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FROM: Dr Brian Benfield, Board Member and Senior Associate
Free Market Foundation

TO: Speaker, National Assembly
speaker@parliament.gov.za; info@fairpaybill.co.za

To whom it may concern,

DRAFT “FAIR PAY BILL”

THE FREE MARKET FOUNDATION RECOMMENDS THAT THE DRAFT BE WITHDRAWN IN ITS
ENTIRETY.

ABOUT THE FREE MARKET FOUNDATION

1. The Free Market Foundation (FMF), founded in 1975, promotes and defends the principles of individual liberty, private property, free enterprise, and limited constitutional government. The FMF primarily engages with the policy environment by informing the public of the benefits of liberalisation and generating pressure on political authorities to lessen and cease their interference in market exchanges and private affairs.

PROBLEM STATEMENT

The Bill

2. South Africa confronts an existential socio-economic crisis defined by catastrophic levels of unemployment, stagnant investment, collapsing productivity, and persistent capital flight. Structural unemployment now exceeds 40 percent, with youth unemployment rates among the highest in the world. In this environment, the overriding imperative is the urgent creation of sustainable employment opportunities, the restoration of

investor confidence, the enhancement of productivity and competitiveness, and the expansion of genuine economic opportunity for all citizens.

3. It is against this backdrop that amendments to the Employment Equity Act (55 of 1998) have been proposed, commonly referred to as the “South African Fair Pay Bill”.
4. The Bill purports to promote pay transparency and equity through a series of coercive interventions in private labour-market transactions. These include, *inter alia*, the prohibition on employers inquiring into a prospective employee’s current or past remuneration, the mandatory disclosure of fixed salary bands in all job advertisements, and the statutory entrenchment of unrestricted discussions of remuneration within the workplace.

Solving South Africa’s problems

5. The FMF submits that the Bill is not only economically unsound but rests upon a fundamentally flawed and destructive premise: namely, that the state possesses both the superior wisdom and the moral authority to substitute its own bureaucratic preferences for the voluntary contractual arrangements freely entered into by competent adults acting in their private capacities. This premise is mistaken. A salary negotiation is a private commercial transaction, not an act of public administration or social engineering. The state has neither the knowledge nor the legitimacy to dictate the information that private parties may consider, the terms upon which they may agree, or the outcomes that may result from such voluntary exchange.
6. Far from alleviating South Africa’s economic difficulties, the proposed legislation will entrench and exacerbate the very conditions that have produced the country’s enduring malaise: regulatory excess, labour-market rigidity, compliance inflation, and pervasive state intrusion into private economic relations. At a time when the economy urgently requires greater flexibility, reduced barriers to entry, and the restoration of institutional conditions conducive to job creation, investment, and growth, the

introduction of yet another layer of coercive labour regulation is profoundly counterproductive.

7. The FMF has consistently maintained that South Africa's heavily regulated labour and economic environment has already demonstrably failed to deliver prosperity or broad-based opportunity. The visible results of this regulatory overreach are chronic low growth, collapsing investor confidence, and industrial-scale unemployment. To attempt to cure the consequences of excessive regulation with still more regulation represents a policy error of the highest order. The Bill will not create a single sustainable job, increase productivity, improve competitiveness, attract investment, or expand opportunity.
8. The FMF therefore urges Parliament to reject the "Fair Pay Bill" in its entirety.
9. The proposal is not merely inopportune; but is actively harmful to the very objectives it claims to advance. In the face of structural unemployment on the current scale, the luxury of indulging fashionable ideological experiments imported from wealthier jurisdictions with vastly different economic structures and institutional capacities cannot be afforded.
10. What South Africa requires is not further bureaucratic prescription of private economic outcomes, but the restoration of the institutional foundations of a free and dynamic labour market – foundations grounded in voluntary exchange, freedom of contract, and the recognition that differential outcomes produced by merit, productivity, and performance are not anomalies to be corrected but the necessary engines of prosperity.
11. Any legislative measure that increases employer legal exposure, recruitment and compliance costs, administrative complexity, litigation risk, and internal labour disputes will inevitably discourage marginal employment creation. Small and medium enterprises (SMEs) – the sector most critical to employment expansion – will be disproportionately burdened, while the overall effect will be fewer opportunities for young entrants, inexperienced workers, and marginal enterprises operating on narrow profitability. The Bill therefore stands in direct opposition to the

urgent national interest in expanding employment and reversing the long-term decline in South Africa's economic performance.

