Submission to the Parliamentary Portfolio Committee on Labour on the Labour Relations Amendment Bill, the National Minimum Wage Bill and the Basic Conditions of Employment Bill, all of 17 November 2017.

Written submission by the Casual Workers Advice Office

This submission is by the Casual Workers Advice Office (CWAO), a registered non-profit organisation. The CWAO provides free advice and support to workers with work-related problems but mainly organises labour broker workers in Gauteng.

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1. Introduction

This submission is by the Casual Workers Advice Office (CWAO), a registered non-profit organisation. The CWAO provides free advice and support to workers with work-related problems but mainly organises labour broker workers in Gauteng.

We believe that the amendments proposed to the Labour Relations Act (LRA), Basic Conditions of Employment Act (BCEA) and the introduction of the National Minimum Wage (NMW) Bill will, if enacted, fundamentally undermine worker rights and further entrench inequality.

This submission is organised as follows:

1. A discussion of the context that informs the drafting of these amendments.
2. An analysis highlighting the flawed sections in each Bill.
3. Our proposals on how the legislative and institutional framework could be amended to protect worker rights.
4. A request to make an oral submission.
5. Appendices with further evidence to support our submission.

2. Context

2.1 Cheap black labour and the right to strike

South Africa suffers the highest income inequality in the world. The source of this inequality is an exploitative economic system of low wages for mainly black workers. The many social ills that continue to afflict South African society well after the formal demise of Apartheid, of hunger, poverty, disease, crime and want, all derive from this fundamental fact.

Most commonly, workers have withheld their labour as the chief weapon in their struggle for higher wages and a decent life. In other words, workers' ability to strike has been their most successful, and often only means to address systemic inequality. Any attempt to limit or undermine this weapon constitutes a conscious effort to perpetuate and indeed intensify inequality. This is clearly what the Labour Relations Amendment Bill intends. It is for this same reason that we oppose its provisions on strikes and picketing, in particular.

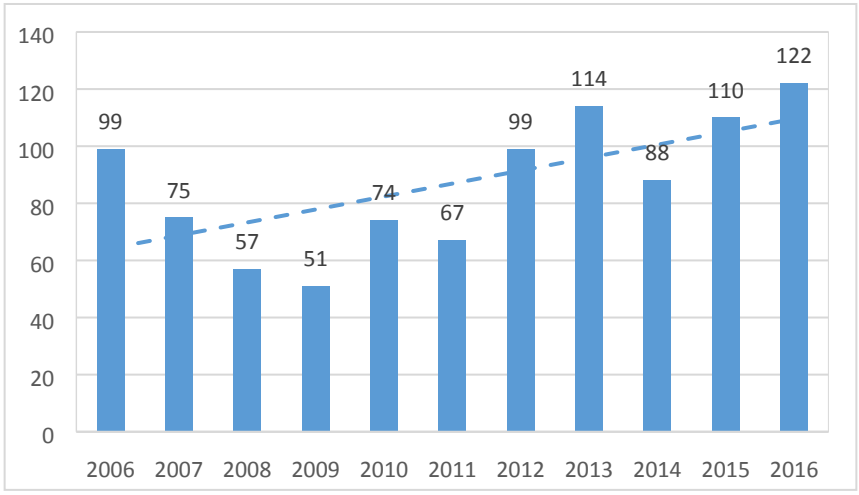
That the country's biggest trade union federations have been party to the tripartite negotiations leading up to the drafting of the amendments does not negate our contention that they seeks to perpetuate and deepen inequality. It is common knowledge that these organisations are in deep crisis, including a crisis of legitimacy, and represent no more than 24% of the country's workers.[1] As we will further contend in our submission on the Bill, these organisations have agreed to the strike limitations in exchange for retaining their non-representative and privileged positions within bargaining councils, to the detriment of the majority of workers, who are not trade union members and therefore not party to these councils.

[1] Steyn, L. 2014. The downward spiral of South African unions. 14 November. *Mail and Guardian*. Available at https://mg.co.za/article/2014-11-13-the-downward-spiral-of-sa-unions; Also see Stats SA. 2017. *Quarterly Labour Force Survey QS*. P71. Available at: http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2017.pdf

The motivations for the proposed amendments undermining workers' right to strike are questionable. The argument that strikes are too numerous is purely ideological and factually inaccurate.

While it is true that the number of work stoppages has increased (see figure 1), over the course of a decade the increase has not been dramatic. But using the number of work stoppages as an indicator of industrial action is in any case a very imprecise measure. More commonly analysts use the number of working days lost as a more accurate measure of industrial action.

