why they constitute the rule of law and what their practical implications are:

i) *Legality*: The doctrine of legality is that all laws must be lawful in terms of the constitution and adopted according to prescribed procedure.
ii) *Rationality*: The rationality principle is that there must be a rational connection between the law and its objective, which must be clear. South Africa recently passed a National Credit Act which has two stated objectives: to increase 'access' to credit and to increase 'protection' for credit-receivers. What might violate the rationality principle is that a measure which raises the cost and risk of granting credit necessarily reduces access. These two objectives in a single bill are inherently contradictory and therefore irrational.
iii) *Non-discretion*: The most elementary aspect of the rule of law is that there should be little or no administrative discretion. People should be ruled by laws, not by men.
iv) *Clear objectives*: Where, for whatever reason, there is discretion, as in judicial proceedings and staff appointments, there should be two distinct and easily confused qualifications. Firstly, the purpose for which the power is conferred must be articulated clearly – to what end is the power created? What outcome does the legislature want?
v) *Objective criteria*: Secondly, there must be objective criteria according to which the power is to be exercised. If an immigration law, for instance, confers the power to grant immigration rights, it should state that its purpose is to attract technical skills or protect people with skills from foreign competition. It should then specify criteria such as the procedure to be followed, ideal qualifications to attract or exclude, and so on.
vi) *Certainty*: Laws should prescribe clearly and unambiguously that with which citizens must comply, rather than leave them at the mercy of arbitrary or discretionary officialdom. It should be as easy as possible for everyone to know what the law is, and when they are complying with or transgressing it. Uncertainty in law creates real or suspected injustice.
vii) *Precedent (res judicata)*: Certainty implies that rulings for comparable facts will be consistent, to which end there must be access to court records and subsequent judgements must follow preceding judgements. The lack of precedent amounts to the rule of person in that presiding officers are not bound by law, which includes precedent – because earlier judgements purported to be manifestations of the law.
viii) *Prospectivity (nullum crimen, nulla poena sine praevia lege poenali)*: The requirement that the law should be clear and objective implies that laws should not be retroactive. Retrospectivity should be considered only in extreme circumstances such as the need to correct the unintended

consequences of erroneous drafting where the original intent can be presumed to have been unclear to all concerned.

ix) *Division of powers*: For sound, tried and tested reasons (examples above) a democratic order requires a genuine separation of powers: legislative, executive and judicial. The legislature alone should legislate, the executive alone execute and the judiciary alone adjudicate. Almost every judgment and publication on the rule of law has judges and writers asserting axiomatically and erroneously that there can be no 'rigid' separation of powers, never giving sound reasons why not.

x) *Due process and natural justice*: The concept of 'due process' is also sophisticated concept. The purpose of due process is to ensure that 'justice is not only done, but seen to be done'. Due process is part of the rule of law to the extent that it increases the likelihood of proper decisions according to law, that is, people being ruled by laws not discretion. For there to be due process various factors must be present, some of which are prescribed in many constitutions. Here is an illustrative list of elements of due process, each of which lends itself to elaboration, but provided without comment because book-length analysis would be necessary to do justice to all items:
   - administrative justice (in that all administrative action must comply with the rule of law, regardless of the legislation under which it falls);
   - the right to be heard (audi alteram partem);
   - the right to be aware of evidence being considered;
   - the right to be present and cross-examine witnesses;
   - no trial or quasi-trial without formal charge;
   - the right to written reasons for administrative and judicial decisions;
   - the right of appeal on the merits to a truly independent tribunal (ultimately to an independent judiciary);
   - the right to judicial review of judicial and administrative decisions;
   - access to relevant information particularly that in the hands of the state;
   - recusal or dismissal of officials with conflicts of interest, or who are otherwise compromised.

xi) *Craftsmanship*: All laws and guidelines should be carefully, professionally and skilfully drafted. Legal drafting is a distinctive skill seldom taught in law courses. For laws to be clear, objective and unambiguous considerable care and skill is needed. To this end, all people responsible for drafting laws should not only be conversant with the principles of good law but also with the precise meanings of words used and the general craft of legislative drafting. Draft legislation should be reviewed and edited by independent experts.