HARMS OF THE BILL

General

12. The proposed amendments will inflict material and foreseeable harm upon South Africa's already fragile labour market. Rather than advancing the cause of employment creation or economic inclusion, the Bill will entrench and exacerbate the structural impediments that have produced the country's chronic unemployment crisis, stagnant growth, and declining competitiveness. By superimposing additional layers of regulatory rigidity, compliance obligations, and state intrusion into voluntary private transactions, the legislation will raise the cost and risk of hiring, deter marginal employment opportunities, and disproportionately burden the very enterprises most capable of absorbing new entrants into the workforce.
13. The public interest demands the removal of barriers to entry rather than the erection of new ones. The Bill proceeds on the opposite premise.
14. Every additional regulatory burden imposed upon employers increases both the direct and indirect costs of employment. Every increment in compliance complexity and litigation risk renders marginal hiring decisions less attractive. The predictable and well-documented consequence of such interventions is a contraction in employment opportunities, particularly for young and inexperienced workers, small and medium-sized enterprises, start-ups, and marginal enterprises operating on narrow profitability margins.
15. Large corporations may possess the internal resources to absorb the expanded human-resources, legal, and administrative overheads that the Bill will generate. Small and medium enterprises, by contrast, cannot. Yet SMEs constitute the sector upon which meaningful employment expansion has historically depended. By further tilting the regulatory playing field against smaller players, the Bill will accelerate the consolidation of economic

activity in the hands of established incumbents and reduce the dynamism essential to broad-based opportunity creation.

16. South Africa already possesses the most heavily regulated labour market on the African continent; the empirical record of this regulatory environment is one of persistently low growth, collapsing investor confidence, and industrial-scale unemployment. To propose additional regulation as a remedy for the harms already caused by excessive regulation is a policy error of profound magnitude.

Particular harms

17. The Bill will harm employment creation in at least six distinct but mutually reinforcing ways.
- a. First, it will increase employer legal exposure by criminalising the consideration of salary history in recruitment and by mandating the public disclosure of salary bands.
 - b. Second, it will inflate recruitment and compliance costs through the imposition of new administrative obligations and the necessity of pre-emptive legal advice.
 - c. Third, it will heighten administrative complexity, requiring employers to restructure internal processes, documentation, and decision-making protocols to satisfy statutory requirements.
 - d. Fourth, it will elevate litigation risk by providing new grounds for disputes, grievances, and referrals to the Commission for Conciliation, Mediation and Arbitration (CCMA).
 - e. Fifth, it will intensify internal labour disputes by encouraging the proliferation of pay-related comparisons and resentments among employees.
 - f. Sixth, it will reduce labour-market flexibility by impairing the ability of employers and employees to negotiate terms tailored to individual circumstances, skill scarcity, productivity differentials, and commercial exigencies.

18. The requirement that all job advertisements disclose fixed salary bands represents a particularly destructive intrusion into commercial autonomy. Remuneration in a market economy is not the product of simplistic bureaucratic formulas but of dynamic interaction among market demand, urgency of need, skill scarcity, productivity expectations, competitive pressures, institutional fit, commercial strategy, and negotiation itself. By compelling employers to publish rigid salary bands *ex ante*, the Bill replaces these organic processes with statutory standardisation. It assumes, contrary to both economic reality and everyday experience, that all remuneration disparities are inherently suspect unless publicly justified to bureaucratic satisfaction. Such an assumption is false. Human beings differ materially in competence, output, experience, reliability, initiative, judgment, leadership capacity, and commercial value. Unequal outcomes are frequently the direct result of differences in merit, productivity, and performance. A free economy depends upon the ability to reward excellence disproportionately, whereas the Bill seeks to suppress precisely this mechanism.
19. The prohibition on employers inquiring into a prospective employee's current or past remuneration further impairs the efficient allocation of labour. A candidate's prior salary frequently reflects accumulated experience, proven productivity, industry demand, scarcity of specialised skills, prior performance, geographic mobility, commercial track record, and institutional knowledge. To criminalise consideration of such information is to deliberately blind employers to data that rational economic actors would otherwise regard as essential to informed decision-making. Price discovery – whether of labour or any other input – is fundamental to efficient market functioning. The Bill's attempt to suppress this information in the labour market alone is economically irrational and will result in misallocation of talent, reduced productivity gains, and slower wage growth over time.
20. The statutory entrenchment of unrestricted workplace discussions of remuneration, presented as an instrument of “transparency”, will in practice serve as an engine of permanent internal discord. Pay structures are shaped by numerous legitimate, often confidential factors invisible to colleagues:

historical performance differentials, strategic retention imperatives, scarce expertise premiums, client relationships, institutional memory, and commercial sensitivities. Forced “transparency” will inevitably generate resentment, grievance proliferation, internal factionalism, increased CCMA referrals, reduced managerial discretion, and a measurable deterioration in workplace cohesion. The legislation effectively presumes that any disparity incapable of immediate public simplification must be suspect. That presumption is patently false and will undermine the trust and collaboration upon which productive employment relationships depend.

Counterproductive

21. Collectively, these harms will not only fail to achieve the Bill’s stated objectives but will actively counteract them:
 - a. The legislation will not create sustainable jobs; it will destroy the conditions under which such jobs are created.
 - b. It will not increase productivity; it will impair the price signals and incentive structures upon which productivity growth depends.
 - c. It will not improve competitiveness; it will raise the cost of doing business in an economy already struggling to attract investment.
 - d. It will not expand opportunity; it will narrow the window of opportunity for the most vulnerable participants in the labour market.
22. In short, the Bill represents yet another instance of subordinating economic reality to ideological aspiration, with the inevitable result that the poorest and least skilled South Africans will bear the heaviest burden.