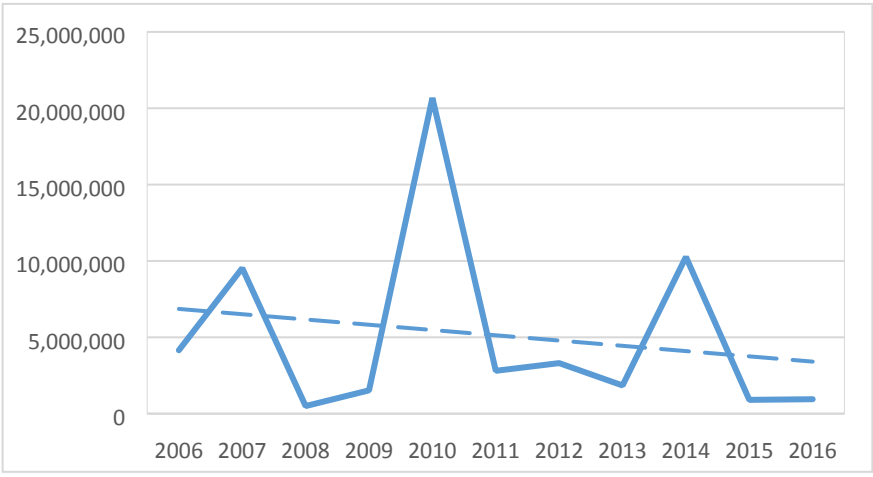
Figure 1. Number of work stoppages in South Africa 2006-2016



Source: Department of Labour Annual Industrial Action Reports

As figure 2 shows, over a 10 year period the trend has been for a *decline* in the number of working days lost, even including the number of working days lost in 2010 during the public sector strike and the 2014 platinum strike.

Figure 2. Number of working days lost 2006-2016



Source: Department of Labour Annual Industrial Action Report

To make the case for the high levels of strike violence the impact assessment accompanying the LRAB draws upon secondary data analysis of media reports from the South African Institute of Race Relations (SAIRR). The use of media data for this kind of analysis is inherently biased as the media is much more likely to report incidents that are violent. While we think a fatality during the course of any strike is a serious matter, this represents a very small fraction of the number of employees involved in strike action. Appendix 1 provides data, drawn from the South African Police Service (SAPS) that offers a much more accurate representation of strike violence.

A further justification for the amendments is the protracted nature of strikes, again this is not borne out by evidence (see Appendix 1). These various arguments are intended merely as a cover to limit workers' rights to strike in general.

A fundamental cause of supposedly violent strikes is employers' ability to use scab labour during even procedural strikes. Secret balloting does not solve this problem and will instead frustrate workers further through endless employer legal challenges, on ballot procedures. This was a key feature of workers' strike experience under Apartheid.

The prohibition on workers' right to strike over disputes of right introduced via the 1995 LRA was predicated on the understanding that a strong, vibrant labour movement, complemented by efficient and effective enforcement agencies, would be adequate safeguards for worker rights. The subsequent dramatic weakening of the labour movement, the dysfunction of the labour inspectorate and the strain faced by the CCMA have allowed employers to flagrantly disregard worker rights and to punish workers who seek to enforce their rights (see Appendix 2) There is a need to reinstate workers' right to strike over dispute of rights, a right they enjoyed in the LRA previous to 1995.

2.2 Cheap black labour and the national minimum wage

The proposed national minimum wage is an acknowledgment of the history of cheap black labour and growing, rather than lessening social inequalities in South Africa. The proposed national minimum wage of R20 per hour is based on the assumption that workers all work 40 hours or more per week. Yet, large numbers of workers often work far fewer weekly hours than 40. A R20-per hour national minimum wage, without a prescribed monthly minimum, means that workers will not earn even the very low R3,500 initially proposed.

Sectoral determinations are likewise an acknowledgment of the vulnerability of specific groups of workers, like farm and domestic workers. Because of particularly abusive and exploitative practices, exacerbated by very low levels of unionisation, the state deemed it necessary to offer such workers protection beyond the generic rights contained in the Basic Conditions of Employment Act. Thus, sectoral determinations go beyond the BCEA in setting minimum wages but also include rights tailored to the specific needs of particular groups of workers. For example, the Farm Worker sectoral determination has important provisions regarding housing, not present in the BCEA or in other sectoral determinations. The proposed repeal of the Minister of Labour's right to make sectoral determinations will mean the loss in the near future of important rights to groups of vulnerable workers. Moreover, given the weakening of the labour movement, it is likely that other groups of workers currently not

covered by either the bargaining council agreements or sectoral determinations, like Food Processing workers, for example, will not have the option of securing sector-specific rights.

As the labour movement declines and union membership falls, fewer workers will improve their wages and conditions of employment through collective agreements. More and more of them will rely on the state for legislated rights instead. The proposed doing away with sectoral determinations can once again only be interpreted as placing the interests of employers' profit-making above the needs of low earning workers.

Lastly, some existing sectoral determinations, like Wholesale & Retail, have wage categories higher than the proposed national minimum wage. The scrapping of sectoral determinations will in such instances lead over time to a fall in the wages of higher-earning workers in these sectors.

2.3 Cheap black labour and rights enforcement

A grossly ineffective labour inspectorate was a feature of the Apartheid-era labour relations framework from the perspective of rights enforcement. This was consistent with preserving the cheap black labour system. The current situation has not improved. The proposed shifting of the responsibility for enforcement of a national minimum wage onto the CCMA is a negation of the state's responsibility to transform the labour inspectorate into an instrument of social justice for non-unionised, vulnerable workers in particular. The shift will also undermine the CCMA's ability to perform its current tasks (see Appendix 3). More importantly, workers seeking their right to a national minimum wage will simply be tied up in endless legal and procedural frustrations in ways employers have already managed to do with current CCMA practices and procedures.