xii) *Stability*: For society to be stable its laws, as far as possible, need to be stable. Laws changing constantly promote instability and uncertainty. They discourage long-term planning and investment. They discourage the attainment of enduring institutions and values. Laws should be formulated for the long term and not on the premise that they can be revisited, repealed or replaced endlessly. Lack of stability is particularly deleterious for the economy. Frequent changes to the law result in costly and time-consuming changes to the nature of business.

xiii) *Presumption of innocence*: Everyone is presumed innocent 'until proven guilty'.

xiv) *Double jeopardy*: No one should face more than one procedure for one alleged offence or tort/delict. Additional proceedings or retrials only on the basis of substantial new evidence not previously available to accusers and prosecutors.

xv) *Equality at law*: Everyone to have the same rights and obligations without unfair discrimination on such grounds as status, religion, sexual orientation, political affiliation, gender, race, age and so on. According to Montesquieu 'law should be like death, which spares no one.'

xvi) *Habeas corpus (ad subjiciendum)*: This translates as 'have the body to be subjected (to examination)'. It also means that everyone is entitled to be free until convicted unless, on

examination, there are exceptional grounds for detaining a supposedly innocent person. It implies 'no detention without trial', and not necessarily detention even if there is a proper charge.

xvii) Information: Everyone arrested, charged or accused has a right to know of what wrongdoing they are suspected, and the right to all relevant documentation and other information.

The principal derivatives from the central concept are:

1. Separation of powers
2. General application (equality at law)
3. Due process
4. Prospectivity
5. Objective criteria (for discretionary power)
6. Specified objectives (for discretionary power)

Given that the rule of law is a Founding Provision of the Constitution, it is imperative that all laws that are enacted should be carefully scrutinised to ensure that they comply with its requirements. The National Minimum Wage Bill is in conflict with the rule of law, and therefore with the Constitution, in respect of the extent to which it fails to comply with the general application requirement (equality at law), and the extent to which it lacks specified objective criteria according to which discretionary powers are to be exercised.

Administrative discretion

It is a recognised principle of good law, and a requirement of the Constitution and the rule of law, that legislation should provide for a minimum of discretionary power, and when it does so, it should be subject to the Guidance Principle (Dawood and Another v minister of Home Affairs and Others 2000 (3) SA 936 (CC), and Janse van Rensburg NO and Another v Minister of Trade and Industry NNO 2001 (1) SA 29 (CC)). In other words, the legislature should make laws as objective as possible and, when it creates discretionary power, it is obliged to prescribe objective criteria according to which the power is to be exercised.

The doctrine of the Separation of Powers, also part of our Constitution, requires that it is the legislature (by way of statutes) and not the Executives (by way of regulation) that must prescribe those criteria.

There are sound jurisprudential reasons for these provisions being in our Constitution. Were there a better understanding and appreciation of the logic that informs them, there would be less propensity to undermine or ignore them in draft legislation. Firstly, if people do not know their rights and obligations, there will be wasteful confusion, uncertainty and conflict. Secondly, and more importantly, unconstrained discretionary power is the primary cause of corruption and the abuse of power. Corruption is one of South Africa's most disturbing and debilitating problems.

The problems of corruption and abuse should be addressed at two levels: by avoiding discretion and by ensuring that whatever discretion is retained is exercised according to maximally objective criteria, and subject to procedural checks and balances. Appropriate checks and balances include established and proven mechanisms such as mandatory transparency, accountability, due process, rights of appeal (to truly independent courts or tribunals), non-discrimination, and the like.

For these and other reasons, wherever the National Minimum Wage Bill creates executive discretion, it should specify the criteria according to which that discretion must or may be exercised, and it should provide for appropriate checks and balances.

The rule of law requires that government should enact only such laws as are general in nature, are applicable to everyone including itself, and which do not attempt to bring about particular outcomes. The rule of law was described by Nobel Laureate Friedrich Hayek in his book The Constitution of Liberty:

> The conception of freedom under the law ... rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. It is because the lawgiver does not know the particular cases to which the rule will apply, and the judge who will apply them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule. Because the rule is laid down in ignorance of the particular case and no man's will decides the coercion used to enforce it, the law is not arbitrary. This, however, is true only if by "law" we mean the general rules that apply equally to everybody.