CONSTITUTIONAL CONCERNS

23. The proposed amendments raise grave constitutional difficulties which Parliament is constitutionally obliged to confront and cannot responsibly disregard.
24. The Bill imposes sweeping, coercive constraints upon ordinary commercial interactions and private contractual arrangements without any compelling evidence that such interventions are either necessary or effective to achieve

any legitimate governmental purpose. In so doing, it risks violating several foundational rights and principles enshrined in the Constitution of the Republic of South Africa, 1996.

25. First, the Bill infringes upon the right to freedom of trade, occupation and profession guaranteed by section 22 of the Constitution. This provision affirms that every citizen has the right to choose their trade, occupation or profession freely. The Constitutional Court has consistently held that any regulatory limitation upon this right must satisfy the requirements of rationality, proportionality, and justifiability in an open and democratic society based on human dignity, equality, and freedom. The Bill fails this test. It substitutes bureaucratic prescription for the voluntary exercise of economic liberty, thereby regulating economic activity into rigidity rather than facilitating the free pursuit of trade and occupation. The cumulative bureaucratic attrition effected by the legislation threatens to extinguish, by incremental degrees, the very economic liberty that section 22 is designed to protect.
26. Second, although freedom of contract is not expressly enumerated as a standalone constitutional right, it is deeply embedded within the constitutional order as an essential component of human dignity (section 10), personal autonomy, property rights (section 25), freedom of association (section 18) and the rule of law itself – an institution meant to ensure the autonomous domain of the individual and the community is not arbitrarily invaded by the powerful who wield state power. Voluntary agreements entered into by competent adults lie at the heart of constitutional democracy and a market-based economy. A salary negotiation is precisely such a voluntary commercial transaction between private parties exercising their respective liberties. The Bill, by prohibiting employers from considering salary history, mandating the disclosure of salary bands in job advertisements, and statutorily entrenching unrestricted workplace remuneration discussions, directly substitutes state-directed outcomes for these voluntary arrangements. It treats consenting adults as incapable of managing their own affairs and assumes that government officials possess

superior insight into the terms upon which private parties should transact. This paternalistic intrusion is constitutionally untenable.

27. Third, the Bill offends the constitutional requirement of rationality and the rule of law. Section 1(c) of the Constitution establishes the rule of law as a founding value, while the principle of legality demands that all lawmaking be rational and connected to a legitimate governmental purpose. There exists scant credible evidence – whether domestic or international – that prohibiting salary-history inquiries or imposing mandatory pay transparency materially improves employment outcomes, reduces inequality, or advances any other constitutionally permissible objective in a developing economy characterised by structural unemployment exceeding 40 percent. On the contrary, the overwhelming weight of economic analysis and South Africa's own regulatory experience indicates that the probable consequences will be harmful: increased costs of employment, reduced labour-market flexibility, fewer job opportunities, and heightened workplace conflict. Legislation predicated primarily upon ideological symbolism rather than demonstrable efficacy cannot satisfy the constitutional standard of rationality. Parliament must not enact measures that, while symbolically appealing, are foreseeably counterproductive to the very goals they purport to serve.
28. The constitutional infirmities of the Bill are compounded by its broader philosophical premise: the conflation of equality before the law, with equality of commercial outcome. The Constitution guarantees equal protection and benefit of the law (section 9), not guaranteed parity of economic results irrespective of differing choices, capacities, risks assumed, or productivity contributed. A society founded upon liberty must tolerate – indeed must celebrate – the differential outcomes that arise from voluntary exchange, merit, and performance. To pursue coerced uniformity through regulatory fiat is not only economically destructive but constitutionally subversive of the open society the Constitution seeks to establish.
29. In sum, the Bill represents an unjustifiable limitation upon constitutionally protected economic freedoms. It fails the tests of rationality, proportionality,

and justifiability repeatedly articulated by the Constitutional Court. Parliament, as the democratic guardian of the Constitution, is duty-bound to reject any legislative proposal that so manifestly undermines the institutional foundations of a free and prosperous society.

RECOMMENDATIONS

1. The Bill will not create a single sustainable job, increase productivity, improve competitiveness, attract investment, or expand opportunity. Instead, it will entrench the very conditions of regulatory excess, labour-market rigidity, compliance inflation, and state intrusion that have produced South Africa's enduring economic malaise. At a moment when the country confronts catastrophic joblessness, stagnant investment, collapsing productivity and persistent capital flight, Parliament must not compound these crises by enacting yet another layer of coercive labour-market intervention.
2. South Africa does not require more labour regulation; it requires more growth, more investment, more entrepreneurship, more competition, more flexibility and more freedom. The path to genuine prosperity and broad-based opportunity lies not in the ever-expanding state management of voluntary economic relations, but in the restoration of the institutional conditions under which free individuals may produce, trade, innovate, employ and prosper.
3. The Free Market Foundation therefore urges the Portfolio Committee on Employment and Labour, and ultimately the National Assembly and the National Council of Provinces, to reject the "Fair Pay Bill" unequivocally and without reservation, in its entirety.