Currently, 76% of the country's workers do not have the right to representation at CCMA hearings.[2] Only after a CWAO labour court challenge, in September 2016 did the CCMA reluctantly agree to exercise discretion in granting non-union members the right to alternative representation. In the experience of the CWAO, other advice offices and NGOs supporting workers, this discretion is being exercised arbitrarily and irrationality. The prospects for the majority of workers accessing social justice through the CCMA are slim without the option of alternative representation.

[2] CWAO and others v CCMA and others. 2016. Case No J645/16, Labour Court of South Africa, Johannesburg.

3. Objections to the proposed amendments to the LRA

The proposed amendments make a number of changes that will prejudice the constitutional rights of workers to strike. Taken together the laws introduce a number of institutional and legal hurdles that unions must overcome in order to be able to strike, which will fundamentally undermine the right to strike.

We draw out the problems with the amendments as follows.

3.1 Extension of conciliation (Section 135 subsections 2A, B)

The amendment proposes the possibility of extending conciliation. The speedy processing of mutual interests disputes is vital. The extension of conciliation will merely frustrate the ability of workers to exercise their right to strike. It will also allow employers more time to prepare for strike action through stockpiling and organising scab labour.

3.2 Introduction of compulsory secret balloting (section 95)

The introduction of subsection 9 means it will be compulsory for a registered trade union to include provisions within its constitution for secret ballots before embarking on strike action.

Secret ballots undermine the essential collective decision making of a strike. The forced imposition of a secret ballot on strike action is a major restriction on the right to strike. It not only individualises an otherwise collective decision but more fundamentally it wrests from the control of workers their ability to choose their own democratic processes and procedures. The introduction of compulsory secret ballots takes away the fundamental right that workers and unions should have to determine their own internal democratic processes.

The forced conducting of a secret strike ballot puts enormous obstacles in the way of organising effective strike action. Conducting secret ballots will put considerable organisational and institutional strain on trade unions at a time when they are already severely weakened. It exposes unions to an array of possible legal actions from employers who will have the opportunity to interdict strikes on the basis on how the secret ballot was conducted.

This proposed change provides employers with more tools through which to disrupt strike action. Such disruptions would likely lead workers to be discouraged from going out on strike, which fundamentally undermines the right to strike, and will weaken the position of labour vis a vis business with regards to the collective bargaining process. The difficulties that trade unions will face in holding secret ballots are likely to weaken further the confidence that workers have in their unions.

3.3 Picketing rules (section 69 subsections 4,5 and 6)

Under the amendment the CCMA commissioner will not be allowed to issue a certificate of non-resolution of a mutual interest dispute unless there is an agreement on picketing rules or picketing rules are put in place.

Not only is a CCMA Commissioner expected to deal with the wage disputes in conciliation but now has to apply his/her mind to the issue of picketing rules. This will impact on the duration of the conciliation process and place a huge burden on the already strained capacity of the CCMA (see Appendix 3).

Presently, picketing rules are negotiated between workers, unions and employers, which allow them to take into account the particularities of the workplace. The amendment will allow this to continue to take place but in instances where agreement cannot be reached the amendment will empower the Commissioner to determine the picketing rules.

Commissioners are far removed from the terrain of conflict, i.e. the workplace, and would tend to impose formal rules that have no relation to the workplace. Generic picketing rules are likely to lead to increased frustration and confrontation between workers, unions and employers.

3.4 Advisory arbitration (insertion of sections 150A, 150B, 150C and 150D)

The changes to advisory arbitration introduce further frustrations to the right to strike.

The circumstances under which an advisory arbitration panel can be convened are extremely broad. This includes if a director of the CCMA deems the strike as 'no longer functional to collective bargaining'. This enables a director of the CCMA to make a decision to effectively end a strike based on their own opinion. This fundamentally compromises the right to strike.

Furthermore, as employers can request advisory arbitration it provides them with another tool with which they can drag workers and unions into a process that will frustrate workers and unions. Employers will exploit advisory arbitration as a way in which to prevent and stop strikes as they can apply for advisory arbitration as soon as a strike certificate is issued.

The process of advisory arbitration will mean that unions are now expected to involve experts and technically inclined personnel to engage in the deliberations of the advisory arbitration panel. Collective bargaining will become more technical in character and far removed from the control and direction of workers.

Though the advisory arbitration process does not automatically interrupt or suspend the strike workers and their unions will nevertheless have to contend with another bureaucratic procedure when exercising the right to strike. Unions are forced to take account of the advisory arbitration and its deliberation even when they do not support it.

Further the reluctant union has to indicate whether it agrees or disagrees with the advisory arbitration recommendations. Where the union rejects the recommendations it is obliged to provide reasons and must demonstrate that its rejections are based on a mandate from its workers. This will once again open unions up to interdicts and legal challenges from employers who will demand proof of the way in which the mandate was arrived at. In the experience of CWAO this is a strategy that employers are already using at the CCMA in order to frustrate workers seeking justice.

Further, if unions do not respond the arbitration becomes binding. At a time when union capacity is weak the likelihood of non-response is high, even when the substantive issues in the dispute are completely legitimate.

In cases where already non-representative trade unions who are parties to bargaining councils accept the advisory arbitration recommendations these will become collective agreements, which can then be extended to an entire sector. This means thousands of

workers who are not members of trade unions will be bound by agreements from disputes they were not part of and decisions from which they were excluded.

3.5 Bargaining Councils (amendment of section 49 and section 32 (f) 5A)

The amendments to the LRA propose changes to the ways in which 'representivity' will be determined.

No longer is the Minister of Labour or the Registrar required to insist that both the employer organisations and trade unions are a majority, that is that the employer organisations employ the majority of employees and that trade unions represent the majority of employees who are trade union members before agreeing to establish a Bargaining Council or extend collective agreements to non-parties.

Instead the amendments propose that representivity can be determined if either the employer organisations employ the majority of employees or the trade unions represent the majority of union members.

The effect of these amendments is that even if the unions do not represent a majority of employees who are union members but as long as their "social partner", the employer organisations, employ the majority of employees the Minister must extend collective agreements or the Registrar can agree to the establishment of a bargaining council.

This is nothing more than a cynical move by trade unions to safeguard their waning influence. Instead of addressing their declining membership by organising new workers, the trade union federations are exchanging hard-won workers' rights, for which they have no mandate from the majority of workers, for the protection of Bargaining Councils.

Furthermore, when determining the representivity for either establishing a bargaining council or extending an agreement to non-parties the amendment gives the Registrar or the Minister the ability to take into account the composition of the workforce, including the extent to which employees work for temporary employment services, part time and other forms of non-standard worker.

While this clause may seem benign its intent is to exclude the large number of non-unionised workers, who are generally non-standard workers, and therefore also often the most vulnerable and precarious workers in the workplace.

We argue that the intent of this amendment is to exclude the 4.5 million workers who are in non-standard employment as since 2012 COSATU has argued for their exclusion from the calculation of representivity.[3] This will prejudice the rights of the majority of workers who are non-unionised. The changes will keep minority unions in control of whole sectors and they will have no need to organise the other workers.

[3] In COSATU's submission to parliament on amendments to the LRA in 2012 they stated, 'we support this amendment as it would ensure that when employee numbers are counted for recognition, atypical employees could be *excluded* as they are extremely difficult to organise into trade unions' (emphasis added). The full submission is available at http://www.cosatu.org.za/show.php?ID=6379

4. Objections to the NMW Bill

Throughout 2017 the public was made to believe that the National Minimum Wage is going to be R3,500 per month but the Bill makes clear that there will be no monthly minimum wage of R3,500, only R20 per hour. Workers will only earn the much-heralded R3,500 if they work a 40 hour week. Yet large sections of the workforce no longer works 40 hour week. Labour broker, sub-contracted and workers in short term contracts often work variable hours and are therefore unlikely to earn R3,500.

Though the R20 hourly minimum wage represents a possible advance for some workers, in the context of rampant poverty and unemployed it is ridiculously low. In 2012 the figure of R3,500 was already deemed as 'working poor'.[4]

In the absence of a guaranteed monthly minimum wage or guaranteed 40 weekly hours, the minimum wage of R20 per hour will have no real value for many workers. Over time it will become a mere instrument to drag down the wages of higher-earning workers.

5. Objections to the amendments to the BCEA

5.1 Repeal of sectoral determinations (repeal of Chapters 8 and 9 of Act 75 of 1997)

The phasing out of the sectoral determinations in favour of the NMW will prejudice the rights of workers.

Sectoral determinations are vital as they go beyond the BCEA in setting minimum wages but also include rights tailored to the specific needs of particular groups of workers, particularly some of the most vulnerable workers. For example, the Farm Worker sectoral determination has important provisions regarding housing, not present in the BCEA or in other sectoral determinations

Their repeal without safeguarding any of the protections currently in place for these workers will severely impact their rights.

5.2 Enforcement of the NMW (amendment to BCEA section 64 dA and insertion of section 73A)

Another major problem with the Bills is the approach to enforcement of the National Minimum Wage. With the amendments enforcement will now largely fall to the CCMA and not the Department of Labour, as is the case with wage underpayments currently. This additional responsibility alone will dramatically increase the scope of the CCMA's work, besides the additional workload envisaged by the advisory arbitration and default picketing rules. This additional responsibility is coming at a time when the demand on the CCMA is already extremely high, in 2016/2017 an average of 745 cases were referred every day (see Appendix 3).

The Bill totally underestimates the increased workload for the CCMA and does not invisage any change in the levels of staffing at the CCMA.

> An increase in the workload of the CCMA is anticipated associated with implementation of the amendments to the BCEA in the next two years. Although

[4] Labor Research Service. 2013. The wage bargaining review. Bargaining Monitor 27 (179).

> it is not anticipated that this will result in additional personnel as opposed to utilising the cohort of full-time and part-time commissioners.[5]

This is a fallacy in the light of the existing and already increasing workload of the CCMA (see Appendix 3).

Presently non-compliance by employers with existing minimum wages contained in sectoral determination, including domestic work and farm work, can be as high as 50% as is the case within the agricultural sector.[6] Based on current experience there is no reason to think that compliance with NMW will be any different. However, the ability of workers to get justice will become significantly more difficult.

By making the CCMA the primary enforcer of the NMW the process is likely to become fraught with legal and practical difficulties that are likely to make the whole process unworkable. It will not make it easier for workers to pursue compliance, as claimed.

If a worker is being underpaid, under the proposed amendment, the dispute will end up in the CCMA. The average time for a case to be resolved at the CCMA is 90 days. In the experience of CWAO, in assisting labour broker workers to access the enforcement of s198, employers often use this time to harass, intimidate and dismiss workers seeking justice. We see no reason as to why employers will act any differently when it comes to the enforcement of the NMW.

Even if a worker is successful and receives an arbitration award experience demonstrates that many employers simply choose to ignore it. The next step is for the worker to have the award certified by the CCMA. If the employer still refuses to abide by the award the worker has to get a writ of execution, which is then served by a sheriff but often only after the demand for a deposit has been met. In 2016/2017, the CCMA had to assist 4,000 low-paid workers in getting a writ of execution.[7] This figure excludes the, presumably higher numbers of workers that had given up hope that their arbitration award would ever be enforced or did not know the CCMA could assist them to do so.

Instead of increasing the workload of the CCMA, the powers of labour inspectors of the Department of Labour to enforce compliance from employers must rather be strengthened. The compliance order of the labour inspector must take the form of a court order and writ of execution when the employer fails to comply within stipulated time-frames, without further legal processes. Taking into account that it is mainly the lowly paid workers who are confronted with delinquent employers, labour inspectors must be the ones who are entrusted to enforce the writ of execution.

The proposed amendments will render the NMW unenforceable.

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[5] South Africa. 2017. Labour relations amendment bill, 17 November, p 197.

[6] Ranchhod, V. and Bassier, I. 2017. Estimating the wage and employment effects of a large increase in South Africa's agricultural minimum wage. REDI3x3 Working paper 38, p6. Available at http://www.redi3x3.org/sites/default/files/Ranchhod%20%26%20Bassier%202017%20REDI3x3%20Working%20Paper%2038%20Agricultural%20minimum%20wages.pdf

[7] CCMA. 2017. *Annual Report 2016/2017* p38

5.3 Replacing the Employment Conditions Commission with the National Minimum Wage Commission

The new National Minimum Wage Commission (NMWC), taking the place of Employment Conditions Commission, will be limited to only an investigation and review of the R20 per hour NMW. It will not have the powers to investigate and regulate other conditions of employment as is the case currently with the ECC, whose responsibility it is to investigate all conditions, not only minimum wages, pertaining to the sector falling under the sectoral determination.

By limiting the NMWC to making considerations on wages only, the NMW is likely to have limited impact. Furthermore, workers will lose the positive interventions that the ECC has been able to make in ensuring conditions as well as pay are regulated in workplaces.

6. CWAO proposals

1. The proposed amendments on strike ballots, default picketing rules, extended conciliation and advisory arbitration be scrapped.

2. The LRA to be amended to prevent employers from using scab labour during procedural strikes.

3. Reinstatement into the LRA of workers' right to strike over disputes of right.

4. Trade unions organise a majority of workers in a sector before the establishment of a bargaining council is permitted or for bargaining council agreements to be extended to non-parties, without this being an equivalent requirement for employer.

5. A national monthly minimum wage be enacted. The setting of the amount must involve workers through a process of mass consultations with various options put to a popular vote.

6. The Minister of Labour's right to make sectoral determinations must be retained.

7. The making of new determinations for sectors currently covered only by the BCEA.

8. The National Minimum Wage Commission to have the power to investigate not only wages but also other conditions of employment in specific sectors and advise the Minister of Labour on the making of further sectoral determinations.

9. Enforcement of worker rights to remain the responsibility of a completely overhauled Labour Inspectorate, with a dramatic increase in personnel, training and monitoring of their performance and extended powers for labour inspectors, especially to enforce compliance orders.

10. Mandatory obligations on labour inspectors to consult with and account to workers when workplace inspections are carried out.

6.1 Oral submission

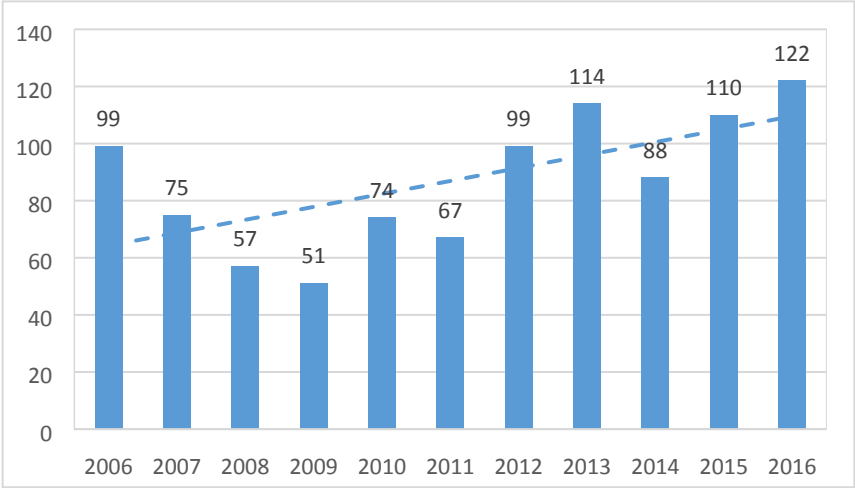
The CWAO requests the opportunity to supplement this submission with oral representation to the portfolio committee. This is particularly necessary in the light of the limited time allowed for written submission. The three Bills propose fundamental, long-lasting changes to worker rights and rights enforcement. Yet, only 2 weeks were initially granted for submissions on the Bills. Even the subsequent extension of the deadline to 10 January is completely inadequate for proper engagement with the Bills' likely impact, not least by those most likely to be affected by them. This is undemocratic and suggestive of an attempt to hasten the Bills through parliament with minimal opposition.

Appendix 1. The facts on strike action in South Africa

The final impact assessment included with the amendments to the LRA states 'industrial action had been at a record high in South Africa for almost a decade although there have been important fluctuations through time'.[8] However, this assertion is not borne out by the facts.

While it is true that the number of work stoppages has increased (see figure 1), looking over the course of a decade the increase has not been dramatic. But using the number of work stoppages as an indicator of industrial action is a very imprecise measure. More commonly we use the number of working days lost as a more accurate measure of industrial action.

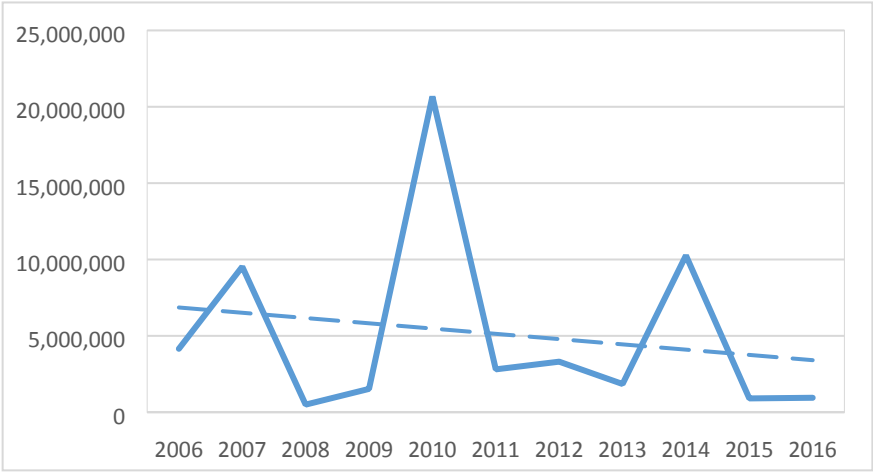
Figure 1: Number of work stoppages in South Africa 2006-2016



Source: Department of Labour Annual Industrial Action Reports

As figure 2 shows, over a 10 year period the trend has been for a *decline* in the number of working days lost, even including the number of working days lost in 2010 during the public sector strike and the 2014 platinum strike.

Figure 2: Number of working days lost 2006-2016

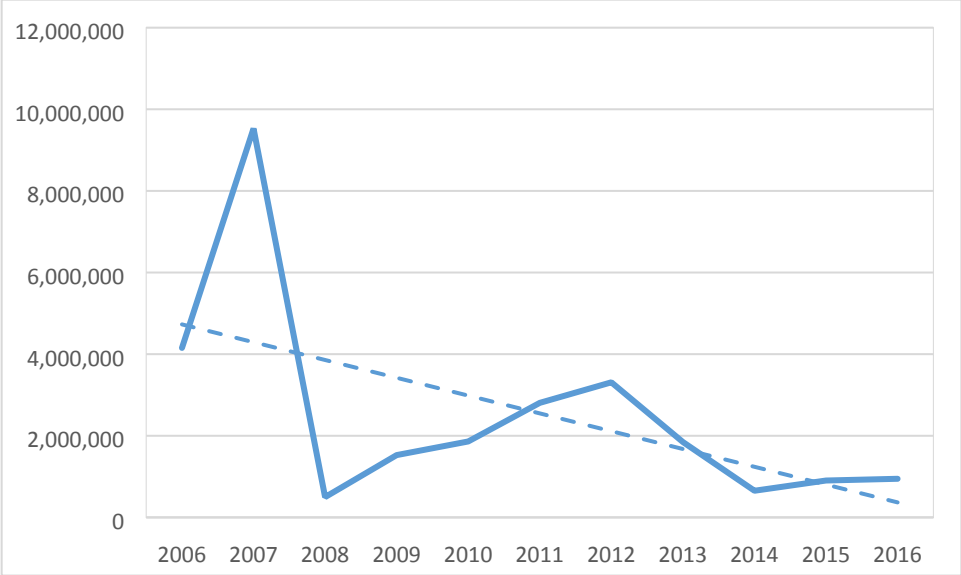


Source: Department of Labour Annual Industrial Action Report

[8] South Africa. 2017. Labour relations amendment bill, 17 November, p182.

If we go further and exclude the exclude the number of working days lost during the 2010 public sector strike and the 2014 platinum strike, due to the fact that these were exceptional strikes in their scale and duration, the downward trend is made even clearer

Figure 3. Number of working days lost 2006-2016 excluding days lost for the 2010 public sector strike and the 2014 platinum strike



Source: Department of Labour Annual Industrial Action Report

It is clear that, contrary to the justification given for the amendments, that industrial action has actually been *stable or declining* over the last ten years.

The second assertion made within the final impact assessment is that protracted strikes are becoming more significant. But again this is not borne out by evidence. According to the 2016 Department of Labour Industrial Action Report the quarterly analysis shows that over two thirds of strikes lasted between 1-5 days. Only a very small number of strikes lasted over 30 days. Based on the data supplied by the Department of Labour there is no evidence that protracted strikes are a particularly prominent phenomenon within the South African industrial relations landscape.

Finally, the amendments are framed around the need to address strike violence. To make the case for the high levels of strike violence in South Africa the impact assessment draws upon secondary data compiled from media reports from the South African Institute of Race Relations (SAIRR) which looks at the number of fatalities that have occurred through strikes. There are a number of problems with this analysis. First of all, the use of media data for this kind of analysis is inherently biased. The media is much more likely to report incidents that are violent, as researchers at the University of Johannesburg have shown.[9] This means the evidence used by the SAIRR is predisposed to find

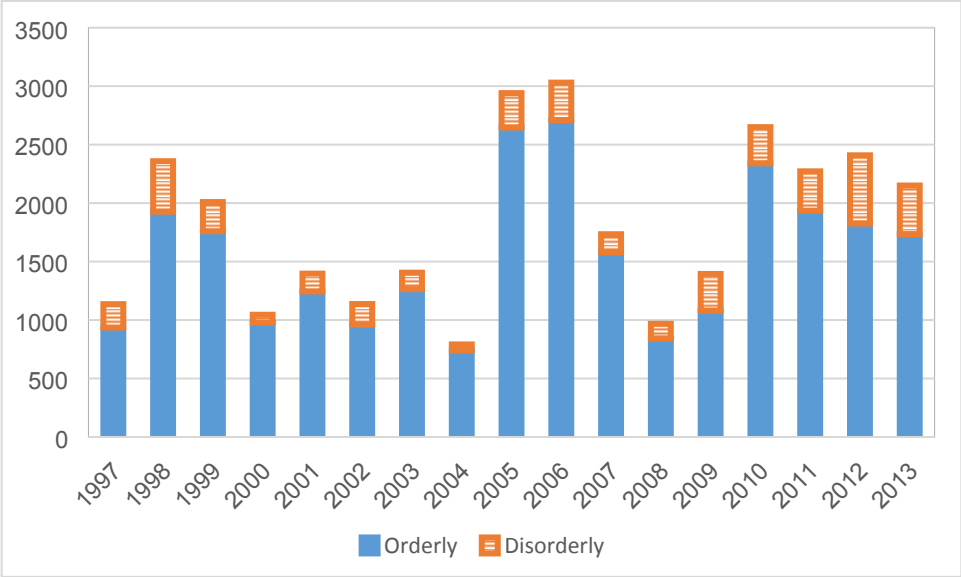
[9] Runciman, C., Alexander, P., Rampedi, M., Moloto, B, Maruping, B., Khumalo, E. & Sibanda, S. 2016 *Counting Police Recorded Protests: Estimates Based on SAPS data*. South African Research Chair in Social Change: University of Johannesburg, p58. Available at https://www.researchgate.net/profile/Peter_Alexander9/publication/304076282_Counting_Police-Recorded_Protests_Based_on_South_African_Police_Service_Data/links/5765768708aedbc345f380d5/Counting-Police-Recorded-Protests-Based-on-South-African-Police-Service-Data.pdf

violence. Second of all, while we think any fatality during the course of a strike is a serious matter, this represents a very small fraction of the numbers of employees involved in strike action.

A much better indicator of levels of strike violence can be found within an analysis of crowd management incident data contained within the Incident Registration Information System (IRIS) compiled by Public Order Police within the South African Police Service.

Researchers at the University of Johannesburg have worked extensively with this data in order to analyse the levels of violence within community and labour protests. Between 1997 and 2013 they found that 86% of all labour protests were orderly and figure 4 illustrates this further.[10]

Figure 4. Estimated number of orderly and disorderly labour protests 1997-2013



Source: Centre for Social Change, University of Johannesburg

There is no strong evidence base to support the argument that violent strikes are a characteristic feature of strike action.

It is vital that parliament takes decisions based on relevant and robust research. As we have demonstrated, parliament has been presented with inaccurate or insubstantial evidence on the nature of industrial relations in South Africa.

To summarise, the evidence shows:

- That overall there is a downward trend in the numbers of work days lost to strike action.
- The vast majority of strikes last under 5 days.
- The evidence shows that most strikes are peaceful.
- There is no evidence to demonstrate that there have been significant increases in violence during protest.

[10] Ibid. p57.

Appendix 2. Examples of worker victimisation while taking a case to the CCMA

Below are examples from CCMA cases where employers dismissed labour broker workers attempting to access important new rights in the amended 2014 Labour Relations Act. All the dismissed workers were key leaders in their workplaces. While they all had access to LRA remedies against unfair dismissal, the length of time such disputes take, bosses' ability to use further legal measures to frustrate workers even where they win reinstatement, and the demoralising effect over time this has on the remaining workers all mean that workers cannot rely only on stressed and failing institutions to enforce their rights. They should have the option to exercise their power to strike in defences of their rights. Their present inability to do so suits only employers.

The following examples are taken from an extract of a submission by CWAO when it acted as an *amicus curiae* in the matter between NUMSA v Assign Services and others. 2016. Case No: JA96/2016, Labour Appeal Court of South Africa.

45. Employers have identified worker leaders, often targeting the first-named Applicant (usually the person who signed the LRA 7-11 form referring a dispute for statutory dispute resolution) resulting in dismissals and a proliferation of disputes. The main applicant in each of the following section 198 cases was dismissed shortly after being named on LRA7-11 forms referring deeming disputes under s198A(3)(b), or equalisation disputes under s198A(5):

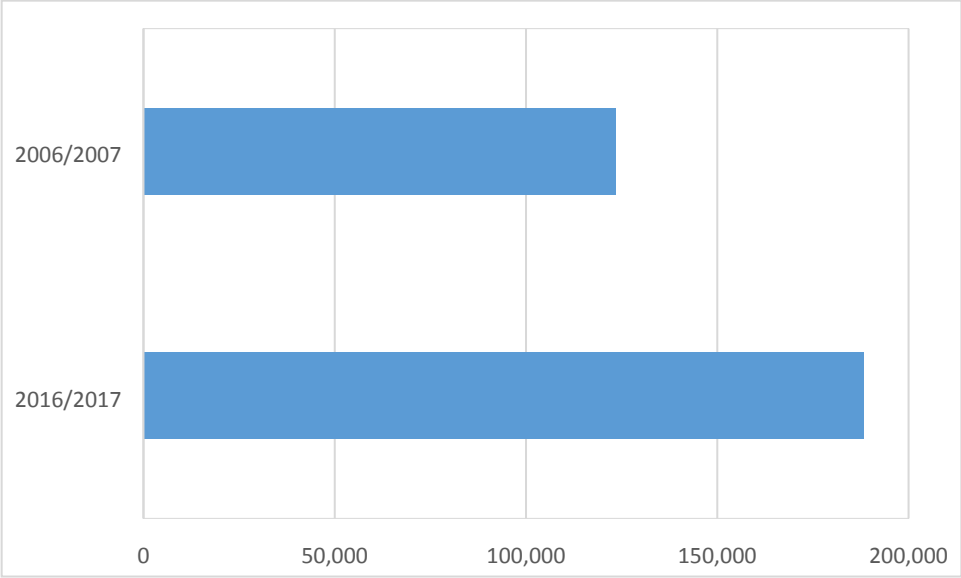
- 45.1. Enterprise Foods dismissed Mandla Nene;
- 45.2. Nampak Glass dismissed Kheele Sefole, the main applicant in the deeming dispute;
- 45.3. Nampak Glass then dismissed Sandile Dlwathi, the main applicant in the equalisation;
- 45.4. LG Electronics retrenched Donald Ramakgadi and 7 others after they referred an equalisation dispute;
- 45.5. Caxton Printers dismissed Freddy Mashapa (who was subsequently reinstated, but moved by the labour broker to a different site);
- 45.6. Cambridge Foods dismissed Ephraim Msibi, who was later placed by the TES on another site. Cambridge Foods is currently ignoring an arbitration award reinstating Msibi, insisting that he is the TES's employee, despite the fact that Cambridge Foods is his section 198A(3)(b) employer;
- 45.7. Volvo dismissed Geoffrey Field; 17
- 45.8. BNVJ dismissed Vutivi Mathebella and his four co-applicants;
- 45.9. Africa Floor Care dismissed Ndawoyakhe Mathafeni;
- 45.10. Swissport dismissed Lerato Chaba;
- 45.11. Luxor Paint dismissed Thandekile Shikhwambane;
- 45.12. Pharmaceuticals Contractors dismissed Thabiso Lehong – followed shortly thereafter by his co-employees Zondo, Nyathi, Khoza and Mxosana; and
- 45.13. Procter and Gamble dismissed Thembile Mzingani at the beginning of the campaign and have now dismissed his successor Aaron Mokhadi.

Appendix 3. The CCMA: an institution under strain

In a report to parliament in 2017 the Department of Labour noted that the decline of the trade union movement, where workers are either unorganised or choosing to side-step their unions places 'an incredible strain on the Department's capacity to provide services'.[11] The CCMA faces a similar problem, as unions have declined in significance the demand on its services has grown.

Over a ten year period there has been a 52% increase in the numbers of cases referred to the CCMA. In 2006/2007 123,472 cases were referred, an average of 496 a day, by 2016/17 this had increased to 188,449, an average of 745 a day.

Figure 5. Number of cases referred to the CCMA



Source: CCMA annual reports

In its Annual Report for 2016/17 the CCMA states,

> the ever increasing caseload is putting strain on already strained organizational resources and also poses a threat to organizational efficiency in the delivery of the legislated mandate. Even though the budget allocation from government is increasing the allocation is still not sufficient. [12]

It is clear that the CCMA is already struggling to cope. The proposed increase to the CCMA's workload caused by these amendments threatens to overwhelm the functioning of the institution. If the CCMA's mandate is increased in the way proposed by these amendments the likelihood is that cases will face significant delays and the CCMA will be unable to resolve cases within 90 days. This will deny justice to thousands of workers and may in fact lead to unprocedural strike action due to the frustrations caused by the inadequate institutional framework.

[11] Parliamentary Monitoring Group. 2017. PMG Monitor Newsletter: State of Labour. Available at https://pmg.org.za/page/State%20of%20Labour

[12] CCMA. 2017. *Annual Report 2016/2017* p25.